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BEING A

Complete Encyclopedia of All the Case Law of the Federal
Supreme Court up to and including Volume 206 U. S.
Supreme Court Reports (Book 51 Lawyers' Edition)

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

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Encyclopedia of United States Supreme Court Reports.

SPECIAL ASSESSMENTS.

BY T. ELLIS HARVEY.

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CROSS REFERENCES.

See the titles *APPEAL AND ERROR*, vol. 1, p. 333; *CONSTITUTIONAL LAW*, vol. 4, p. 1; *EQUITY*, vol. 5, p. 803; *TAXATION*.

As to rights to review decision of state court holding that city is estopped to collect benefits assessed upon lots, see the title *APPEAL AND ERROR*, vol. 1, p. 734. As to curative and validating acts, general principles, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 452, n. 16. As to special assessments in the District of Columbia, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 457. As to state determining in what manner assessments may be discharged, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 304. As to assessments being on same footing with taxes, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 304. As to competency of owner of land, which is a part of a grant to a state under the swamp land act, to set up proceedings begun to enforce a tax on land assessed under a state law, the state law impairing the obligation of contract between the state and the United States, and so violating the constitution, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 75. As to construction placed by highest court of a state upon a statute providing for paying streets and distributing assessment therefor being conclusive upon the federal courts, see the title *COURTS*, vol. 4, p. 1120. As to what is a public purpose for which assessments will lie, see the title *DUE PROCESS OF LAW*, vol. 5, p. 612. As to due process in special assessment proceedings, see the title *DUE PROCESS OF LAW*, vol. 5, p. 665. As to enjoining illegal taxation or assessment, see the title *INJUNCTIONS*, vol. 6, p. 1022. As to trust assumed by city in respect to drainage assessment fund, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 982, n. 66. As to mandamus used to compel payment of special tax on bonds issued by city, see the title *MANDAMUS*, vol. 8, p. 72, n. 9. As to pledge of special assessment to discharge liability, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 664. As to estoppel of landowners from denying validity where city bonds had been issued under void statute and assessments had been made to pay for same, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 736. On negligence, as to power of city to levy an assessment where property has passed into hands of bona fide purchase for value, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 664, n. 4. As to whether violation of ordinance requiring employment of resident laborers only is a defense to suit to enforce payment, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 76. As to power of legislature to apportion public lands, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 404. As to whether assessments upon abutting owners are contracts, see the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 808.

I. General Nature and Theory of Special Assessments.

A. In General.—Special Assessments as Species of Taxation.—Special assessments are peculiar species of taxation, standing apart from the

general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally.¹

B. Assessments Compared with and Distinguished from Taxes.—The distinction between a municipal tax for general benefits and one for special assessments is understood to be that special assessments are made upon the assumption that a portion of the community is to be specifically and peculiarly benefited, while the general tax is for the benefit of no one in particular.² But the courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it.³

II. Power to Levy Assessments.

A. Power of Legislature to Levy or Authorize Assessment—1.
IN GENERAL.—The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby.⁴ And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements.⁵ But the power of the legislature in these matters

1. *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 198, 37 L. Ed. 132. See *Cooley on Taxation*.

They proceed upon the theory that when a local improvement enhances the value of neighboring property, that property should pay for the improvement. *Wright v. Boston*, 9 Cush. 233, 241; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 198, 37 L. Ed. 132; *Peake v. New Orleans*, 139 U. S. 342, 350, 35 L. Ed. 131.

Benefit and burden.—There would often be manifest injustice in subjecting the whole property of a city, and the same may be said of the whole property of any district, to taxation for an improvement of a local character. The rule, that he who reaps the benefit should bear the burden, must in such cases be applied. *Louisiana v. Pilsbury*, 105 U. S. 278, 295, 26 L. Ed. 1090; *Hager v. Reclamation Dist.*, No. 108, 111 U. S. 701, 705, 28 L. Ed. 569; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 198, 37 L. Ed. 132.

2. **Assessment distinguished from tax.**—*Peake v. New Orleans*, 139 U. S. 342, 35 L. Ed. 131; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 197, 37 L. Ed. 132.

3. *Parsons v. District of Columbia*, 170 U. S. 45, 56, 42 L. Ed. 943; *Dillon's Municipal Corporation*, vol. 2, § 752, 4th Ed., quoted with approval in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 339, 343, 45 L. Ed. 879.

4. **Legislation may apportion expense of public improvements.**—*Parsons v. District of Columbia*, 170 U. S. 45, 56, 42 L. Ed. 943; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 343, 45 L. Ed. 879; *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270. See, also, *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Mat-*

tingly v. District of Columbia, 97 U. S. 687, 24 L. Ed. 1098; *Shoemaker v. United States*, 147 U. S. 282, 302, 37 L. Ed. 170; *County of Mobile v. Kimball*, 102 U. S. 691, 704, 26 L. Ed. 238.

5. *Norwood v. Baker*, 172 U. S. 269, 278, 43 L. Ed. 443; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943; *Carson v. Brockton Sewerage Comm.*, 182 U. S. 398, 403, 45 L. Ed. 1151; *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047; *Goodrich v. Detroit*, 184 U. S. 432, 439, 46 L. Ed. 627; *Peake v. New Orleans*, 139 U. S. 342, 352, 35 L. Ed. 131.

"The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 355, 356, 31 L. Ed. 763; *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544; *Lent v. Tillson*, 140 U. S. 316, 328, 35 L. Ed. 419; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 198, 199, 37 L. Ed. 132; *Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637. This authority has been repeatedly exercised in the District of Columbia by congress, with the sanction of the federal supreme court. *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Shoemaker v. United States*, 147 U. S. 282, 286, 302, 37 L. Ed. 170." *Bauman v. Ross*, 167 U. S. 548, 589, 42 L. Ed. 270.

The determination of a territorial dis-

is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property.⁶ The matter is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere.⁷ Whenever a local improvement is authorized, it is for the legislature and not the judiciary to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure.⁸ The question of adopting a method of levying assessments for local improvements lies purely in legislative discretion, and so long as that discretion is exercised in a reasonable manner, and gives parties interested an opportunity to be heard with the right to appeal to the courts from the determination of the city council, it cannot be said that there is a violation of the fourteenth amendment.⁹

2. WHAT AGENCIES MAY BE AUTHORIZED TO LEVY ASSESSMENTS.—See post, "Power of Municipal Corporations," II, B.

3. CONSTITUTIONAL RESTRICTIONS ON POWER.—a. *As Affected by Due Process of Law Clause.*—State legislative provisions for the levying of special assessments for local improvements are governed by the same principles as proceedings for levying and collecting taxes, with regard to which it has been held that the general system of procedure which has been established for that purpose in this country is, within the meaning of the constitution, due process of law.¹⁰ The federal courts ought not, therefore, to interfere in special assessment cases when that which is complained of amounts to the enforcement of the laws of the state applicable to all persons in like circumstances and conditions, unless there is some abuse of law amounting to confiscation of property or a deprivation of personal rights.¹¹ If the provision made is found to be suitable or admissible in the special case, it will be adjudged to be "due process

trict to be taxed for a local improvement is within the province of legislative discretion. *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637; *Lent v. Tillson*, 140 U. S. 316, 328, 35 L. Ed. 419.

If the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. *Goodrich v. Detroit*, 184 U. S. 432, 439, 46 L. Ed. 627; *Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047.

Reclamation of swamp lands.—The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 705, 28 L. Ed. 569.

6. *Norwood v. Baker*, 172 U. S. 269, 278, 43 L. Ed. 443.

7. *Chadwick v. Kelley*, 187 U. S. 540, 545, 47 L. Ed. 293. See post, "Property Subject to Assessment," III.

Power of legislature to charge property by area, frontage, etc.—It is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement,

in whole or in part, upon the property in said districts, either according to valuation or superficial area of frontage, and it was not the intention of the court, in *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, to hold otherwise. *Webster v. Fargo*, 181 U. S. 394, 45 L. Ed. 912; *O'Brien v. Wheelock*, 184 U. S. 450, 467, 46 L. Ed. 636.

8. *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 705, 28 L. Ed. 569, citing *County of Mobile v. Kimball*, 102 U. S. 691, 704, 26 L. Ed. 238; *Bauman v. Ross*, 167 U. S. 548, 589, 42 L. Ed. 270.

9. **Legislature determines method of levying assessment.**—*Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. Ed. 908; *Wight v. Davidson*, 181 U. S. 371, 45 L. Ed. 900; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 325, 45 L. Ed. 879; *Seattle v. Kelleher*, 195 U. S. 351, 352, 49 L. Ed. 232. See, generally, the title **STREETS AND HIGHWAYS**.

10. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. Ed. 195. See, generally, the title **TAXATION**.

11. *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *Hibben v. Smith*, 191 U. S. 310, 325, 48 L. Ed. 195; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 398, 45 L. Ed. 914; *Detroit v. Parker*, 181 U. S. 399, 45

of law," but if found to be arbitrary, oppressive and unjust it may be declared to be not "due process of law."¹² That the authority for levying a special assessment was only given subsequent to the work, does not render the assessment obnoxious to the due process clause of the fourteenth amendment.¹³

b. *Provisions Relating to Taxation.*—Local assessments for local improvements are not embraced in the twentieth section of the twelfth article of the constitution of the United States requiring taxation to be equal and uniform.¹⁴

c. *Provisions Forbidding Taking of Private Property without Just Compensation.*—Special assessments levied on property benefited by improvements is not in violation of the constitutional prohibition against taking property without just compensation.¹⁵

d. *Statute Valid in Part and Void in Part—Separability.*—See footnote.¹⁶

4. FOR WHAT PURPOSES ASSESSMENTS MAY BE LEVIED—*a. Public Purpose.*—See the titles DUE PROCESS OF LAW, vol. 5, p. 612; CONSTITUTIONAL LAW, vol. 4, p. 1; EMINENT DOMAIN, vol. 5, p. 764; TAXATION.

b. *What Constitutes a Public Purpose*—(1) *Arid Lands.*—**Arid lands** may be provided with water and the cost thereof provided for by a general tax, or by an assessment for local improvement upon the lands benefited.¹⁷

(2) *Streets.*—All municipal taxes for improvement of streets, rest, for their final reason, upon the enhancement of private properties. And special assessments for opening and improving streets may be laid upon the property owners.¹⁸

Conclusiveness of Construction Placed upon Statute.—The construction placed by the supreme court of the state upon a statute providing for the paving of streets and distributing the assessments is conclusive upon the federal supreme court.¹⁹

L. Ed. 917; *Tonawanda v. Lyon*, 181 U. S. 389, 45 L. Ed. 908; *Wight v. Davidson*, 181 U. S. 371, 45 L. Ed. 900.

As to due process of law with respect to particular questions, see post, the appropriate subheads in the analysis of this title.

12. *Ballard v. Hunter*, 204 U. S. 241, 255, 51 L. Ed. 461. See, also, *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 38 L. Ed. 751; *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780; *Davidson v. New Orleans*, 96 U. S. 97, 107, 108, 24 L. Ed. 616.

Neither the corporate agency by which the work was done, the excessive price which the statute allowed therefore, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment was made before the work was done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 333, 45 L. Ed. 879; *Walston v. Nevin*, 128 U. S. 578, 581, 32 L. Ed. 544.

13. *Lombard v. West Chicago Park Comm'rs*, 181 U. S. 33, 42, 45 L. Ed. 731.

14. *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 670, 41 L. Ed. 590. See, generally, the title TAXATION.

15. *Provisions forbidding taking of*

private property without just compensation.—*Martin v. District of Columbia*, 205 U. S. 135, 51 L. Ed. 743. See, also, *Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 487, 45 L. Ed. 280. See ante, "As Affected by Due Process of Law Clause," II, A, 3, a.

16. An act providing for special assessments may be valid in part and invalid in part. *Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 488, 490, 45 L. Ed. 280. See the title STATUTES.

17. **Arid lands.**—*Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 164, 41 L. Ed. 369. See the title WATERS AND WATERCOURSES.

18. **Streets.**—*Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 198, 37 L. Ed. 132; *Loeb v. Columbia Tp.*, 179 U. S. 472, 488, 45 L. Ed. 280.

Imperative duty to adjust assessments.—*French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; *Schaefer v. Werling*, 188 U. S. 516, 518, 47 L. Ed. 570.

19. *Schaefer v. Werling*, 188 U. S. 516, 47 L. Ed. 570. See, also, *Merchants' etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236.

Power of supreme court to correct errors of state courts in respect to assessments.—The United States supreme court has no power to correct the errors of state courts in respect to the details of assessments made by municipal corporations upon private property to defray the expenses of street improvements. *Corry v. Campbell*, 154 U. S., appx., 629, 24 L. Ed. 926.

(3) *Sewers*.—A municipal ordinance making an annual assessment upon property owners for the use of a common sewer does not infringe upon any provision of the constitution of the United States even though the original cost of the sewer was raised by a special assessment upon the property of the abutting owners.²⁰

(4) *Parks*.—It is within the power of the legislature to authorize special or local assessments, upon property benefited, in aid of a public park.²¹

(5) *Drainage Acts*.—General laws authorizing the drainage of tracts of swamp and low lands, by commissioners appointed upon proceedings instituted by some of the owners of the lands, and the assessment of the whole expense of the work upon all the lands within the tract in question, have long been held to be constitutional.²²

B. Power of Municipal Corporations.—The right of the legislature to delegate its authority to municipal corporations to assess property for local public improvements is unquestionable.²³

III. Property Subject to Assessment.

A. In General.—The class of lands to be assessed may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited.²⁴

B. As Dependent on Benefits Received.—In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.²⁵

C. Bounding or Abutting Property.—Undoubtedly abutting owners may

20. *Carson v. Brockton Sewerage Comm.*, 182 U. S. 398, 403, 45 L. Ed. 1151.

21. *Wilson v. Lambert*, 168 U. S. 611, 42 L. Ed. 599.

Assessments as evidence of taking property for public use.—*Wilson v. Lambert*, 168 U. S. 611, 615, 42 L. Ed. 599.

22. *Drainage acts*.—*Wurts v. Hoagland*, 114 U. S. 606, 610, 29 L. Ed. 229; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 22, 28 L. Ed. 889.

California.—*Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 711, 28 L. Ed. 569.

Assessment of city for lands owned by it.—*Peake v. New Orleans*, 139 U. S. 342, 356, 35 L. Ed. 131.

23. Legislative power to assess may be delegated.—*Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Mobile v. Es-lave*, 16 Pet. 233.

Ohio.—*Fitch v. Creighton*, 24 How. 159, 161, 16 L. Ed. 596; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 207, 37 L. Ed. 132.

Michigan.—*Voigt v. Detroit*, 184 U. S. 115, 118, 46 L. Ed. 459.

24. *Wight v. Davidson*, 181 U. S. 371, 379, 45 L. Ed. 900; *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270. See, also, *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Shoemaker v. United States*, 147 U. S. 282, 37 L. Ed. 170; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 167, 168, 175, 176, 41 L. Ed. 369; *Ulman v. Baltimore*, 165 U. S. 719, 41 L. Ed. 1184.

A question of fact.—“The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final.” *Parsons v. District of Columbia*, 170 U. S. 45, 53, 42 L. Ed. 943.

25. Legislature may designate lands assessable.—*Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763, approved in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 338, 45 L. Ed. 879.

In proportion to benefits.—Act of September 27, 1890, c. 1001, § 6; 26 Stat. 493; *Shoemaker v. United States*, 147 U. S. 282, 37 L. Ed. 170; *Bauman v. Ross*, 167 U. S. 548, 591, 42 L. Ed. 270.

be subjected to special assessments to meet the expenses of opening public highways in front of their property.²⁶

D. Exemption from Assessments.—See the title **TAXATION**.

IV. Personal Liability of Property Owners.

That a special assessment act imposes a personal obligation and that the court actually renders and enforces a personal judgment against the owner of property liable to a special assessment, is not a deprivation of property without due process of law within the meaning of the fourteenth amendment.²⁷

V. Amount and Apportionment.

A. Amount.—So long as the amount assessed is not grossly excessive, or out of all proportion to the benefit received, there is no reason to complain of want of due process.²⁸

B. Apportionment—1. **IN GENERAL.**—The rule of apportionment among the parcels of land benefited rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners.²⁹ The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits. The whole cost in other cases is levied on lands in the immediate vicinity of the work. In a constitutional point of view, either of these methods is admissible, and one may sometimes be just and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.³⁰

2. **POWER TO FIX STANDARD OF ASSESSMENT.**—Where the legislature it-

26. Constitutionality of state statute.

—Willard *v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; Mattingly *v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; Spencer *v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; Bauman *v. Ross*, 167 U. S. 548, 42 L. Ed. 270; Parsons *v. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943; Wight *v. Davidson*, 181 U. S. 371, 45 L. Ed. 900; French *v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; Chadwick *v. Kelley*, 187 U. S. 540, 543, 47 L. Ed. 293; County of Mobile *v. Kimball*, 102 U. S. 691, 703, 704, 26 L. Ed. 238; Illinois Cent. R. Co. *v. Decatur*, 147 U. S. 190, 202, 37 L. Ed. 132; Norwood *v. Baker*, 172 U. S. 269, 278, 43 L. Ed. 443.

27. Davidson *v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616. See, also, Dewey *v. Des Moines*, 173 U. S. 193, 201, 43 L. Ed. 665.

Rule in Louisiana.—For the sum assessed against their property no personal liability attaches to the abutting owners under Louisiana statute as construed by the courts of that state, beyond the value of the property affected, and that the proceeding is purely one in rem acting on the property benefited and none

other. Chadwick *v. Kelley*, 187 U. S. 540, 543, 47 L. Ed. 293.

Personal liability of nonresident.—But this personal liability cannot be enforced against a nonresident. Dewey *v. Des Moines*, 173 U. S. 193, 202, 43 L. Ed. 665.

28. Parsons *v. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943; Carson *v. Brockton Sewerage Comm.*, 182 U. S. 398, 403, 45 L. Ed. 1151.

Amount a question of fact.—"The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final. No constitutional question of a federal nature arises therefrom." Hibben *v. Smith*, 191 U. S. 310, 321, 48 L. Ed. 195.

29. **Rule of apportionment.**—Bauman *v. Ross*, 167 U. S. 548, 590, 42 L. Ed. 270; Ford *v. Delta, etc., Land Co.*, 164 U. S. 662, 670, 41 L. Ed. 590. See, also, Spencer *v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763.

30. **Apportionment between public and property benefited.**—Cooley on Taxation, 447, quoted with approval in French *v. Barber Asphalt Paving Co.*, 181 U. S. 324, 339, 343, 45 L. Ed. 879.

self has designated how, in what proportion and by what standard this cost is to be met, the council is not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard, a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof.³¹

3. **ASSESSMENT ACCORDING TO BENEFITS.**—It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners, that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate.³² All that is required is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received.³³

4. **ASSESSMENT ACCORDING TO FRONTAGE.**—It is within the power of the legislature to create, or to authorize the creation, of special taxing districts, and to charge the cost of a local improvement upon the property in such a district by frontage.³⁴

VI. Assessment Proceedings.

A. Petition of Property Owners or Resolution of Council.—Where the power to pave or improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number has assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void.³⁵ After a person has signed a petition for an improvement, which can

31. **Legislature has sole power to fix standard.**—*Chadwick v. Kelley*, 187 U. S. 540, 545, 47 L. Ed. 293.

32. **Assessment according to benefits.**—*Chadwick v. Kelley*, 187 U. S. 540, 545, 47 L. Ed. 293.

33. *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 705, 28 L. Ed. 569.

"The better doctrine, deducible from adjudged cases, including those of the supreme court of the United States, is that the assessment will be upheld wherever it is not patent and obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, the cost and relative value of the property to the assessment, that the plan or method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate within the district as between owners." *King v. Portland City*, 184 U. S. 61, 69, 46 L. Ed. 431.

34. **According to frontage.**—*Webster v. Fargo*, 181 U. S. 394, 45 L. Ed. 912; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. Ed. 879; *Seattle v. Kelleher*, 195 U. S. 351, 358, 49 L. Ed. 232; *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 397, 45 L. Ed. 914; *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *Webster v. Fargo*, 181 U. S. 394, 45 L. Ed. 912; *French v. Barber Asphalt Co.*, 181 U. S. 324, 343, 45 L. Ed. 879.

"It was held that the city council had

power to charge the cost of a sidewalk upon the lots touching it, in proportion to their frontage thereon; that whether or not the special tax exceeded the actual benefit to the lots taxed, was not material; that it may be supposed to be based upon a presumed equivalent; and that where the proper authorities determine the frontage to be the proper measure of benefits, this determination could be neither disputed nor disproved." *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 207, 37 L. Ed. 132.

The Louisiana statute, providing that the property owner's proportion of the cost of paving a street should be determined by ascertaining the entire cost of the work assessable to the property fronting thereon, in proportion, and apportioning the same to said property in proportion of front footage, was held to be obnoxious to the due process clause of the fourteenth amendment. *Chadwick v. Kelley*, 187 U. S. 540, 543, 47 L. Ed. 293.

Imposed after work completed.—An assessment according to the frontage, of the entire expense of a public improvement is not necessarily obnoxious to the fourteenth amendment because imposed after the work was completed. *Seattle v. Kelleher*, 195 U. S. 351, 49 L. Ed. 232.

35. **Assent or petition for improvement.**—*Dillon's Municipal Corporations*, vol. 2, § 800, 4th edition; *Zeigler v. Hopkins*, 117 U. S. 683, 29 L. Ed. 1019; *Ogden City v. Armstrong*, 168 U. S. 224, 235, 42 L. Ed. 444.

only be paid for by means of an assessment on contiguous property, he is estopped from contesting the validity of the assessment, especially after the work has been completed and accepted by the proper authorities.³⁶

B. Notice or Opportunity to Be Heard.—See the title *DUE PROCESS OF LAW*, vol. 5, p. 499.

1. **NECESSITY.**—Special assessments that do not provide for notice to the property owner nor an opportunity to be heard are void.³⁷ But it is only those whose property is proposed to be taken for a public improvement that due process of law requires shall have prior notice.³⁸

Necessity of Providing for Notice.—Where proper and sufficient notice has been given, it is immaterial that it was not in terms prescribed by the ordinance appointing the viewers.³⁹

The time and place must be such that with reasonable effort he will be enabled to attend and present his objections.⁴⁰

Tribunal before Which Hearing Is Had.—A board of supervisors authorized to hear and determine the question of benefits to property proposed to be included in a special assessment district for irrigation purposes is a proper and sufficient tribunal to satisfy the constitutional requirement of due process of law.⁴¹ Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be conclusive so far as the federal constitution is concerned.⁴²

Scope of Inquiry at Hearing.—The owners have no right to be heard upon

36. Signer of petition estopped.—*Seattle v. Kelleher*, 195 U. S. 351, 353, 49 L. Ed. 232; *Shepard v. Barron*, 194 U. S. 553, 48 L. Ed. 1115; *Goodrich v. Detroit*, 184 U. S. 432, 440, 46 L. Ed. 627.

37. Notice a constitutional requirement.—*Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637; *Goodrich v. Detroit*, 184 U. S. 432, 438, 46 L. Ed. 627; *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763; *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. Ed. 444.

Unless the legislature decides the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369. This, in substance, was determined by the decisions of the court in *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763 and *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544.

38. Who, entitled to hearing.—*Goodrich v. Detroit*, 184 U. S. 432, 438, 46 L. Ed. 627.

Neighboring property owners.—The interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. *Goodrich v. Detroit*, 184 U. S. 432, 437, 46 L. Ed. 627; *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204.

39. Necessity of providing for notice.—*Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637.

Notwithstanding the doubt arising from the lack of express provision for notice in ordinance 5068, of the city of Portland, Oregon, it cannot be held, in view of the notice which was given, of the construction placed upon this ordinance by the council thereafter, and of the approval by the supreme court of the proceedings as in conformity to the laws of the state, that the provisions of the federal constitution requiring due process of law, have been violated. *Paulsen v. Portland*, 149 U. S. 30, 42, 37 L. Ed. 637.

40. Time and place of hearing.—*Bellingham, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 319, 43 L. Ed. 460.

41. Tribunal before which hearing is had.—*Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 169, 41 L. Ed. 369; accord, *Spring Val. Waterworks v. Schottler*, 110 U. S. 347, 354, 28 L. Ed. 173.

The law may provide for hearing by the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such assessments the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before a court provided by the law in order to give validity to such assessment. *Hibben v. Smith*, 191 U. S. 310, 321, 48 L. Ed. 195.

42. *Seattle v. Kelleher*, 195 U. S. 351, 354, 49 L. Ed. 232.

the question whether their lands are to be benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.⁴³

How Right to Hearing Enforced.—If the abutting owners are refused a hearing in regard to the subject of benefit, it may be enforced by mandamus or injunction, and the lot owner cannot waive such a remedy and make the denial of hearing available as a defense in an action to collect the assessment.⁴⁴

2. **PURPOSE OF NOTICE.**—The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof.⁴⁵

3. **FORM AND SUFFICIENCY OF NOTICE.**—The notice to be effectual should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed.⁴⁶

4. **MANNER AND TIME OF NOTICE**—a. *In General.*—The manner of notice and the specific proof of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed.⁴⁷ Therefore, it is not essential to the validity of a section in the charter of a city granting power to construct sewers, that there should in terms be expressed either the necessity for or the time or manner of notice. It is enough if, in the charter, the power is granted in general terms, for when granted it must necessarily be exercised subject to all limitations imposed by constitutional provisions.⁴⁸

b. *Notice by Publication.*—See the title SUMMONS AND PROCESS.

Notice by publication is held sufficient in a special assessment proceeding if authorized by statute.⁴⁹

43. **Constitutionality of ordinance.**—An ordinance enacted under legislative authority and providing that the costs of paving a certain street shall be apportioned among the lots abutting upon that street in proportion to their frontage, without providing for any notice or hearing upon the question of benefits, is not unconstitutional as depriving the lot owners of their property without due process of law. *Paulsen v. Portland*, 149 U. S. 30, 41, 37 L. Ed. 637; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 174, 41 L. Ed. 369; *Farrell v. West Chicago Park Comm'rs*, 181 U. S. 404, 45 L. Ed. 924; *Tregea v. Modesto Irrigation Dist.*, 164 U. S. 179, 41 L. Ed. 395.

Hearing at original apportionment.—An objection that the owners of property subjected to a special assessment were not afforded a hearing as to the original apportionment is untenable, since that is a hearing never granted in the process of taxation unless by special permission. The legislature keeps within its power when it fixed, first the amount to be raised to discharge the improvement debt incurred by its direction; and second when it designated the lots and property which in its judgment, by reason of special benefits should bear the burden. *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; approved in *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 338, 45 L. Ed. 879.

44. **How right to hearing enforced.**—**Injunction.**—*Hibben v. Smith*, 191 U. S. 310, 321, 48 L. Ed. 195.

45. **Purpose of notice.**—*Bellingham,*

etc., *R. Co. v. New Whatcom*, 172 U. S. 314, 318, 43 L. Ed. 460.

46. **Form and sufficiency of notice.**—*Bellingham, etc.*, *R. Co. v. New Whatcom*, 172 U. S. 314, 43 L. Ed. 460.

47. **Manner and time of notice.**—*Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569; *Walston v. Nevin*, 128 U. S. 578, 32 L. Ed. 544; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637; *King v. Portland City*, 184 U. S. 61, 69, 46 L. Ed. 431.

48. *Paulsen v. Portland*, 149 U. S. 30, 38, 37 L. Ed. 637.

49. **Notice by publication.**—*Lent v. Tillson*, 140 U. S. 316, 35 L. Ed. 419; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 339, 45 L. Ed. 879; *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637.

Where the form of the notice and the time of its publication are not affirmatively disclosed in the complaint, it must be assumed that there was no defect in respect to these matters. *Paulsen v. Portland*, 149 U. S. 30, 40, 37 L. Ed. 637.

The publication of a notice of the proposed presentation of the petition for the formation of an irrigation district is a sufficient notification to those interested in the question and gives them an opportunity to be heard before the board. *Hager v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569; *Lent v. Tillson*, 140 U. S. 316, 35 L. Ed. 419; *Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637; *Wight v. Davidson*, 181

5. **TIME OF NOTICE.**—If provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law, nor is he deprived of equal protection of the law.⁵⁰

C. Description of Property.—The lands to be assessed should be sufficiently described or identified.⁵¹ But in a proceeding to assess benefits, a misdescription of several other parcels of land taken for such improvement, cannot be shown.⁵² It seems, however, doubtful if a simple misdescription raises any federal question.⁵³

D. Reassessment.—A reassessment implies not merely the fact of the improvement, but also that one attempt had been made to collect the cost and failed.⁵⁴ And it is no longer open to question that where a special assessment to pay for a particular work has been held to be illegal, no violation of the constitution of the United States arises from a subsequent authority to make a new special assessment to pay for the completed work.⁵⁵ A reassessment can be made by a different method from that in force when the original assessment was made.⁵⁶

Objections to Reassessments.—Although one inquiry had been had in the courts, and the one assessment set aside, and the facts were known, ten days'

U. S. 371, 379, 382, 45 L. Ed. 900; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 339, 340, 45 L. Ed. 879.

Publication in three successive issues of the official paper of the city notifying property owners to file their objections to a special assessment held to be an appropriate and sufficient notice. *Bellingham, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 319, 43 L. Ed. 460.

50. Time of notice.—*Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544; *Lent v. Tillson*, 140 U. S. 316, 328, 35 L. Ed. 419; *Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 41 L. Ed. 369; *Bauman v. Ross*, 167 U. S. 548, 590, 42 L. Ed. 270; *Goodrich v. Detroit*, 184 U. S. 432, 438, 46 L. Ed. 627; *King v. Portland City*, 184 U. S. 61, 46 L. Ed. 431.

It is not necessary that notice be given at every step in the proceedings. It is sufficient if a hearing is given at which one may insist that his property is not benefited to the amount assessed. *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. Ed. 583, and cases cited; *King v. Portland City*, 184 U. S. 61, 46 L. Ed. 431.

Ten days' notice sufficient.—*Bellingham, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 320, 43 L. Ed. 460.

51. Description of property.—The lands to be assessed being described generally as "the lands benefited" by the condemnation and establishment of the new highway, or by the abandonment of an existing highway, and again as the "property thereby benefited," and as the lands which the jury "find to be so benefited," without any words of restriction to lands in the particular subdivision, the

reasonable inference is that all lands so benefited lying within the exclusive jurisdiction of congress over the District of Columbia, may be included in the assessment. The question what parcels of lands, within the district so ascertained, are benefited, and therefore liable to be assessed, might justly and constitutionally be committed, by congress to the determination of the tribunal entrusted with the authority of making this assessment. *Bauman v. Ross*, 167 U. S. 548, 591, 42 L. Ed. 270.

52. Goodrich v. Detroit, 184 U. S. 432, 46 L. Ed. 627; *Voorhees v. United States Bank*, 10 Pet. 449, 9 L. Ed. 490; *Comstock v. Crawford*, 3 Wall. 396, 18 L. Ed. 34.

53. Goodrich v. Detroit, 184 U. S. 432, 441, 46 L. Ed. 627.

54. Meaning of reassessment.—*Bellingham, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 319, 43 L. Ed. 460.

55. Reassessments are valid.—*Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Lombard v. West Chicago Park Comm'rs*, 181 U. S. 33, 42, 45 L. Ed. 731; *Farrell v. West Chicago Park Comm'rs*, 181 U. S. 404, 45 L. Ed. 924.

Reassessment as new assessment.—A reassessment may be a new assessment. Whatever the legislature could authorize it if it were ordering an assessment for the first time, it equally could authorize, notwithstanding a previous invalid attempt to assess. *Norwood v. Baker*, 172 U. S. 269, 293, 43 L. Ed. 443; *Seattle v. Kelleher*, 195 U. S. 351, 359, 49 L. Ed. 232; *Williams v. Supervisors*, 122 U. S. 154, 30 L. Ed. 1088.

56. Methods for reassessment.—*Wilson v. Seattle*, 2 Washington, 543; *Seattle v. Kelleher*, 195 U. S. 351, 352, 49 L. Ed. 232.

time does not seem unreasonably short for presenting objections to a reassessment.⁵⁷

VII. Enforcement and Collection.

A. Lien of Assessment.—Every municipal tax, in cases of local improvement, paving, etc., involves a lien upon the particular real estate on which it is imposed.⁵⁸ The general rule is, that when no time is expressly fixed by the statute for the lien to take effect, it accrues upon the assessment of the tax.⁵⁹

B. Remedy of Contractor.—When a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor.⁶⁰

VIII. Remedies to Property Owners.

A. In General.—When the statute leaves open to judicial inquiry all questions of a jurisdictional character, it is well settled that a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.⁶¹

B. For Irregular Assessments.—Undoubtedly, for merely irregular assessments, where the authorities have jurisdiction to act, the statutory remedy is the exclusive remedy.⁶²

C. Waiver of Remedy.—Under some circumstances, a party who is illegally assessed may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others, that he should be allowed to complain of the illegality.⁶³

SPECIAL DAMAGES.—See the title DAMAGES, vol. 5, p. 159.

SPECIAL DEMURRERS.—See the title DEMURRERS, vol. 5, p. 296.

SPECIAL DEPOSITS.—See the title BANKS AND BANKING, vol. 3, p. 39.

SPECIAL FINDING OF COURT.—See the title APPEAL AND ERROR, vol. 1, p. 1031.

SPECIAL INTERROGATORIES TO JURIES.—See the titles ISSUES TO JURY, vol. 6, p. 526; VERDICT.

SPECIALLY SET UP OR CLAIMED.—See the title APPEAL AND ERROR, vol. 1, p. 601.

SPECIAL MASTERS.—See the titles JUDICIAL SALES, vol. 7, p. 707; REFERENCE, vol. 10, p. 600.

SPECIAL PLEAS.—See the title PLEADING, vol. 9, p. 443.

SPECIAL PRIVILEGE.—See the title CORPORATIONS, vol. 4, p. 681.

SPECIAL TAX.—See the titles SPECIAL ASSESSMENTS, ante, p. 1; TAXATION.

SPECIALTY.—See the titles BONDS, vol. 3, p. 382; CONTRACTS, vol. 4, p. 552; DEEDS, vol. 5, p. 245; SEALS AND SEALED INSTRUMENTS, vol. 10, p. 1079. The definition of a specialty is thus given in 2 Black. Com. 465: "Debts by

57. Time for objecting to reassessment.—Bellingham, etc., R. Co. v. New Whatcom, 172 U. S. 314, 319, 43 L. Ed. 460.

58. Lien.—Lyon v. Alley, 130 U. S. 177, 188, 32 L. Ed. 899.

59. Accrual of lien.—Lyon v. Alley, 130 U. S. 177, 188, 32 L. Ed. 899.

60. Remedy of contractor.—Peake v. New Orleans, 139 U. S. 342, 361, 35 L. Ed. 131.

61. Remedies to property owners.—Ogden City v. Armstrong, 168 U. S. 224,

239, 42 L. Ed. 444.

62. Remedy for irregular assessments.—Ogden City v. Armstrong, 168 U. S. 224, 234, 239, 42 L. Ed. 444.

63. Waiver of remedy.—Wight v. Davidson, 181 U. S. 371, 377, 45 L. Ed. 900; Cooley on Taxation 573.

Waiver would exist if one should ask for and encourage the levy of the tax of which he subsequently complains. Wight v. Davidson, 181 U. S. 371, 377, 45 L. Ed. 900; Chadwick v. Kelley, 187 U. S. 540, 47 L. Ed. 293.

specialty are such whereby a sum of money becomes or is acknowledged to be due by an instrument under seal.”¹

SPECIAL VERDICT.—“A special verdict is defined by Blackstone to be one ‘Where the jury state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that is, if upon the whole matter the court should be of the opinion that the plaintiff had cause of action, then they find for the plaintiff; if otherwise, for the defendant.

* * * Another method of finding a species of special verdict is when the jury find generally for the plaintiff, but subject nevertheless to the opinion of the judge of the court on a special case stated by the counsel on both sides with regard to matter of law.’”¹

SPECIE.—As to payment “in specie,” see the title PAYMENT, vol. 9, p. 333.

SPECIFICATION OF ERRORS.—See the title APPEAL AND ERROR, vol. 2, p. 263.

SPECIFICATIONS.—See the titles APPEAL AND ERROR, vol. 1, p. 333; BILL OF PARTICULARS, vol. 3, p. 243; PATENTS, vol. 9, p. 203; WORKING CONTRACTS. As to specification of errors on appeal, see the title APPEAL AND ERROR, vol. 2, p. 271. As to specification and charges according to military usage, see the title MILITARY LAW, vol. 8, p. 350.

SPECIFIC MACHINE.—See note 1.

1. **Specialty.**—January *v.* Goodman, 1 Dall. 208, 1 L. Ed. 103. See, also, United States Bank *v.* Donnally, 8 Pet. 361, 371, 8 L. Ed. 974.

Words rendering contract a specialty.—An instrument, by which the defendant promised and obliged himself and his heirs to pay to the plaintiff and his assigns, concluding with the words, “as witness my hand and seal,” and actually sealed, is a **specialty**, and cannot be given in evidence to support an action of assumpsit. January *v.* Goodman, 1 Dall. 208, 1 L. Ed. 103.

As to judgment for damages, estimated

in money, being a **specialty** or contract of record, see the title JUDGMENTS AND DECREES, vol. 7, p. 553.

2. **Special verdict.**—Statler *v.* United States, 157 U. S. 277, 278, 39 L. Ed. 700. See the title VERDICT.

3. **The words “the specific machine, manufacture, or composition of matter”** in the second clause of § 7 of the act of 1839, meant the thing invented, the right to which was secured by the patent. Andrews *v.* Hovey, 124 U. S. 694, 703, 31 L. Ed. 557. See the title PATENTS, vol. 9, p. 136.

SPECIFIC PERFORMANCE.

BY T. ELLIS HARVEY.

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As to specific performance where improvements are made because of promise to convey, see the title *IMPROVEMENTS*, vol. 6, p. 897, n. 5. As to mandamus being in the nature of a suit to enforce the specific performance of a contract, see the title *MANDAMUS*, vol. 8, p. 11. As to the writ of mandamus used to compel performance of a contract, see the title *MANDAMUS*, vol. 8, p. 77. As to dismissal of bill on merits as being conclusive, see the title *RES ADJUDICATA*, vol. 10, p. 787, n. 63. As to decree against a state, see the title *STATES*. As to specific performance of contract for sale and transfer of stock, see the title *STOCK AND STOCKHOLDERS*. As to suits against the United States, see the title *UNITED STATES*.

I. Definition and General Consideration.

A. Definition.—A suit to enforce the performance of a contract is a suit to recover the contents of a chose in action, within the meaning of § 629 of the Revised Statutes. See the title *COURTS*, vol. 4, p. 696.

B. Origin and History of Remedy.—The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and

rests on the ground of inadequacy and incompleteness of the remedy at law.¹

C. Discretion of Court—1. IN GENERAL.—Specific performance is not an absolute right, but it rests entirely in the judicial discretion of the court according to well-established principles of equity.²

2. DISCRETION NOT ARBITRARY.—Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case.³

3. WHEN A MATTER OF COURSE.—Contracts entered into in a spirit of peace and for the settlement of unadjusted demands on both sides, will not, where executed by persons of intelligence, and under circumstances which indicate caution and a knowledge of what is done, be readily questioned in equity as in fact not fair; but, on the contrary, will be protected and enforced.⁴

D. Compared with Rescission.—A court of equity may sometimes refuse to decree specific performance in favor of one party when it would also refuse to rescind in favor of the other.⁵

II. The Contract.

A. Formation and Execution.—Where husband and wife agree that agent should sell certain property on installments, on suit by vendees to compel performance of conditions of agreement and transfer, specific performance was refused, assent of wife not being clearly shown.⁶

B. Requisites and Validity—1. IN GENERAL.—Specific performance of a void contract will not be decreed because of part performance, unless fraud and injustice would be done if the contract were held inoperative.⁷ And specific

1. *Union Pac. R. Co. v. Chicago, etc.*, R. Co., 163 U. S. 564, 600, 41 L. Ed. 265.

2. *Pope Mfg. Co. v. Gormully*, 144 U. S. 224, 36 L. Ed. 414; *Hennessy v. Woolworth*, 128 U. S. 438, 32 L. Ed. 500; *Ahl v. Johnson*, 20 How. 511, 529, 15 L. Ed. 1005; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

Specific performance is never decreed where the party can be otherwise fully compensated. *Memphis v. Brown*, 20 Wall. 289, 304, 22 L. Ed. 264.

Specific performance as exception to rule.—"To compel the specific performance of contracts still is the exception, not the rule, the courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action." *Beasley v. Texas, etc.*, R. Co., 191 U. S. 492, 497, 48 L. Ed. 274.

Dependent upon circumstances of case.—Whether specific performance shall be decreed in any case depends upon the circumstances of that case, and rests in the discretion of the court. *Nickerson v. Nickerson*, 127 U. S. 668, 675, 32 L. Ed. 314; *Wesley v. Eells*, 177 U. S. 370, 376, 44 L. Ed. 810; *McCabe v. Matthews*, 155 U. S. 550, 553, 39 L. Ed. 256; *Pratt v. Carroll*, 8 Cranch 471, 3 L. Ed. 627; *Holt v. Rogers*, 8 Pet. 420, 8 L. Ed. 995; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Hennessy v. Woolworth*, 128 U. S. 438, 32 L. Ed. 500.

3. **Discretion not arbitrary.**—*Wesley v. Eells*, 177 U. S. 370, 376, 44 L. Ed. 810, citing *Hennessy v. Woolworth*, 128 U. S. 438, 442, 32 L. Ed. 500; *Willard v.*

Tayloe, 8 Wall. 557, 567, 19 L. Ed. 501; *Marble Co. v. Ripley*, 10 Wall. 339, 357, 19 L. Ed. 955; 1 Storey's Eq. Jur., § 742; *Nickerson v. Nickerson*, 127 U. S. 668, 674, 32 L. Ed. 314.

4. **When matter of course.**—*May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50.

Importance of specific performance.—The powers of a court of chancery to enforce a specific execution of contracts are very valuable and important; for in many cases, where the remedy at law for damages is not lost, complete justice cannot be done, without a specific execution; and it has been almost as much a matter of course, for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law, where an action will lie for a breach of the contract; but this power is to be exercised under the sound discretion of the court, with an eye to the substantial justice of the case, and when a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity; when a contract is hard and destitute of all equity, the court will leave parties to their remedy at law. *King v. Hamilton*, 4 Pet. 311, 7 L. Ed. 869.

5. *Clark v. Reeder*, 158 U. S. 505, 531, 39 L. Ed. 1070; *Jackson v. Ashton*, 11 Pet. 229, 9 L. Ed. 698.

6. *Hennessy v. Woolworth*, 128 U. S. 438, 32 L. Ed. 500.

7. *Winslow v. Baltimore, etc.*, R. Co.,

performance will not be decreed where the contract is contrary to legal or moral justice.⁸

2. **CERTAINTY AND DEFINITENESS.**—A contract for the conveyance of lands, which a court of equity will specifically enforce, must be certain in its terms, and the certainty required has reference both to the description of the property and the estate to be conveyed.⁹

3. **LEGALITY.**—Courts of equity will not decree specific performance in cases where it would be against public policy.¹⁰

4. **MUTUALITY.**—It is a general principle of equity, to grant a decree of specific performance only in cases where there is mutuality of obligation, and when the remedy is mutual.¹¹

188 U. S. 646, 658, 47 L. Ed. 635, citing *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360.

8. *Byers v. Surget*, 19 How. 303, 15 L. Ed. 670. See post, "Fraud, Imposition, Inequality and Illegality," II, B. 6.

9. *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494; *Rogers Locomotive, etc., Works v. Helm*, 154 U. S., appx., 610, 611, 22 L. Ed. 562.

Accordingly, where the property could not be identified, specific performance was denied. *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494.

The principle is not inflexible that the court will not specifically enforce the contract where the price is not fixed or is left to be fixed by arbitration. *Guntton v. Carroll*, 101 U. S. 426, 431, 25 L. Ed. 985.

A decree for a specific performance of a contract to sell lands, refused, because a definite and certain contract was not made; and because the party who claimed the performance had failed to make it definite and certain on his part, by neglecting to communicate by the return of the mail conveying to him the proposition of the vendor, his acceptance of the terms offered. *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556, cited, and the principles of the decision reaffirmed. *Carr v. Duval*, 14 Pet. 77, 10 L. Ed. 361.

Agreement according to terms.—A court of equity is incapable of affording relief by enforcing specific performance of an agreement not according to its terms. *Hunt v. Rousmanier*, 8 Wheat. 174, 175, 5 L. Ed. 589.

In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them; if the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy. *Colson v. Thompson*, 2 Wheat. 336, 4 L. Ed. 253.

Contract not concluded.—If it be doubtful, whether an agreement has been concluded, or is a mere negotiation, chancery will not decree specific performance. *Carr v. Duval*, 14 Pet. 77, 10 L. Ed. 361.

Uncertainty as to contractual amount.—Where a party is entitled to a specific performance of a contract upon the payment of certain sums, and there is uncertainty as to the amount of such sums, he may apply by bill for such specific performance, and submit to the court the question of amount which he should pay. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

Fluctuations.—Fluctuations in the value of property contracted for between the date of the contract, and the time when execution of the contract is demanded, where the contract was when made a fair one, and in its attendant circumstances unobjectionable, are not allowed to prevent a specific enforcement of the contract. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *DeSollar v. Hanscome*, 158 U. S. 216, 39 L. Ed. 956; *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315, 326, 37 L. Ed. 749; *Hennessy v. Woolworth*, 128 U. S. 438, 32 L. Ed. 500.

10. **Public policy.**—*Beasley v. Texas, etc., R. Co.*, 191 U. S. 492, 48 L. Ed. 274. See the title **ILLEGAL CONTRACTS**, vol. 6, p. 751. And see post, "Fraud, Imposition, Inequality and Illegality," II, B. 6.

Perjury.—"Courts of equity would not enforce the performance of such contracts 'founded upon perjury and entered into in defiance of a clearly expressed will of the government.'" *Adams v. Church*, 193 U. S. 510, 515, 48 L. Ed. 769.

Injury to third persons.—*Texas, etc., R. Co. v. Marshall*, 136 U. S. 393, 34 L. Ed. 385; *Beasley v. Texas, etc., R. Co.*, 191 U. S. 492, 48 L. Ed. 274.

11. **Mutuality.**—*United States v. Noe*, 23 How. 312, 315, 16 L. Ed. 462.

It is a universal rule of equity, that he who asks for a specific performance, must himself be in a condition to perform. *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242.

Specific performance of a contract will not be decreed where there is a want of mutuality in the contract; as ex. gr., where it is stipulated that one of the parties may abandon the contract at any time on giving a year's notice. *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955.

Revocation.—"A court of equity never

5. **CONSIDERATION**—a. *Necessity for Consideration*.—Equity will not decree the specific execution of mere nude pacts, or voluntary agreements not founded on some valuable or meritorious consideration.¹²

b. *Inadequacy of Consideration*.—Mere inadequacy of price, paid for article bought at sheriff's sale, does not of itself, furnish sufficient reason for dismissing a bill for specific performance.¹³

c. *Excessiveness of Price*.—Excess of price over value, if the contract be free from imposition, is not of itself sufficient to prevent a decree for a specific performance; but though it will not, standing alone, prevent a court of chancery enforcing a contract, it is an ingredient, which, associated with others, will contribute to prevent the interference of a court of equity.¹⁴

6. **FRAUD, IMPOSITION, INEQUALITY AND ILLEGALITY**—a. *In General*.—No contract which is tinged with illegality, fraud, or immorality will be enforced by a court of justice.¹⁵

b. *Injury to Third Persons*.—A court of equity will not decree specific performance of a contract to keep a railroad terminus at a certain city; the remedy is at law for damages.¹⁶

c. *Determination of Fairness*.—The question of the want of equality and fairness, and of the hardship of the contract, should, as a general rule, be judged of in relation to the time of the contract, and not by subsequent events. We do not intend to say that the court will never pay any attention to hardships

interferes where the power of revocation exists." *Express Co. v. Railroad Co.*, 99 U. S. 191, 200, 25 L. Ed. 319.

When demand and refusal necessary.—Specific performance of the renewal of a contract cannot be compelled without demand and refusal, especially where the defendant has an option to renew or pay specific damages. *Smith v. Washington Gas Light Co.*, 154 U. S., appx., 559, 19 L. Ed. 187. See post, "Options and Covenants," VI, C.

12. *Dorsey v. Packwood*, 12 How. 126, 137, 13 L. Ed. 921; *Moore v. Crawford*, 130 U. S. 122, 32 L. Ed. 878.

13. *Erwin v. Parham*, 12 How. 197, 13 L. Ed. 952. See, also, *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 473, 36 L. Ed. 776. As to inadequacy of consideration as defense, see the title **MAXIMS**, vol. 8, p. 317.

14. *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120.

A court of equity will not enforce a sale of property under execution where the sum paid for same is much greater than its value and causes a shock to the conscience of the court, but will leave the parties to their remedy at law. *Randolph v. Quidnick Co.*, 135 U. S. 457, 34 L. Ed. 200.

15. As to fraud in defense to actions, see the titles **FRAUD AND DECEIT**, vol. 6, p. 420; **PUBLIC LANDS**, vol. 10, p. 139.

Illegality, fraud and immorality.—*Thomas v. Brownsville, etc.*, R. Co., 109 U. S. 522, 27 L. Ed. 1018; *Byers v. Surget*, 19 How. 303, 15 L. Ed. 670; *Beasley v. Texas, etc.*, R. Co., 191 U. S. 492, 48 L. Ed. 274; *Texas, etc.*, R. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385.

Equal competency of parties.—In Sug-

den on Vendors it is said that "a court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party saying that another man would give him more money or better terms than he agreed to take. It may be an improvident contract; but improvidence or inadequacy do not determine a court of equity against decreeing specific performance." *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 473, 36 L. Ed. 776.

Unfairness—When court will interfere or withhold its aid.—A defendant may resist a bill for specific performance, by showing that, under the circumstances, the plaintiff is not entitled to the relief he asks; omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid; if, to any unfairness, a great inequality between the price and value be added, a court of chancery will not afford its aid. *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120.

16. *Beasley v. Texas, etc.*, R. Co., 191 U. S. 492, 48 L. Ed. 274; *Texas, etc.*, R. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385.

Public policy precludes a decree for specific performance of a covenant in a deed granting to a railroad a right of way, not to build a depot within three miles of the one therein stipulated for. *Beasley v. Texas, etc.*, R. Co., 191 U. S. 492, 48 L. Ed. 274; *Texas, etc.*, R. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385.

produced by a change of circumstances; but certainly the general rule is, that a mere decline in value since the date of the contract is not to be regarded by the court in cases of this nature.¹⁷

d. *Parol Evidence*.—Where specific performance is requested on a bond to make title, parol evidence is admissible to establish the intention of the parties to the bond, and the fact that the bond was given under a mistake may be shown.¹⁸

7. **CONTRACTS WORKING HARDSHIP TO EITHER PARTY**.—Equity in the exercise of a sound judicial discretion will refuse a decree for specific performance, where it would be a great hardship upon one of the parties to grant relief of that character.¹⁹

8. **COMPETENT PARTIES**.—It is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former.²⁰

9. **POSSIBILITY OF PERFORMANCE**.—See post, "Title," VI, H, 3.

C. Performance—Conditions Precedent.—Where party to a contract agrees to convey land upon performance of condition precedent, equity will not decree specific performance except upon the performance of the condition.²¹

D. Partial Enforcement.—A court of equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder.²²

III. Statute of Frauds.²³

A. Part Performance.—Rule in Equity.—A parol contract for the sale of land may be enforced in a court of equity, where there has been part performance of the contract.²⁴

B. Parol Gifts.—See the title *GIFTS*, vol. 6, p. 565.

IV. Rule Where Applicant Is in Default.

A. In General.—The failure on the part of the party applying for specific

17. **Determination of fairness**.—*Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 473, 36 L. Ed. 776.

18. *Bradford v. Union Bank*, 13 How. 57, 14 L. Ed. 49. See the title *PAROL EVIDENCE*, vol. 9, p. 19.

19. *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 471, 36 L. Ed. 776; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

20. *Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955.

As to right of assignee to compel specific performance, see the title *ASSIGNMENTS*, vol. 2, p. 574, n. 3.

21. *Waterman v. Banks*, 144 U. S. 394, 36 L. Ed. 479. See post, "Rule Where Applicant Is in Default," IV.

Due diligence and tender of performance.—A party does not forfeit his rights to the interposition of a court of equity to enforce specific performance of a contract, if he seasonably and in good faith offers to comply with its stipulations on his part, although he may err in estimating the extent of his obligation. *Willard v. Tayloe*, 8 Wall. 557, 569, 19 L. Ed. 501.

Rent in arrears, taxes, purchase money.—The lessors of an estate, leased with agreements and covenants to convey title

to lessee whenever the purchase money is paid, is entitled, upon decree for specific performance, to be paid the rent in arrears, and the amount of his expenditures for taxes, both with interest and purchase money, before he can be required to convey. *Prout v. Roby*, 15 Wall. 471, 21 L. Ed. 58.

22. *Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955.

23. As to effect of statute of frauds upon courts of equity, see the title *FRAUDS, STATUTE OF*, vol. 6, p. 458.

As to amount and character of evidence required under statute of frauds of Maryland, see the title *FRAUDS, STATUTE OF*, vol. 6, p. 459.

24. *Riggles v. Erney*, 154 U. S. 244, 38 L. Ed. 976. See the title *FRAUDS, STATUTE OF*, vol. 6, p. 460.

Possession and improvements.—The taking of possession of land by parties to contract, and making improvements upon same, constitute part performance of such contract sufficient to take it out of the statute of frauds and a court will decree specific performance of the agreement. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 32 L. Ed. 673. See the title *FRAUDS, STATUTE OF*, vol. 6, p. 461.

performance to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief, and turn the party over to his action at law.²⁵

B. Applicant Must Be Ready, Desirous, Prompt and Eager.—The party asking a specific performance must show that he has been in no default in not having performed the agreement on his part, and that he has taken all proper steps towards the performance. He must show himself desirous, prompt and eager to perform the contract.²⁶

C. Change of Circumstances Due to Complainant's Default—1. IN GENERAL.—Circumstances may be so changed that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time; in such a case, a court of equity will leave the parties to their remedy at law.²⁷

2. CHANGE IN VALUE OF SUBJECT MATTER.—The right to enforce specific performance of an agreement to sell is lost by lapse of five years, during which time the property had increased greatly in value.²⁸

V. Time as Essence of Contract.

The general rule is that time is not of the essence of a contract of sale; and a failure on the part of the purchaser, or vendor, to perform his contract, on the stipulated day, does not, of itself, deprive him of his right to a specific performance, when he is able to comply with his part of the engagement.²⁹

VI. Particular Contracts and Transactions Considered.

A. Exchange of Property.—Equity will decree specific performance of a contract for the exchange of lands.³⁰

B. Insurance Contracts.—Where agreements and parol promises are made as to the terms on which a policy of insurance is to be issued, a court of equity will compel the company to execute the contract specifically.³¹

C. Options and Covenants.—A covenant in a lease giving to the lessee a

25. Rule where applicant is in default.—*Walsh v. Preston*, 109 U. S. 297, 318, 27 L. Ed. 940; *Holgate v. Eaton*, 116 U. S. 33, 29 L. Ed. 538; *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955; *Rogers Locomotive, etc., Works v. Helm*, 154 U. S., appx., 610, 611, 22 L. Ed. 562; *Richardson v. Hardwick*, 106 U. S. 252, 27 L. Ed. 145; *Telfener v. Russ*, 162 U. S. 170, 181, 40 L. Ed. 930; *Hepburn v. Auld*, 5 Cranch 262, 3 L. Ed. 96.

Performance as offer to perform.—The plaintiff who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged understanding on the part of the defendant. *Colson v. Thompson*, 2 Wheat. 336, 4 L. Ed. 253. See the title CONTRACTS, vol. 4, pp. 581, 582.

26. *Dorsey v. Packwood*, 12 How. 126, 13 L. Ed. 921; *Hyde v. Booraem & Co.*, 16 Pet. 169, 10 L. Ed. 925; *King v. Hamilton*, 4 Pet. 311, 7 L. Ed. 869. See the title MAXIMS, vol. 8, p. 314.

Rule as to imperfect gifts.—“The same rule is applied to imperfect gifts, *inter vivos*, to imperfect voluntary assignments of debts or other property, to voluntary executive trusts, and to voluntary defective conveyances.” *Dorsey v. Packwood*, 12 How. 126, 137, 13 L. Ed. 921.

27. *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322; *Holgate v. Eaton*, 116 U. S. 33, 40, 29 L. Ed. 538; *Pratt v. Carroll*, 8 Cranch 471, 3 L. Ed. 627.

28. Change in value of subject matter.—*Davison v. Davis*, 125 U. S. 90, 98, 31 L. Ed. 635. See the title LACHES, vol. 7, p. 801.

29. *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322; *Ahl v. Johnson*, 20 How. 511, 15 L. Ed. 1005.

Failure to renew lease.—Notice without payment insufficient.—Where upon a lease, with the right of purchase within seven years, upon giving three months' notice, and paying a fixed sum at the expiration of such notice, the lessee gave the requisite notice, but did not pay the money in time, a bill for specific performance was dismissed. *Waterman v. Banks*, 144 U. S. 394, 404, 36 L. Ed. 479. See the title CONTRACTS, vol. 4, p. 585.

30. *McIver v. Kyger*, 3 Wheat. 53, 4 L. Ed. 332.

The statute, which requires such contracts to be in writing, is equally binding on courts of equity as courts of law. *Purcell v. Miner*, 4 Wall. 513, 517, 18 L. Ed. 435. See the title FRAUDS, STATUTE OF, vol. 6, p. 461.

31. *Insurance Co. v. Colt*, 20 Wall. 560, 22 L. Ed. 423.

right or option to purchase the premises leased at any time during the term, is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede. When accepted by the lessee, a contract of sale is completed, and will be specifically enforced.³²

Tender or Performance by Vendee.—In the case of an optional sale, if the vendee wish to compel the other to fulfill the contract, he must make his part of the agreement precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal.³³

D. Partnership Contracts.—A court of equity may compel the execution of articles of partnership so as to put the parties in the same position as if the articles had been executed as agreed; it will seldom, if ever, specifically compel subsequent performance of the contract by either party, the contract of the partnership being of an essential personal character.³⁴

E. Contracts to Convey Expectancy.—Though a conveyance of an expectancy, as such, is impossible at law, it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration.³⁵

F. Personal Property Contracts.—1. IN GENERAL.—Specific performance has reference ordinarily to agreements for the conveyance of lands, and is rarely applied to contracts affecting personal property, but where the relief prayed for is the delivery up of certain instruments, the court will end the cause without sending the parties to law.³⁶

2. WHERE REMEDY AT LAW IS INADEQUATE.—Courts of equity will not decline to specifically enforce contracts where the remedy at law is doubtful in its nature, extent, operation, or adequacy.³⁷

32. Options.—Willard *v.* Tayloe, 8 Wall. 557, 19 L. Ed. 501.

33. Kelsey *v.* Crowther, 162 U. S. 404, 409, 40 L. Ed. 1017; citing *Bank v. Hagner*, 1 Pet. 455, 464, 7 L. Ed. 219; *Marble Co. v. Ripley*, 10 Wall. 339, 359, 19 L. Ed. 955.

34. Karrick *v.* Hannaman, 168 U. S. 328, 335, 42 L. Ed. 484.

Where, by the partnership agreement, as in the case at bar, the defendant is to supply all or most of the capital, and the plaintiff is to furnish his personal services, the agreement cannot be specifically enforced against the plaintiff, and will not be enforced against the defendant. *Karrick v. Hannaman*, 168 U. S. 328, 336, 42 L. Ed. 484.

35. Moore *v.* Crawford, 130 U. S. 122, 132, 32 L. Ed. 878.

36. Personal property contracts.—Clarke *v.* White, 12 Pet. 178, 9 L. Ed. 1046.

General rule.—Although it seems to be a general rule that a court of chancery will not decree specific performance of contracts, except for the purchase of lands, or things which relate to the realty and are of a permanent nature, and that where contracts are yet chattels, and compensation can be made in damages, the parties must be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty have been enforced in chancery; but courts will weigh with greater

nicety, contracts of this description, than such as relate to lands. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

Receipt of certain articles in satisfaction of money debt.—A court of equity will in a proper case enforce the execution of such an agreement. *Very v. Levy*, 13 How. 345, 357, 11 L. Ed. 173.

37. Express Co. *v.* Railroad Co., 99 U. S. 191, 200, 25 L. Ed. 319; 2 Story Eq. Jud., § 728.

Examples of inadequate remedy at law.

—Where a lease of a railroad for ninety-nine years contained covenants for the payment of monthly installments of rent, to keep the road in repair, and to keep account of all matters connected with its business, as affecting the amount of rent to be paid, which covenants were guaranteed by other parties than the lessee, a bill which shows failure to pay rent, depreciation of the road, and combination of the guarantors and lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction when it prays for specific performance of the obligations of the lease. In such a case a suit at law on each installment of rent as it falls due is not an adequate remedy. *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 30 L. Ed. 83.

Payment of corporate bonds enforced remedy at law exhausted.—There can be no jurisdiction in equity to enforce the payment of corporation bonds until the remedy at law has been exhausted. *Heine v. Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223.

Railroad Loan.—A covenant by a railroad that money received upon bonds should be faithfully applied to the building and equipment of a railroad, will be specifically enforced where there is a threatened breach.³⁸

G. Personal Services.—Specific performance of a contract of service will not be decreed where the duties to be fulfilled are continuous and involve the exercise of skill, personal labor, and cultivated judgment.³⁹

H. Real Property Contracts—1. **ENFORCEMENT IN GENERAL.**—Where contracts of purchase are distinct, in no way connected with each other, a bill for a specific execution, whether filed by the vendor or vendees, must be limited to one contract.⁴⁰

2. **JURISDICTION.**—Only a court of equity can compel the surrender of the legal title held by the defendant and invest the plaintiff with it.⁴¹

3. **TITLE**—a. *In General.*—A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title.⁴²

b. *Suit by Vendor*—(1) *In General.*—In order to be able to enforce specific performance of a contract, the vendor of real estate has to hold himself out as the sole owner or having authority to sell from his co-owners.⁴⁴

Vendor's Ability to Make Clear Title.—A vendor, to entitle himself to a specific execution of the contract, must be able to make a clear title. No court of chancery will force a doubtful title on the vendee.⁴⁵

(2) *Litigious or Clouded Title.*—It is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation.⁴⁶

(3) *Grace Allowed Vendor to Perfect His Title*—(a) *Before Report of Master.*—A vendor is entitled to specific performance, though he have no title at the sale, if he can make one before the master's report.⁴⁷

(b) *At or before Time of Decree.*—A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title, at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed.⁴⁸

38. Railroad loan.—*Pennock v. Coe*, 23 How. 117, 129, 16 L. Ed. 436.

39. Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955; *Karrick v. Hannaman*, 168 U. S. 328, 336, 42 L. Ed. 484.

40. Enforcement in general.—*Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 410, 32 L. Ed. 468.

Conveyance before title acquired.—In the case of a conveyance before the grantor has acquired the title, the legal estate is not transferred by the statute of uses, but the conveyance operates as an agreement, which the grantee is entitled to have executed in chancery. *Moore v. Crawford*, 130 U. S. 122, 132, 32 L. Ed. 878.

41. Ruckman v. Cory, 129 U. S. 387, 389, 32 L. Ed. 728.

42. Kennedy v. Hazelton, 128 U. S. 667, 671, 32 L. Ed. 576.

Title to all land sold.—But a court of equity will not compel a specific performance, unless the vendor can make a good title to all the land contracted to be sold. *Hepburn v. Auld*, 5 Cranch 262, 3 L. Ed. 96.

In a suit for specific performance, if it turns out that the defendant cannot make a title to that which he has agreed to con-

vey, the court will not compel him to convey less, with indemnity against the risk of eviction. The purchaser is left to seek his remedy at law, in damages for the breach of the agreement. *Refeld v. Woodfolk*, 22 How. 318, 329, 16 L. Ed. 370.

When the defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises she had agreed to lease to the plaintiff, the other moiety being vested in her son, a minor. She was decreed to specifically perform so much of the contract as she was able to perform, with an abatement of half the rent, and an inquiry as to damages was refused only upon the ground that there was no evidence that plaintiff had sustained any damages. *Townsend v. Vanderwerker*, 160 U. S. 171, 182, 40 L. Ed. 383.

44. Cochran v. Blout, 161 U. S. 350, 40 L. Ed. 727.

45. Watts v. Waddle, 6 Pet. 389, 401, 8 L. Ed. 437.

46. Wesley v. Ells, 177 U. S. 370, 376, 44 L. Ed. 810, citing *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242.

47. Galloway v. Finley, 12 Pet. 264, 289, 9 L. Ed. 1079.

48. Hepburn v. Auld, 5 Cranch 262, 3 L. Ed. 96.

c. *Suit by Vendee*—(1) *In General*.—Where a party takes possession of the premises, under contract of sale, makes improvements and receives the rents and profits with the acquiescence of vendor, under such circumstances the vendor cannot put an end to the contract, but a court of equity will decree specific performance in favor of vendee.⁴⁹

When Contract Price Is Fully Paid.—On the sale of real property, when the contract price is fully paid, the entire title is equitably vested in the vendee, and he may compel a conveyance of the legal title by the vendor, his heirs, or his assigns.⁵⁰

(2) *Partial Performance with Abatement or Compensation.*—The American cases are to the effect that, where the defendant has only partially disabled himself from carrying out the contract, the plaintiff may be entitled to a specific performance so far as it can be enforced, and may receive compensation in damages for the deficiency.⁵¹

(3) *Tender of Performance.*—If the plaintiff wished to specifically enforce a contract, it is necessary for the complainant to tender performance.⁵² Where a contract was for the sale of certain land on payment of certain notes, and the obligor's offer of payment, which was refused, prevented the forfeiture of the contract and saved his right of specific performance, it was not absolutely necessary for him to bring the money into court for the defendant at the time he filed his bill. His offer in the bill to perform all the conditions and stipulations of the contract was sufficient to give him a standing in court. It was necessary, however, that the notes be actually paid by him before he was entitled to a deed, or to a decree that would have the force and effect of a conveyance.^{52a}

Default—Tender of Purchase Money with Costs in Reasonable Time.—In case of a default in payment, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract.⁵³

d. *Pleading.*—A bill by vendee against vendor for specific performance, which does not show any title in the defendant, is bad on demurrer.^{53a}

VII. Statute of Limitations and Laches.

A. Laches.—Courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances. Even where time is not of the essence of the contract, they will not interfere, where there has been long delay and laches on the part of the party seeking a specific performance. And especially, will they not interfere, where there has, in the meantime, been a great change of circum-

49. *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405.

50. *Jennisons v. Leonard*, 21 Wall. 302, 22 L. Ed. 539.

Performance by vendee necessary.—A court of equity will not perfect the title of the vendee of a piece of land, where it appears that he has not performed his part of the contract. *Potter v. Couch*, 141 U. S. 296, 35 L. Ed. 721. See ante, "Rule Where Applicant Is in Default," IV.

51. *Townsend v. Vanderwerker*, 160 U. S. 171, 182, 40 L. Ed. 383.

52. *Kelsey v. Crowther*, 162 U. S. 404, 408, 40 L. Ed. 1017.

To entitle the purchasers to a decree for a specific performance of a contract to sell land, it has always been held necessary that the purchasers should tender the purchase money. *Kelsey v. Crowther*, 162 U. S. 404, 408, 40 L. Ed. 1017.

The inability of the vendor to make a complete conveyance as called for by the contract does not permit the vendee to enforce it except upon tender or performance of his part of the contract. *Coughran v. Bigelow*, 164 U. S. 301, 41 L. Ed. 442; *Bank v. Hagner*, 1 Pet. 455, 7 L. Ed. 219; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017; *Bissell v. Heyward*, 96 U. S. 580, 24 L. Ed. 678.

Tender of purchase money with interest held sufficient.—*Secombe v. Steele*, 20 How. 94, 15 L. Ed. 833; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

52a. *Cheney v. Libby*, 134 U. S. 83, 33 L. Ed. 818.

53. *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520.

53a. *Kennedy v. Hazelton*, 128 U. S. 667, 671, 32 L. Ed. 576.

stances, and new interests have intervened.⁵⁴

Enforcement at Time of Partition.—An agreement to convey interest in realty after partition, cannot be enforced until partition, and delay being that of owner, statute does not run till then.⁵⁵

B. Limitation of Actions.—A vendee of land of a deceased person who has paid the consideration for the conveyance but has not received the legal title which is in the lien, is not considered as a creditor, and the heir cannot plead the statute of limitations against specific performance of the contract, brought after seven years.⁵⁶

VIII. Pleading and Practice.

A. Bill.—1. **NATURE OF BILL.**—A bill for specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character.⁵⁷

2. **AMENDMENT OF BILL.**—See the title **AMENDMENTS**, vol. 1, pp. 295, 336.

3. **MULTIFARIOUSNESS.**—Where an estate is sold in lots to different persons, in a bill for specific performance, the purchasers cannot join in exhibiting one bill against the vendor, and also the vendor cannot file a bill for specific performance against all the purchasers.⁵⁸

4. **PRAYER FOR RELIEF.**—A court of equity under a prayer for general relief in a bill for specific performance of a contract, will grant such relief only as the case stated in the bill and substantially the proof will justify.⁵⁹

B. Parties.—The general rule is that the parties to the contract are the only proper parties to the suit for its performance.⁶⁰

C. Jurisdiction and Venue⁶¹—1. **ADEQUATE REMEDY AT LAW.**—Specific performance of a contract will not be decreed where the party has a complete

54. Laches.—*Holt v. Rogers*, 8 Pet. 420, 433, 8 L. Ed. 995; *United States v. Noe*, 23 How. 312, 315, 16 L. Ed. 462; *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405; *Gallier v. Cadwell*, 145 U. S. 368, 373, 36 L. Ed. 738; *Davison v. Davis*, 125 U. S. 90, 31 L. Ed. 635; *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437; *United States v. Simon*, 12 How. 433, 435, 13 L. Ed. 1054.

The aid of a court of chancery will be given to either party who claims specific performance of a contract, if it appear, that in good faith, and within the proper time, he has performed the obligations which devolved upon him. *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437.

Ten years in Texas.—*Hanner v. Moulton*, 138 U. S. 486, 492, 34 L. Ed. 1032.

Limitation at law and in equity.—The delay of a party in taking proceedings to enforce a contract for a period which would bar an action at law for the property is, except under special circumstances, such laches as disentitle him to the aid of a court of equity. *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494.

55. Gunton v. Carroll, 101 U. S. 426, 25 L. Ed. 985.

Negligence of both parties.—Where, under agreement to partition land and convey portion, vendor neglects partition for twenty years, six years delay thereafter by vendee in seeking specific performance is not fatal laches. *Gunton v. Carroll*, 101 U. S. 426, 25 L. Ed. 985.

56. Limitation of actions.—*Coulson v. Walton*, 9 Pet. 62, 9 L. Ed. 51. See the title **LIMITATIONS OF ACTIONS**

AND **ADVERSE POSSESSION**, vol. 7, p. 930, n. 10.

57. Arndt v. Griggs, 134 U. S. 316, 324, 33 L. Ed. 918.

58. Multifariousness.—*Brown v. Guarantee Trust, etc., Co.*, 128 U. S. 403, 410, 32 L. Ed. 468. See the title **MULTIFARIOUSNESS**, vol. 8, p. 532.

59. Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. 930. See the title **EQUITY**, vol. 5, pp. 853, 854.

Sufficiency of prayer.—Prayer by defendant that company be enjoined from refusing plaintiff to use its road is held sufficient to secure specific performance. *Joy v. St. Louis*, 138 U. S. 1, 34 L. Ed. 843.

60. Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

Transfer by complainant of partial interest.—The assignment by the complainant, prior to his bill, of a partial interest in the entire contract, is no defense to the bill for such performance. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

Judgment creditors and purchasers at sheriff's sale.—Creditors of the vendor, who recovered judgments and sold the property, pending a suit for a specific performance, in which the purchase money had been paid into court, are not necessary parties to the suit, nor are the purchasers at the sheriff's sale under such judgments. *Secombe v. Steele*, 20 How. 94, 15 L. Ed. 833.

Heirs where vendor is dead.—*Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242.

61. As to jurisdiction of court of equity to defeat specific performance of realty

and adequate remedy at law.⁶²

2. **RETAINING JURISDICTION TO GIVE COMPLETE REMEDY.**—The right of a vendor to come into a court of equity to enforce a specific performance is unquestionable; such subjects are within the settled and common jurisdiction of the court. It is equally well settled that if the jurisdiction attaches, the court will go on to do complete justice; although, in its progress, it may decree on a matter which was cognizable at law.⁶³

D. Nature of Relief Granted Parties.—If specific performance cannot for any reason be enforced in favor of the party who is thereunto entitled, on his completion of the work under the contract, a court of equity will adjudge that compensation in damages be made to him.⁶⁴

E. Decree⁶⁵.—1. **FORM OF DECREE.**—**Conditional, Modified, and Alternative Decrees.**—Specific performance will be decreed conditionally if hardship can be thus obviated.⁶⁶

Refusal to Convey by Vendor's Lien without Indemnity.—Equity may refuse conveyance of property by vendor liens until the vendor shall indemnify them for the undertaking of their ancestor as his account.⁶⁷

2. **PERFORMANCE OF DECREE.**—The most usual mode under the chancery practice, unaffected by statute to make defendant specifically perform his contract to convey, is to compel the defendant, in person, to convey to plaintiff, or to have such conveyance made in his name, by a commissioner appointed by the court for that purpose, and in some of the states it is provided by statute that a decree of the court shall operate as a conveyance where it is so expressed in the decree.⁶⁸

SPECULATIVE DAMAGES.—See the title **DAMAGES**, vol. 5, p. 166.

SPEECH.—See **SOUNDS**, vol. 10, p. 1215.

SPEED.—As to speed in accident cases, see the titles **COLLISION**, vol. 3, p. 918; **CROSSINGS**, vol. 5, p. 150.

SPEEDY TRIAL.—As to right of accused to speedy trial, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 500.

beyond court's jurisdiction, see the title **EQUITY**, vol. 5, p. 839.

As to jurisdiction of admiralty over bill, see the title **ADMIRALTY**, vol. 1, p. 146. As to whether suit for is a federal question, see the title **APPEAL AND ERROR**, vol. 1, p. 699, n. 15. As to appellate jurisdiction of supreme court over bill filed to enforce the specific execution of a contract in relation to the use of a patent right, see the title **APPEAL AND ERROR**, vol. 2, p. 79.

62. **Adequate remedy at law.**—*Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955. See the titles **EQUITY**, vol. 5, p. 820; **MINES AND MINERALS**, vol. 8, p. 412.

To compel a railroad to maintain a track.—A bill in equity will not lie to compel a railroad company to specifically perform a covenant to maintain a track, the remedy would be an action at law for damages. *Hoard v. Chesapeake, etc., Railway*, 123 U. S. 222, 31 L. Ed. 130. See the title **EQUITY**, vol. 5, p. 803.

63. *Cathcart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120. See the title **EQUITY**, vol. 5, p. 824.

64. **Damages in lieu of specific performance.**—*County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238.

Pratt v. Law, 9 Cranch 456, 494, 3 L. Ed. 792.

65. As to sufficiency of evidence to warrant decree, see the title **EVIDENCE**, vol. 5, p. 1040.

As to statute making decree operate as conveyance ipso facto, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 554.

66. *Willard v. Tayloe*, 8 Wall. 557, 567, 19 L. Ed. 501. As to party taking conditional decree, see the title **MAXIMS**, vol. 8, p. 314.

Where specific execution which would work hardship when unconditionally performed, would work equity when decreed on conditions, it will be decreed conditionally. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501.

Modified decree.—A court of equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misrepresentation, it would be unconscionable so to do; the court may so modify the agreement as to do justice so far as circumstances will permit, and refuse specific execution, unless the party seeking it will comply with such modifications as justice requires. *Mechanics' Bank v. Lynn*, 1 Pet. 376, 7 L. Ed. 185.

67. *Carneal v. Banks*, 10 Wheat. 181, 6 L. Ed. 298.

68. **Performance of decree.**—*Silver v. Ladd*, 7 Wall. 219, 228, 19 L. Ed. 138.

SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

CROSS REFERENCES.

See the title **TRUSTS AND TRUSTEES**.

It cannot be doubted, that it is competent for testators and grantors, by will or deed, to construct and establish trusts, both of real and personal property, and of the rents, issues, profits and produce of the same, by appropriate limitations and powers to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part, or in invitum, by his creditors.¹ Discretion in trustees to give beneficiary an interest after bankruptcy, gives nothing for assignee, although bankrupt be one of the trustees.² A devise of the income of certain property, to cease on the insolvency or bankruptcy of the devisee, and then to go directly to his wife and children in such manner as certain trustees in their discretion shall deem proper, is valid, but if the devisee is to receive a vested interest, that interest must be paid over to his assignee in bankruptcy.³

SPIRITS—SPIRITUOUS LIQUORS.—See the title **INTOXICATING LIQUORS**, vol. 7, p. 518. See, also, **LOW WINES**, vol. 7, p. 1076.

SPITE FENCES.—See the title **ADJOINING LANDOWNERS**, vol. 1, p. 117.

SPLITTING CAUSES OF ACTIONS.—See the title **ACTIONS**, vol. 1, p. 112.

SPOILIATION.—As to revocation of wills by, see the title **WILLS**. As to French spoliation claims, see the title **UNITED STATES**.

STALE DEMANDS.—See the title **LACHES**, vol. 7, p. 790.

STAMPS.—See **POSTAGE STAMPS**, vol. 9, p. 549, and references there given.

STAMP TAX.—See the titles **REVENUE LAWS**, vol. 10, p. 1012; **TAXATION**. As to state statute imposing stamp tax on foreign bills of lading, see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 463.

1. *Spindle v. Shreve*, 111 U. S. 542, 547, 28 L. Ed. 512. And see the title **BANKRUPTCY**, vol. 2, p. 892.

The owner of property, in free exercise of his will in disposing of it, may so dispose of it, that the object of his bounty does not hold it subject to his debts. *Nichols v. Eaton*, 91 U. S. 716, 726, 23 L. Ed. 254, distinguished in *Potter v. Couch*, 141 U. S. 296, 317, 35 L. Ed. 721; *Hyde v. Wood*, 94 U. S. 523, 24 L. Ed. 264; *Spindle v. Shreve*, 111 U. S. 542, 547, 28 L. Ed. 512.

The limits, within which such provisions may be made and administered, of course, must be found in the law of that jurisdiction which is the situs of the property, in case of real estate, and in cases of personalty, where the trust was created or is to be administered according to circumstances. And in determining those limits, that law declares how far, and by what forms and modes, the institution of property may be permitted to

accommodate itself to the will and convenience of individuals, without prejudice to public interest and policy, by what limitations and instruments its usual incidents may be affected and altered, so as to effectuate the intentions of parties; how far the dominion, implied in the idea of property, may be extended so as to limit the future dominion of those who succeed to its beneficial enjoyment. *Spindle v. Shreve*, 111 U. S. 542, 547, 28 L. Ed. 512, citing *Nichols v. Levy*, 5 Wall. 433, 18 L. Ed. 596; *Nichols v. Eaton*, 91 U. S. 716, 729, 23 L. Ed. 254.

By the law of Illinois such an equitable estate is valid. *Potter v. Couch*, 141 U. S. 296, 35 L. Ed. 721.

2. *Nichols v. Eaton*, 91 U. S. 716, 730, 23 L. Ed. 254.

3. *Nichols v. Eaton*, 91 U. S. 716, 722, 23 L. Ed. 254, reaffirmed in *Hyde v. Woods*, 94 U. S. 523, 526, 24 L. Ed. 264; *Manson v. Duncanson*, 166 U. S. 533, 546, 41 L. Ed. 1105.

STARE DECISIS.

BY WARREN LEE KINDER.

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As to force and effect of decisions of the supreme court, and the rule that whatever has been decided on appeal cannot be re-examined in a subsequent appeal of the same suit, and that a second appeal brings up only the proceedings therein subsequent to the mandate, see the title *APPEAL AND ERROR*, vol. 2, p. 412. As to decision on matters, the disposition of which is not required for the decision, not being binding upon an appellate court on second appeal of same case, see the title *APPEAL AND ERROR*, vol. 2, p. 416. As to the rule that an actual decision on appeal of any question settles the law in respect thereto for future action in the case, that all questions which appear upon the record and have not already been decided are open for consideration, see the title *APPEAL AND ERROR*, vol. 2, p. 416. As to rule that questions repeatedly argued and decided are no longer open for discussion, but that an order entered through inadvertence by the court in a case previously before it, cannot be drawn into a precedent, see the title *APPEAL AND ERROR*, vol. 2, p. 418. As to right of court to change its opinion where case comes before it on exceptions from a master's report, and dismiss bill, see the title *DISMISSAL, DISCONTINUANCE AND NON-SUIT*, vol. 5, p. 368. As to lower court being bound by decision of appellate court and must act in compliance with its mandate, see the title *MANDATE AND PROCEEDINGS THEREON*, vol. 8, p. 132. et seq. As to rule of precedents or stare decisis where judgment below is affirmed because of equal division of court, see the title *APPEAL AND ERROR*, vol. 2, p. 396. As to judicial rebuke for appealing a case twice before decided the same way, see the title *APPEAL AND ERROR*, vol. 2, p. 413. As to where a party, instead of prosecuting a second appeal, attempts by a bill of review or bill in nature of a bill of review, to reach errors apparent on the face of the record, see the title *APPEAL AND ERROR*, vol. 2, p. 414. As to decisions of court as laws, see the title *COURTS*, vol. 4, p. 1005. As to duty of court not to extend any decision upon a constitutional question if convinced that error in principle might supervene, see the title *CONSTITU-*

TIONAL LAW, vol. 4, p. 68. As to opinions of courts, see the titles APPEAL AND ERROR, vol. 2, p. 372; OPINION OF COURTS, vol. 8, p. 1003. As to judicial decisions as impairing obligation of contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 773, et seq. As to inference where a rule of the lower court is sustained but no ground is given for the decision, see the title PLEADING, vol. 9, p. 454. As to conclusiveness of a valid final judgment as to the questions therein in issue and decided, see the title RES ADJUDICATA, vol. 10, p. 729. As to judicial notice by the United States courts of the decision of courts of the states, see the title JUDICIAL NOTICE, vol. 7, p. 693. As to rule that the supreme court is not disposed to disturb the decision of the supreme court of a territory in construing a local statute, and in matters of practice, see the title APPEAL AND ERROR, vol. 1, p. 541. As to comity as controlling decisions of co-ordinate tribunals and the decisions applicable, see COMITY, vol. 3, p. 948; and see the title COURTS, vol. 4, p. 888.

I. Doctrine of Stare Decisis.

Where a case decides a question of property, or lays down a rule by which the right of property should be determined, the court feels bound to follow it.¹ The court will not depart from the safe maxim of stare decisis, where the decisions of the court have been unanimous on a very difficult and intricate subject.²

In the construction of wills, however, adjudged cases are of very little aid; except for establishment of general principles; for it seldom happens that two cases can be found precisely alike.³

II. Reasons for the Rule.

The right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions.⁴

III. Decisions Applicable.

A. Cases Not in Point.—The doctrine of stare decisis only arises in respect of decisions directly upon the points in issue.⁵ Positive authority of a decision

1. Doctrine of stare decisis.—Propeller Genesee Chief v. Fitzhugh, 12 How. 443, 458, 13 L. Ed. 1058.

In questions which respect the rights of property, it is better to adhere to principles once fixed, though, originally, they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound reason. Marine Ins. Co. v. Tucker, 3 Cranch 357, 388, 2 L. Ed. 466. See, also, National Bank v. Whitney, 103 U. S. 99, 102, 26 L. Ed. 443; The Lot-tawanna, 21 Wall. 558, 571, 22 L. Ed. 654.

Decisions as to judicial sales of estates of decedents rules of property.—Grignon v. Astor, 2 How. 319, 343, 11 L. Ed. 283.

Decisions as to extraterritorial effect of insolvency laws on contracts.—Cook v. Moffat, 5 How. 295, 309, 12 L. Ed. 159.

Lapse of time and rights of property involved.—“It must be a very strong case, indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court.” Goodtitle v. Kibbe, 9 How. 471, 478, 13 L. Ed. 220.

2. Cook v. Moffat, 5 How. 295, 309, 12 L. Ed. 159.

3. Lambert v. Paine, 3 Cranch 97, 131, 2 L. Ed. 377. See, generally, the title WILLS.

Particular expressions in wills given a definite meaning.—When, however, a particular expression in a will has received a definite meaning by express adjudications, it must be adhered to for the sake of uniformity of decision and of security in disposal of landed property. Lambert v. Paine, 3 Cranch 97, 134, 2 L. Ed. 377, Paterson, J.

4. Reasons for rule.—Peralta v. United States, 3 Wall. 431, 439, 18 L. Ed. 221. See, also, Gilman v. Philadelphia, 3 Wall. 713, 724, 18 L. Ed. 96; Ex parte Bollman, 4 Cranch 75, 103, 2 L. Ed. 554.

Right to contracts in reference to decisions as to questions of property.—Propeller Genesee Chief v. Fitzhugh, 12 How. 443, 458, 13 L. Ed. 1058.

Decisions affecting titles to land become rules of property, and it is of great importance to the public that when they are once decided they should no longer be considered open. Minnesota Co. v. National Co., 3 Wall. 332, 334, 18 L. Ed. 42.

5. Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 574, 39 L. Ed. 759.

is coextensive only with the facts on which it is made.⁶

B. Matters Not Considered by Court.—Where in the determination of a case a matter is passed sub silentio, without bringing the point distinctly before the court, it is no precedent.⁷

C. Obiter Dicta.—The expression of an opinion on a point upon which the court was not called upon to decide must be considered merely a dictum,⁸ and is not authoritative and binding.⁹ As to decision of matters on appeal not nec-

6. *Sturges v. Crowninshield*, 4 Wheat. 122, 207, 4 L. Ed. 529.

General principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case. *Parsons v. District of Columbia*, 170 U. S. 45, 51, 42 L. Ed. 943.

Circumstance of cases not the same.—An opinion in a particular case, founded on its special circumstances, is not applicable to cases under circumstances essentially different. *Brooks v. Marbury*, 11 Wheat. 78, 91, 6 L. Ed. 423.

"The rulings of courts must be considered always in reference to the subject matter of litigation and the attitude of parties in relation to the point under discussion. And it will often be the case, as it is now, that counsel will use an illustration for a judicial ruling, or words correctly used when they were written as applicable to a different state of things." *Gaines v. Hennen*, 24 How. 553, 566, 16 L. Ed. 770.

Comity.—As to rule that the doctrine of comity applies only to questions that were actually decided, and arose under the same facts, see the title COURTS, vol. 4, p. 888.

7. **Matters not considered.**—The *Edward*, 1 Wheat. 261, 276, 4 L. Ed. 86.

Questions as to jurisdiction.—Where no question was made, in a case, as to the jurisdiction, but it passed sub silentio, the supreme court does not consider itself as bound by that case. *United States v. More*, 3 Cranch 159, 172, 2 L. Ed. 397; *Ex parte Crane*, 5 Pet. 190, 203, 8 L. Ed. 92; *United States v. Sanges*, 144 U. S. 310, 319, 36 L. Ed. 445; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 236, 48 L. Ed. 159; *New v. Oklahoma*, 195 U. S. 252, 256, 49 L. Ed. 182. See, also, *Durousseau v. United States*, 6 Cranch 307, 317, 3 L. Ed. 232; *United States Bank v. Deveaux*, 5 Cranch 61, 88, 3 L. Ed. 38.

Decisions where court has assumed jurisdiction as to causes between certain parties, though not authorities, being made without a consideration of the particular point, have much weight, as they show that the point neither occurred to the bench or bar and the common understanding of intelligent men. *United States Bank v. Deveaux*, 5 Cranch 61, 88, 3 L. Ed. 38.

Where the received construction of a statute has been erroneously adopted, without examination, it is not binding and

it is never too late to correct it. *Buel v. Van Ness*, 8 Wheat. 312, 322, 5 L. Ed. 624.

8. **Dicta.**—*McCormick Harvesting Mach. Co. v. Aultman*, 169 U. S. 606, 611, 42 L. Ed. 875; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 509, 33 L. Ed. 687.

Where the court was only called upon to consider how far an extraordinary or special tax could be levied, the case called for nothing more; and, if more was intended by the judge who delivered the opinion, it was purely obiter. *United States v. County of Clark*, 96 U. S. 211, 218, 24 L. Ed. 628.

Court should decide nothing unnecessary to the judgment.—*United States v. Joseph*, 94 U. S. 614, 618, 24 L. Ed. 295.

9. **Dicta not authoritative and binding.**—*Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 509, 33 L. Ed. 687; *McCormick Harvesting Mach. Co. v. Aultman*, 169 U. S. 606, 611, 42 L. Ed. 875; *Bryan v. Bernheimer*, 181 U. S. 188, 197, 45 L. Ed. 814; *The Atlanta*, 3 Wheat. 409, 423, 4 L. Ed. 422. See, also, *Hans v. Louisiana*, 134 U. S. 1, 20, 33 L. Ed. 842.

Case must call for the opinion expressed.—The federal supreme court has never held itself bound by any part of an opinion in any case, which is not needful to the ascertainment of the right or title in question between the parties. *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 575, 39 L. Ed. 759, citing *Carroll v. Carroll*, 16 How. 275, 286, 14 L. Ed. 936.

The cases of *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603, and *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841, "are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains." *Carroll v. Carroll*, 16 How. 275, 287, 14 L. Ed. 936; *Bardes v. Hawarden Bank*, 178 U. S. 524, 534, 44 L. Ed. 1175.

Character of decisions of state courts binding on federal courts.—As to questions discussed in opinion of state court, not necessary to the judgment, not being regarded as decisions and consequently not binding on federal courts, see the title COURTS, vol. 4, p. 1052.

Interstate commerce.—In *Plumley v. Massachusetts*, 155 U. S. 461, 474, 39 L. Ed. 223, the language of the decision in *Leisy v. Hardin*, 135 U. S. 100, 124, 34 L. Ed. 128, as to sale of articles, the subject of interstate commerce, was restrained to the question actually presented for de-

essary to its determination being obiter dicta and open for determination on second appeal, see the title *APPEAL AND ERROR*, vol. 2, p. 416.

General expressions, in every opinion, are to be taken in connection with the case in which they are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.¹¹

Opinions Not Considered Obiter Dicta.—Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no sense, be called mere dictum.¹²

D. Concurrent Opinions.—Where judges concur in the opinion delivered, that opinion is deemed to be their own, and whatever principles are established are considered no longer open for controversy, but the settled law of the court.¹³

termination. See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 401.

11. "The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 6 Wheat. 264, 399, 5 L. Ed. 257; *Carroll v. Carroll*, 16 How. 275, 287, 14 L. Ed. 936; *United States v. Wong Kim Ark*, 169 U. S. 649, 679, 42 L. Ed. 890; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 574, 39 L. Ed. 759; *Downes v. Bidwell*, 182 U. S. 244, 258, 45 L. Ed. 1088. See, also, *Northern Bank v. Porter Tp. Trustees*, 110 U. S. 608, 615, 28 L. Ed. 258; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 291, 49 L. Ed. 739.

General expressions as to power of congress over territories.—Too much weight must not be given to general expressions found in several opinions that power of congress over territories is complete and supreme. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 110.

Income tax.—The supreme court declines to hold itself bound to extend the scope of decision—none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only—so as to sustain a tax on the income of realty on the ground of being an excise or duty. *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 579, 39 L. Ed. 759. See the title *TAXATION*.

12. Where a point is properly considered but something else disposes of the case.—"Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that ques-

tion, the ruling of the court in respect thereto can, in no just sense, be called mere dictum. *Railroad Companies v. Schutte*, 103 U. S. 118, 26 L. Ed. 327, in which this court said (p. 143): 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.' " *Union Pac. R. Co. v. Mason City, etc., R. Co.*, 199 U. S. 160, 166, 50 L. Ed. 134.

Where the statutory authority to exchange railroad bonds for state bonds was decided in the case, and the point was directly made by the pleadings and as directly passed on by the court, the decision was in no just sense dictum. *Railroad Companies v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327.

Construction of statute in case of probate of will.—Where in a case, involving the probate of a will, it clearly appears that the question whether the will was illegal and void, so far as regarded a charitable devise, because in contravention of a statute, was presented for adjudication upon the offering of the whole will for probate, and was considered by the court, the decision is not obiter dicta as to the construction and effect of the statute. *Jones v. Habersham*, 107 U. S. 174, 179, 27 L. Ed. 401.

13. **Concurrent opinions.**—The judges who were in the minority of the court upon the general question as to the constitutionality of state insolvent laws, concurred in the opinion of Mr. Justice Johnson, in the case of *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606. That opinion is, therefore, to be deemed the opinion of the other judges, who assented to that judgment. Whatever principles are established in that opinion are to be considered no longer open for contro-

E. Decisions Obtained by Collusion of Parties.—Where a decision is alleged to have been obtained by the fraudulent collusion of the parties, but other parties intervened and the point in question was considered by the court, it is an authoritative exposition of the law.¹⁴

IV. Decisions of Other Tribunals as Precedents.

A. State Decisions in Other State Courts.—As to decisions of another state on adopted statutes, being rules of decision, see the title *STATUTES*.

B. State Decisions in Federal Courts.—See the title *COURTS*, vol. 4, p. 1049, et seq., for full treatment. As to forms and modes of proceeding under the practice conformity act, see the title *COURTS*, vol. 4, p. 1123.

C. Decisions of Maryland Courts in District of Columbia.—The decisions of the Maryland courts, founded upon general principles, and made since the organization of the District of Columbia, are not binding upon the courts of the district as authorities, though entitled to all the respect due to the opinions of the highest court of the state.¹⁵

D. Federal Decisions in State Courts.—When the supreme court has declared state legislation to be in conflict with the constitution of the United States, and therefore void, the state tribunals are bound to conform to such decision.¹⁶

E. Decisions of Foreign Courts.—The decisions of foreign courts on questions of common,¹⁷ mercantile¹⁸ or international law,¹⁹ are respected here. The decisions of foreign countries upon their local statutes are also respected.²⁰

V. Overruling and Qualifying Decisions.

While the general authority of adjudications is not denied,²¹ the court is not, however, precluded from the right, or exempted from the necessity, of examining into the correctness or consistency of its own decisions, or those of any other tribunal.²² Moreover the supreme court does not hesitate to overrule

versy, but the settled law of the court. *Boyle v. Zacharie*, 6 Pet. 348, 8 L. Ed. 423.

14. *Williams v. Baker*, 17 Wall. 144, 150, 21 L. Ed. 561. See, also, *Stryker v. Goodnow*, 123 U. S. 527, 539, 31 L. Ed. 194; *Chapman v. Goodnow*, 123 U. S. 540, 546, 31 L. Ed. 235; *Litchfield v. Goodnow*, 123 U. S. 549, 550, 31 L. Ed. 199; *Wells v. Goodnow*, 150 U. S. 84, 37 L. Ed. 1007.

15. *Decisions of Maryland courts in District of Columbia.*—*Phillips v. Negley*, 117 U. S. 665, 678, 29 L. Ed. 1013. See *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450; *Russell v. Allen*, 107 U. S. 163, 171, 27 L. Ed. 397.

In a case involving a devise of real property situated in the District of Columbia, the decisions of the courts of Maryland as to the rule in *Shelley's Case*, made while the land in question formed a part of that state, are the only ones binding. *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, 41 L. Ed. 827.

Statutes.—As to authority of decisions of Maryland courts as to statutes adopted by the District of Columbia on its cession, see the title *STATUTES*.

16. *Cook v. Moffat*, 5 How. 295, 308, 12 L. Ed. 159. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 60, et seq.

17. See the title *COMMON LAW*, vol. 3, p. 967.

18. *Decisions as to general mercantile*

law.—Where cases in France, Spain or Holland, as well as England, are a determination upon general mercantile law, they are of authority here. *Steinmetz v. Currie*, 1 Dall. 270, 272, 1 L. Ed. 132.

19. **International law.**—In deciding the question of the law of nations, the supreme court will respect the decision of foreign courts. See the title *INTERNATIONAL LAW*, vol. 7, p. 241.

20. *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Hilton v. Guyot*, 159 U. S. 113, 194, 40 L. Ed. 95.

English decisions as to adopted statutes.—As to English decisions constructing adopted statutes rendered prior and subsequent to the American Revolution, see the title *COMMON LAW*, vol. 3, p. 968.

21. *Ex parte Bollman*, 4 Cranch 75, 103, 2 L. Ed. 554. See ante, "Doctrine of *Stare Decisis*," I.

22. *Ex parte Bollman*, 4 Cranch 75, 103, 2 L. Ed. 554.

Courts not absolutely bound by prior decisions.—Courts are bound in their very nature to declare what the law is and has been, and not what it shall be in the future; if they were absolutely bound by their prior decisions, they would be without the power to correct their own errors. *Wood v. Brady*, 150 U. S. 18, 23, 37 L. Ed. 981.

Questions as to jurisdiction.—Where a

an erroneous decision.²³

Change in Personnel of Court.—Where personnel of the court is changed, parties should not speculate on a change of decision.²⁴

Cases Considered as Overruling Decisions.—No proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made.²⁵

STATE AND PUBLIC LANDS.—See the title PUBLIC LANDS, vol. 10, p. 1.

STATE BONDS.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650.

STATE DEPARTMENT.—See the title UNITED STATES.

STATE JAIL—STATE PRISON.—See the titles PRISONS AND PRISONERS, vol. 9, p. 729; SENTENCE AND PUNISHMENT, vol. 10, p. 1090. As to "state jail" and "state prison" being synonymous, see the title SENTENCE AND PUNISHMENT, vol. 10, p. 1099.

STATE LAWS.—As to a municipal ordinance not passed, under supposed legislature not being a state law within meaning of constitutional prohibition against impairing obligation of contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 779.

STATEMENT.—See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 1. As to what publication of evidence, or what purports to be the evidence of a case, being "a statement in public journal," see the title JURY, vol. 7, p. 772.

STATEMENT OF FACTS ON APPEAL.—See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 1.

decision has no relation to rights of property, but is a question of jurisdiction only, and the judgment it decides to render can disturb no rights of property nor interfere with any contracts heretofore made, the court does not feel bound to follow its previous decision. *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 458, 13 L. Ed. 1058.

Construction of similar statutes.—It is carrying the doctrine to an unwarrantable extent to say that the construction placed by the court upon one statute implies an obligation on its part to put the same construction upon a different statute, though the language of the two may be similar. *Wood v. Brady*, 150 U. S. 18, 22, 37 L. Ed. 981.

23. **Erroneous decisions.**—*Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 575, 39 L. Ed. 759; *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 455, 13 L. Ed. 1058; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 322, 38 L. Ed. 992; *Legal Tender Cases*, 12 Wall. 457, 554, 20 L. Ed. 287; *Ramsay v. Allegree*, 12 Wheat. 611, 614, 6 L. Ed. 746.

Erroneous citation of compact between two different states on which decision depended.—"There being an error of citation (from a compact between two states), a decision founded upon the supposed correctness of the citation cannot be accepted as authoritative any more than a decision founded upon a mistranslation of a passage in an author will be followed when the mistake or error is discovered." *Wharton v. Wise*, 153 U. S. 155, 176, 38 L. Ed. 669.

Decision overruled in some respects.—

The case of *Kilbourn v. Thompson*, 103 U. S. 168, 200, 26 L. Ed. 377, overruled the case of *Anderson v. Dunn*, 6 Wheat. 204, 5 L. Ed. 242, in some respects, that in an action against a sergeant at arms of the House of Representatives for false imprisonment for arrest for contempt to that body, a case deciding that the judgment of the House of Representatives finding him guilty of contempt was conclusive in the action, was no precedent where the house had exceeded its authority.

24. *Minnesota Co. v. National Co.*, 3 Wall. 332, 334, 18 L. Ed. 42.

25. **Cases considered as overruling decisions.**—*Woodruff v. Parham*, 8 Wall. 123, 138, 19 L. Ed. 382, citing *The Victory*, 6 Wall. 382, 18 L. Ed. 848.

Where no allusion made to prior conflicting decision.—Where in deciding a case as to the law of the District of Columbia on a certain point, no allusion was made by court or counsel to a prior decision in conflict to that rendered, its decision cannot be considered as evidence of the law of the district on this point. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 694, 27 L. Ed. 1070.

But in *Asher v. Texas*, 128 U. S. 129, 131, 32 L. Ed. 368, the court said: "Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not."

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vol. 6, p. 758; INDIANS, vol. 6, p. 906; INJUNCTIONS, vol. 6, p. 1022; INSPECTION LAWS, vol. 7, p. 16; INTEREST, vol. 7, p. 217; INTERNATIONAL LAW, vol. 7, p. 239; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; INTOXICATING LIQUORS, vol. 7, p. 518; JUDGMENTS AND DECREES, vol. 7, p. 544; LACHES, vol. 7, p. 790; LIMITATION OF ACTIONS, AND ADVERSE POSSESSION, vol. 7, p. 900; MANDAMUS, vol. 8, p. 1; MILITARY LAW, vol. 8, p. 342; MUNICIPAL CORPORATIONS, vol. 8, p. 546; MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650; NATURALIZATION, vol. 8, p. 797; NAVIGABLE WATERS, vol. 8, p. 805; NUISANCES, vol. 8, p. 933; PARTIES, vol. 9, p. 34; PAYMENT, vol. 9, p. 319; PILOTS, vol. 9, p. 399; POSTAL LAWS, vol. 9, p. 550; PUBLIC LANDS, vol. 10, p. 1; PUBLIC OFFICERS, vol. 10, p. 363; QUARANTINE, vol. 10, p. 435; RAILROADS, vol. 10, p. 455; RELIGIOUS SOCIETIES, vol. 10, p. 638; SLAVERY AND INVOLUNTARY SERVITUDE, vol. 10, p. 1209; SUMMONS AND PROCESS; TAXATION; TELEGRAPHS AND TELEPHONES; TERRITORIES; TONNAGE DUTIES; TREATIES; UNITED STATES; WAR; WAREHOUSES AND WAREHOUSEMEN; WATERS AND WATERCOURSES; WHARVES AND WHARFINGERS.

As to a state as the sole stockholder in a corporation, and as to the repeal of the charter thereof by the state, see the titles BANKS AND BANKING, vol. 3, pp. 124, 180, et seq.; CONSTITUTIONAL LAW, vol. 4, pp. 310, 311; CORPORATIONS, vol. 4, pp. 683, 684. As to recovery by state of damages and penalties on bonds, see the title BONDS, vol. 3, p. 440. As to bounties granted by a state, see the title BOUNTIES, vol. 3, p. 508. As to the adoption of the common law by the states, see the title COMMON LAW, vol. 3, p. 962, et seq. As to compromise and settlement of claims against a state, see the title COMPROMISE AND SETTLEMENT, vol. 3, pp. 991, 994. As to the federal guaranty of republican government to the states and protection against domestic violence, see the title CONSTITUTIONAL LAW, vol. 4, p. 329, et seq. As to state treasury warrants as a medium of payment, see the titles CONSTITUTIONAL LAW, vol. 4, pp. 305, 308, 309, 311; PAYMENT, vol. 9, p. 327. As to state courts, see the title COURTS, vol. 4, pp. 861, 1151, et seq. As to the application of the doctrine of equitable estoppel against states, see the title ESTOPPEL, vol. 5, p. 1001. As to the states as depositaries of the revenues of the United States, see the title UNITED STATES. As to liability of state to owner of property, captured by the enemy after its seizure or removal under an order of the continental congress during the revolutionary war, see the title WAR. As to whether, in a domestic attachment, the state is entitled to a preference on a bond for duties, see the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 675; REVENUE LAWS, vol. 10, p. 933.

I. Definitions and Distinctions.

State Defined.—A state is a body politic or society of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.¹ The term state, as used in the constitution, refers to one of the states composing the United States.²

1. Keith v. Clark, 97 U. S. 454, 459, 460, 24 L. Ed. 1071. See, also, Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440; Penhallow v. Doane, 3 Dall. 54, 1 L. Ed. 507; Texas v. White, 7 Wall. 700, 19 L. Ed. 227.

The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Halleck, Int. Law, c. 3, §§ 5, 6, 7. Geoffroy v. Riggs, 133 U. S. 258, 268, 33 L. Ed. 642; Talbot v. Silver Bow County, 139 U. S. 438, 444, 35 L. Ed. 210.

For other definitions of the term "state,"

see the title CONSTITUTIONAL LAW, vol. 4, pp. 81, 82, 329, 330.

2. Geoffroy v. Riggs, 133 U. S. 258, 269, 33 L. Ed. 642.

Territory and District of Columbia.—

While the word state is often used in contradistinction to territory, yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the territories, as well as those political communities known as states of the Union. Such a use of the word state has

II. Sovereignty and Powers of States and Relation to Federal Government.

A. In General.—Generally, as to the sovereignty and powers of the states and their relation to the federal government, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 1, 83, et seq., 137, et seq., 147, et seq., 156, et seq., 174, et seq.

As to the states as a part of the United States as a nation, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 91, 93.

B. Power over Particular Subjects.—Bridges.—As to the right of a state to erect and maintain bridges, and to control, regulate, alter and remove same, see the title *BRIDGES*, vol. 3, p. 516.

Carriers.—As to power of a state to regulate carriers, see the title *CARRIERS*, vol. 3, p. 622, et seq.

Charities.—As to the control of charities by state legislatures and their power to direct a sale of real estate devised to charitable purposes, see the title *CHARITIES*, vol. 3, pp. 694, 695.

Citizenship.—As to citizenship in the states and the right of the states to confer citizenship, see the title *CITIZENSHIP*, vol. 3, p. 788.

Coinage of Money and Emission of Bills of Credit, etc.—As to the power of the states to coin money, emit bills of credit and prescribe a legal tender, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 305, et seq.

Commerce.—As to the power of the states to regulate interstate and foreign commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 310, et seq., 345, et seq., 441, et seq. As to the power of the states to regulate internal or intrastate commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 443, et seq. As to power of the states to regulate commerce with the Indian tribes, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 440.

Corporations.—As to the power of the states to create, and the regulation and control of corporations by states, see the title *CORPORATIONS*, vol. 4, pp. 636, et seq., 662, et seq. As to the power of a state to incorporate a bank, see the title *BANKS AND BANKING*, vol. 3, p. 9.

Crimes.—As to the power of the states to define and prevent crime, and to ordain its punishment, see the title *CRIMINAL LAW*, vol. 5, p. 52.

Duties on Imports or Exports.—As to the provision of the constitution declaring that no state shall, without the consent of congress, lay imposts, or duties on imports or exports, see *EXPORTS AND IMPORTS*, vol. 6, p. 210. See, also, the title *TAXATION*. As to the taxing of imports or exports by the states as constituting a regulation of interstate and foreign commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 464, et seq.

Eminent Domain.—As to the right of a state to exercise the power of eminent domain, see the title *EMINENT DOMAIN*, vol. 5, pp. 754, 755.

been recognized in the decisions of the federal supreme court. *Talbott v. Silver Bow County*, 139 U. S. 438, 444, 35 L. Ed. 210; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 9, 33 L. Ed. 231; *Hepburn v. Ellzey*, 2 Cranch 445, 452, 2 L. Ed. 332; *Geofroy v. Riggs*, 133 U. S. 258, 268, 33 L. Ed. 642.

State as corporation or person within meaning of revenue laws.—The terms "corporation" and "person" as used in the acts of congress touching internal revenue, do not include a state. *United States v. Railroad Co.*, 17 Wall. 322, 328, 21 L. Ed. 597. Generally, as the power of congress to tax the property or revenues of a state, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 210, et seq. See, also, the titles *REVENUE LAWS*, vol. 10, p. 838;

TAXATION.

Word state as used in judiciary act.—As to the meaning of the word "state" as used in the 25th section of the judiciary act of 1789, see the titles *APPEAL AND ERROR*, vol. 1, p. 555; *COURTS*, vol. 4, pp. 940, 941.

District of Columbia as a state.—See the title *DISTRICT OF COLUMBIA*, vol. 5, p. 406.

Indian nations or tribes as states.—See the title *INDIANS*, vol. 6, pp. 913, 914.

Status of states as colonies.—See the title *CONSTITUTIONAL LAW*, vol. 4, p. 83, et seq.

Distinction between state and government of state.—See the title *CONSTITUTIONAL LAW*, vol. 4, p. 81.

Ex Post Facto Laws and Bills of Attainder.—As to the power of the states to pass ex post facto laws and bills of attainder, see the title CONSTITUTIONAL LAW, vol. 4, p. 515, et seq.

Extradition.—As to the extradition of fugitives from one state to another, and as to the powers and duties of the governors of the states in regard thereto, see the title EXTRADITION, vol. 6, pp. 222, et seq., 224, et seq. As to mandamus to compel the governor of one state to deliver a fugitive to the authorities of another state, see the title MANDAMUS, vol. 8, pp. 15, 66. As to the power of the states with respect to the extradition of fugitives to foreign countries, see the titles CONSTITUTIONAL LAW, vol. 4, p. 150; EXTRADITION, vol. 6, p. 217.

Ferries.—As to the power of the states to establish and regulate ferries, see the titles FERRIES, vol. 6, p. 274; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 367.

Fish and Fisheries.—As to the rights and powers of the states with respect to fish and fisheries, see the title FISH AND FISHERIES, vol. 6, pp. 291, 299.

Foreign Corporations.—As to the powers of the states over foreign corporations, see the titles FOREIGN CORPORATIONS, vol. 6, p. 305; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 369.

Fugitive Slaves.—As to the power of the states to legislate with respect to fugitive slaves, see the title CONSTITUTIONAL LAW, vol. 4, pp. 182, 183. See, also, the title SLAVERY AND INVOLUNTARY SERVITUDE, vol. 10, p. 1209.

Impairment of Obligation of Contracts.—As to the provision of the constitution declaring that no state shall pass any law impairing the obligation of contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758.

Inspection Laws.—As to the right of the states to enact inspection law, see the title INSPECTION LAWS, vol. 7, p. 16.

Intoxicating Liquors.—As to state regulation and control of intoxicating liquors, see the title INTOXICATING LIQUORS, vol. 7, p. 519. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 378, et seq.

Limitation of Negotiability of United States Bonds.—As to the transfer of United States bonds owned by a state, and the power of the state to limit the negotiability of such bonds, see the titles CONSTITUTIONAL LAW, vol. 4, p. 191; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, pp. 777, 778.

Naturalization.—As to the powers of the states to naturalize aliens, see the title NATURALIZATION, vol. 8, p. 798. As to collective naturalization upon the admission of a state into the Union, see the title NATURALIZATION, vol. 8, pp. 803, 804.

Navigable Waters.—As to state dominion, sovereignty and ownership of navigable waters, beds, shores, etc., see the title NAVIGABLE WATERS, vol. 8, p. 812, et seq. As to the power of the states to regulate, improve or obstruct navigable waters within their limits, see the title NAVIGABLE WATERS, vol. 8, p. 850, et seq. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 386, et seq. As to the power of a state to authorize the erection of dams and booms to hold logs, across a navigable river within its limits, see the title LOGS AND LOGGING, vol. 7, p. 1061.

Nuisances.—As to the power of a state to abate nuisances, see the title NUISANCES, vol. 8, pp. 933, 940, 941.

Pilots.—As to state regulation of pilots and pilotage, see the title PILOTS, vol. 9, p. 400. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 401, et seq.

Police Power.—As to the police power of the states, see the title POLICE POWER, vol. 9, p. 468.

Postoffices and Post Roads.—As to the power of the states before the formation of the Union to establish postoffices and post roads, see the title POSTAL LAWS, vol. 9, p. 552.

Quarantine Laws.—As to the power of the states to enact quarantine laws,

see the title **QUARANTINE**, vol. 10, p. 435. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 405.

Railroads.—As to state regulation of railroads, see the title **RAILROADS**, vol. 10, pp. 455, 468. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 409, et seq.

Religious Liberty.—As to the power of the states to protect their citizens in their religious liberties, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 462.

Taxation.—As to taxation by the states, see the title **TAXATION**. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 441, et seq.

Telegraph Companies.—As to state regulation of telegraph companies, see the title **TELEGRAPHS AND TELEPHONES**. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 424.

Tonnage Duties.—As to the provision of the constitution declaring that no state shall, without the consent of congress, lay any duty of tonnage, see the title **TONNAGE DUTIES**.

Treaties.—As to the treaty-making power of the states, see the title **TREATIES**. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, pp. 149, 150.

Warehouses and Elevators.—As to state regulation of public warehouses and elevators, see the title **WAREHOUSES AND WAREHOUSEMEN**. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 428.

Wharves and Wharfage.—As to the power of the states to regulate wharves and wharfage, see the title **WHARVES AND WHARFINGERS**. See, also, the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 429.

III. Relations of States to One Another.

Generally, as to the relation of the states to one another, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 343, et seq.

As to comity between the states, see the title **CONFLICT OF LAWS**, vol. 3, pp. 1030, et seq., 1034.

IV. Relations between State and Its Counties and Municipal Corporations.

As to the relations between a state and the counties thereof, see the title **COUNTIES**, vol. 4, pp. 827, 828, 829.

As to the relations between a state and the municipal corporations thereof, see the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 546.

V. Admission of States.

In General.—Generally, as to the admission of states into the Union and the creation of new states by division of old states, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 333, et seq.

Effect of Admission as Abolishing Territorial Government.—The admission of a state into the Union brings the territory under the full and complete operation of the federal constitution, and every portion of the territorial government or jurisdiction is thereby abolished.³

3. *Benner v. Porter*, 9 How. 235, 242, 13 L. Ed. 119; *McNulty v. Batty*, 10 How. 72, 78, 13 L. Ed. 303.

As to the effect of the admission of a territory as a state as abolishing territorial courts and transferring causes pending therein, see the titles **APPEAL AND ERROR**, vol. 1, pp. 528, 529; **COURTS**, vol. 4, p. 1161, et seq.

As to the effect of the admission of a territory as a state upon appellate jurisdiction over territorial courts, see the titles **APPEAL AND ERROR**, vol. 1, pp. 528, 529; **COURTS**, vol. 4, p. 1161, et seq.

Equality upon admission.—As to the equality of states upon admission into the Union, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 334, et seq.

Citizenship.—As to the citizenship of the inhabitants of a state upon its admission into the Union, see the titles **CITIZENSHIP**, vol. 3, p. 801; **NATURALIZATION**, vol. 8, pp. 803, 804.

Naturalization.—As to collective naturalization upon the admission of a state into the Union, see the title **NATURALIZATION**, vol. 8, pp. 803, 804.

VI. Boundaries.

As to state boundaries, see the titles **BOUNDARIES**, vol. 3, p. 494, et seq.; **CONSTITUTIONAL LAW**, vol. 4, p. 238, et seq.; **NAVIGABLE WATERS**, vol. 8, p. 815; **PUBLIC LANDS**, vol. 10, p. 27.

VII. Officers.

States can act only by their agents and servants; and whatever is done by them, by authority of law, is done by the state itself.⁴

VIII. Property.

Title of State upon Admission to Property Owned by Territory.—Unless otherwise declared by congress, the title to every species of property owned by a territory passes to the state upon its admission into the Union. A provision in a state constitution to that effect is only declaratory of what is the law.⁵

Title of State to Municipal Property after Repeal of Charter.—As to title of state to property held by municipal corporation for public uses after repeal of its charter, see the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 602.

State Lands.—Generally, as to state lands, see the title **PUBLIC LANDS**, vol. 10, p. 1. As to grants of public lands to the states in aid of railroads, see the title **PUBLIC LANDS**, vol. 10, p. 153, et seq.; as to grants in aid of internal improvements, see the title **PUBLIC LANDS**, vol. 10, p. 210, et seq.; as to grants for school purposes, see the title **PUBLIC LANDS**, vol. 10, p. 214, et seq.; as to grants of swamp and overflowed lands, see the title **PUBLIC LANDS**, vol. 10, p. 220, et seq. As to a gift of lands to a state for the purpose of erecting a capitol and other buildings thereon, see the title **DUE PROCESS OF LAW**, vol. 5, p. 575. As to the right of a state to replevy timber cut from lands belonging to the state, see the title **REFLEVIN**, vol. 10, p. 719.

Attachment of State Property.—As to liability of property belonging to a state to attachment in another state, see the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 676.

Taxation of State Property by Federal Government.—As to the taxation of state property and revenues by the United States government, see the

4. *Holmes v. Jennison*, 14 Pet. 540, 572, 10 L. Ed. 579. See, generally, the title **PUBLIC OFFICERS**, vol. 10, p. 363.

As to the execution of a deed or contract on behalf of a state by a public officer, see the titles **PRINCIPAL AND AGENT**, vol. 9, p. 661; **PUBLIC OFFICERS**, vol. 10, pp. 428, 429.

Power to create or abolish offices.—As to the power of a state to create offices for state purposes, see the title **PUBLIC OFFICERS**, vol. 10, p. 371.

As to power of state to abolish offices, see the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 830, et seq.; **PUBLIC OFFICERS**, vol. 10, p. 400.

Eligibility.—As to the eligibility of persons to become state officers, see the title **PUBLIC OFFICERS**, vol. 10, p. 372. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, pp. 166, 167.

Election or appointment.—As to the election or appointment of state officers, see the title **PUBLIC OFFICERS**, vol. 10, p. 374. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, pp. 166, 167.

As to contests of election of state of-

ficers, see the title **ELECTIONS**, vol. 5, p. 728. See, also, the title **APPEAL AND ERROR**, vol. 1, p. 669.

Trial of title to office.—As to trial of title to state offices, see the title **PUBLIC OFFICERS**, vol. 10, p. 377. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, pp. 166, 167.

Impairment of obligation of contract.—As to impairment of obligation of contract in relation to state offices, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 830, et seq.

Powers conferred by congress upon state officers.—See the title **PUBLIC OFFICERS**, vol. 10, p. 415.

Suits by and against state officers.—See post, "Suits by and against States," XIV.

5. **Title to property owned by territory.**—*Brown v. Grant*, 116 U. S. 207, 212, 29 L. Ed. 598.

As to the title of a state upon admission to lands given to the territory for the purpose of erecting a capitol and other buildings thereon, see *Brown v. Grant*, 116 U. S. 207, 29 L. Ed. 598. See, also, the title **DUE PROCESS OF LAW**, vol. 5, p. 575.

titles CONSTITUTIONAL LAW, vol. 4, p. 210, et seq.; MUNICIPAL CORPORATIONS, vol. 8, p. 602. See, also, the title TAXATION. As to the liability of the states or the public property of the states under the direct tax act of Aug. 5, 1861, see the title TAXATION.

IX. Contracts.

Right of State to Enter into Contracts.—As to the right of a state to enter into contracts and the nature and effect of such contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 784, et seq. As to contract contained in state securities, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 785, et seq.

Corporate Charter as Contract.—As to the charter of a private corporation as a contract between the corporation and the state granting the charter, see the title CORPORATIONS, vol. 4, p. 677, et seq.

Contract of Agency.—As to a contract of agency made by a state with an individual to prosecute before congress and the departments certain claims of the state against the United States, see the titles POWERS, vol. 9, p. 592; PRINCIPAL AND AGENT, vol. 9, pp. 706, 707.

Legislative Contracts.—As to legislative contracts by a state, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 823, et seq.

Impairment of Obligation of Contract.—As to the impairment of the obligation of contracts to which a state is a party, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 768, 782, 808, 823, 831, 832.

X. Agreements or Compacts between States or between State and Foreign Power.

A. In General.—The constitution declares that no state, without the consent of congress, shall enter into any agreement or compact with another state, or with a foreign power.⁶ The prohibition extends only to future agreements and compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of congress.⁷ The word "agreement" as used in the constitutional prohibition does not necessarily import any direct and express stipulation, nor is it necessary that it should be in writing.⁸

6. Compacts and agreements—Constitutional provision.—United States Const., art. 1, § 10, ch. 2. *Holmes v. Jennison*, 14 Pet. 540, 570, 10 L. Ed. 579; *Virginia v. Tennessee*, 148 U. S. 503, 517, 37 L. Ed. 537; *Wharton v. Wise*, 153 U. S. 155, 168, 16*, 38 L. Ed. 669. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 143, 144, 147, 333, 334, 337; CORPORATIONS, vol. 4, p. 665. See, also, the title NAVIGABLE WATERS, vol. 8, pp. 814, 815, 825, 826.

As to agreements and compacts between the states relating to boundaries, see the titles BOUNDARIES, vol. 3, p. 498, et seq.; CONSTITUTIONAL LAW, vol. 4, p. 238, et seq.; PUBLIC LANDS, vol. 10, p. 27. See, also, the title NAVIGABLE WATERS, vol. 8, p. 815.

As to compacts between states with respect to boundary streams providing for the free navigation thereof by both, see the titles BRIDGES, vol. 3, pp. 519, 520; NAVIGABLE WATERS, vol. 8, p. 826.

As to agreements between states respecting the division of territory and the creation of new states, see the title CONSTITUTIONAL LAW, vol. 4, p. 333, et seq.

As to agreements and compacts between states in regard to fisheries in border waters, see the title FISH AND FISHERIES, vol. 6, p. 299.

As to compacts between states and the United States upon admission of states into the Union by which the states were granted a percentage of the proceeds from sales of public lands, see the title PUBLIC LANDS, vol. 10, p. 212.

As to impairment of compacts between states and between a state and the United States, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 768, 782, 808.

The compact between Maryland and Virginia of 1785.—*Georgetown v. Alexandria Canal Co.*, 12 Pet. 91, 96, 9 L. Ed. 1012.

7. Wharton v. Wise, 153 U. S. 155, 171, 38 L. Ed. 669.

The compact of 1785 between the states of Virginia and Maryland was not prohibited by the Articles of Confederation. *Wharton v. Wise*, 153 U. S. 155, 171, 38 L. Ed. 669.

8. Holmes v. Jennison, 14 Pet. 540, 572, 10 L. Ed. 579.

If there is a verbal understanding, to

B. Consent of Congress.—The consent of congress is the sole limitation imposed by the constitution upon the right of the states to enter into compacts with one another.⁹ The terms "compact" or "agreement" in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of congress must be obtained.¹⁰ The consent of congress may either precede or follow the compact,¹¹ and may be either express or implied.¹²

XI. Debts.

Apportionment of Debts upon Division of State.—The principle is well established that where a state is divided into two or more states, in the adjustment of liabilities between each other, the debts of the parent state should be ratably apportioned among them.¹³

Funding and Payment of Debts.—As to the funding and payment of state debts, see the titles *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 785,

which both parties have assented, and upon which both are acting, it is an "agreement." *Holmes v. Jennison*, 14 Pet. 450, 472, 10 L. Ed. 579.

When the constitution declares that no state shall enter into "any agreement or compact" with a foreign power, without the assent of congress, the words "agreement" and "compact," cannot be construed as synonymous with one another. *Holmes v. Jennison*, 14 Pet. 540, 571, 10 L. Ed. 579.

Extradition of fugitives from justice.—As to the power of a state to enter into an agreement with a foreign nation, by which the state agreed to deliver up fugitives charged with offenses committed in such foreign country, see *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579. See, also, the title *CONSTITUTIONAL LAW*, vol. 4, pp. 149, 150.

9. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725, 9 L. Ed. 1233; *Poole v. Fleegeer*, 11 Pet. 185, 209, 9 L. Ed. 680; *Holmes v. Jennison*, 14 Pet. 540, 570, 10 L. Ed. 579.

As to the consent of congress to agreements and compacts between the states, see the titles *BOUNDARIES*, vol. 3, p. 499; *CONSTITUTIONAL LAW*, vol. 4, pp. 143, et seq. 147, 334. See, also, the titles *COURTS*, vol. 4, p. 1016; *NAVIGABLE WATERS*, vol. 8, p. 826.

When such consent has been given, the states are in this respect restored to their original inherent sovereignty, and left as they were before the constitution. *Rhode Island v. Massachusetts*, 12 Pet. 657, 725, 9 L. Ed. 1233; *Poole v. Fleegeer*, 11 Pet. 185, 209, 9 L. Ed. 680.

10. **Consent not necessary in every case.**—*Virginia v. Tennessee*, 148 U. S. 503, 518, 37 L. Ed. 537; *Wharton v. Wise*, 153 U. S. 155, 168, 169, 38 L. Ed. 669.

There are many matters upon which the different states may agree that can in no respect concern the United States. The object of the constitutional provision must be looked to and the terms "agreement" and "compact" construed by reference to it. *Virginia v. Tennessee*, 148 U.

S. 503, 518, 519, 37 L. Ed. 537; *Wharton v. Wise*, 153 U. S. 155, 169, 170, 38 L. Ed. 669.

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state which created it, to accept authority from another state to extend its railroad into such state and to receive a grant of power to own and control, by lease or purchase, railroads therein, and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by congress, regarded as within the constitutional prohibition of agreements or compacts between states. *St. Louis, etc., R. Co. v. James*, 161 U. S. 545, 562, 40 L. Ed. 802.

11. *Virginia v. Tennessee*, 148 U. S. 503, 521, 37 L. Ed. 537.

A compact between two states having received the consent of congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both states. *Virginia v. Tennessee*, 148 U. S. 503, 525, 37 L. Ed. 537.

12. *Virginia v. Tennessee*, 148 U. S. 503, 521, 37 L. Ed. 537. See the titles *BOUNDARIES*, vol. 3, p. 499; *CONSTITUTIONAL LAW*, vol. 4, pp. 143, et seq., 147, 334.

The consent required by the constitution to make valid agreements between the states need not necessarily be by an express assent to every proposition of the agreement. It is sufficient if the assent is an irresistible inference from the legislation of congress on the subject. *Virginia v. West Virginia*, 11 Wall. 39, 26 L. Ed. 67.

13. **Apportionment of debts.**—*Hartman v. Greenhow*, 102 U. S. 672, 677, 26 L. Ed. 271. See the title *COURTS*, vol. 4, p. 1011.

Virginia—West Virginia case.—*Hartman v. Greenhow*, 102 U. S. 672, 676, 677, 26 L. Ed. 271.

et seq., 796, 797; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 685. As to the appropriation of the assets of an insolvent bank owned by a state, to pay the debts of the state, see the title BANKS AND BANKING, vol. 3, p. 181. As to payment of debts due to the state, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 785, et seq., 796, 797.

Liability of State to Pay Interest.—It has been settled on grounds of public convenience that interest is not to be awarded against a sovereign state on its debts unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers.¹⁴

XII. Securities.

Generally, as to state securities, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650. As to impairment of obligation of contract contained in state securities, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 785, et seq.

XIII. Aid.

As to state aid, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618.

XIV. Suits by and against States.

A. Suits by States—1. **RIGHT OF STATE TO SUE.**—This subject is treated elsewhere.¹⁵

2. **PROCEDURE.**—**Set-Off.**—In an action brought by a state the defendant cannot recover a balance found in his favor.¹⁶

Right of State to Appeal.—See the title APPEAL AND ERROR, vol. 2, p. 59.

Service of Citation on Appeal or Writ of Error.—See the title APPEAL AND ERROR, vol. 1, p. 760.

14. Liability to pay interest.—United States *v.* North Carolina, 136 U. S. 211, 34 L. Ed. 336, citing United States *v.* Sherman, 98 U. S. 565, 25 L. Ed. 235; Angarica *v.* Bayard, 127 U. S. 251, 260, 32 L. Ed. 159.

The state of North Carolina held not to have consented to pay interest on bonds issued by it after the date at which the principal was payable. United States *v.* North Carolina, 136 U. S. 211, 34 L. Ed. 336.

But the Pennsylvania court has held that the state is liable to pay interest, as well as individuals. *Respublica v.* Mitchell, 2 Dall. 101, 1 L. Ed. 307.

15. As to the necessity for a properly organized state government in order to the exercise by a state of the right to sue in the United States supreme court, and as to the right of a seceding state to sue in such court, see the titles CONSTITUTIONAL LAW, vol. 4, pp. 341, 342; COURTS, vol. 4, p. 1008.

Suit against another state.—See the title COURTS, vol. 4, p. 1009, et seq.

Suit against United States.—See the title COURTS, vol. 4, pp. 1013, 1014.

As to jurisdiction of court of claims over an action by a state against the United States, see the title COURTS, vol. 4, p. 1034.

Suits involving political questions.—See the title COURTS, vol. 4, pp. 1008, 1009.

Suits against citizens of other states or aliens.—See the title COURTS, vol. 4, pp. 1014, 1016.

As to jurisdiction of supreme court over suits by states, see the title COURTS, vol. 4, p. 1009, et seq.

Suit to enjoin holder from asking payment of United States bonds belonging to a state, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 784.

Jurisdiction of federal circuit court over suits by states.—See the title COURTS, vol. 4, p. 906.

Injunction by state to restrain violations of the antitrust act of July 2, 1890, see the title MONOPOLIES AND CORPORATE TRUSTS, vol. 8, pp. 446, 447.

Injunction against nuisances.—As to the right of a state to abate nuisances, and to file a bill for an injunction against nuisances generally, and against obstructions to navigation, see the titles, COURTS, vol. 4, pp. 1011, et seq., 1016; NAVIGABLE WATERS, vol. 8, pp. 866, 867; NUISANCES, vol. 18, pp. 940, 941, 943, et seq.

Quo warranto proceedings by a state. See the title QUO WARRANTO, vol. 10, pp. 453, 454.

Action to enforce penal laws.—See the title COURTS, vol. 4, p. 1016.

16. Set-off.—Commonwealth *v.* Matlack, 4 Dall. 303, 1 L. Ed. 843.

B. Suits against States—1. **LIABILITY TO OR IMMUNITY FROM SUIT**—*a. Common-Law Doctrine*.—No sovereign state can be sued in its own courts, or in any other, without its consent and permission,¹⁷ by an individual¹⁸ or another state.¹⁹ This is a privilege of sovereignty;²⁰ but the state may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state.²¹ Its consent is not requisite in each particular case. On the other hand it may be given by a general law.²² A state can at any time repeal a law giving its consent to be sued.²³

b. Under Federal Constitution—(1) *General Rule*.—The doctrine is unquestioned that a state cannot be sued as defendant in any court in this country without her consent, except in the limited class of cases in which a state may be made a party in the supreme court of the United States by virtue of the original jurisdiction conferred on that court by the constitution.²⁴

(2) *Suit in State's Own Courts*.—Where a state has made no provision for suits against itself in its own courts, it cannot be sued in those courts either by its own citizens, or by the citizens of other states.²⁵

(3) *Suits in Federal Courts*—(a) *Suits by United States*.—See the title **COURTS**, vol. 4, p. 1013.

(b) *Suits by Another State*.—See the title **COURTS**, vol. 4, pp. 1009, 1013.

Controversies as to Boundaries.—See the title **COURTS**, vol. 4, p. 1012. See, also, the title **BOUNDARIES**, vol. 3, p. 501, et seq.

17. Common-law doctrine.—*Cohens v. Virginia*, 6 Wheat. 264, 380, 5 L. Ed. 257; *Briscoe v. Bank*, 11 Pet. 257, 9 L. Ed. 709; *Railroad Co. v. Tennessee*, 101 U. S. 337, 339, 25 L. Ed. 960; *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805; *Baltzer v. North Carolina*, 161 U. S. 240, 242, 40 L. Ed. 684; and see *Fitts v. McGhee*, 172 U. S. 516, 524, 43 L. Ed. 535; *Hans v. Louisiana*, 134 U. S. 1, 10, 15, 33 L. Ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849; *Smith v. Reeves*, 178 U. S. 436, 446, 44 L. Ed. 1140.

Cases stating common-law rule and reason therefor.—*Belknap v. Schild*, 161 U. S. 10, 16, 40 L. Ed. 599; *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 129; *United States v. Clarke*, 8 Pet. 436, 444, 8 L. Ed. 1001; *Smith v. Reeves*, 178 U. S. 436, 440, 44 L. Ed. 1140.

A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. Ed. 834.

18. Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. Ed. 623; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448.

19. New Hampshire v. Louisiana, 108 U. S. 76, 27 L. Ed. 656.

20. Railroad Co. v. Tennessee, 101 U. S. 337, 339, 25 L. Ed. 960; *Baltzer v. North Carolina*, 161 U. S. 240, 242, 40 L. Ed. 684.

21. Beers v. Arkansas, 20 How. 527, 529, 15 L. Ed. 991; *Smith v. Reeves*, 178 U. S. 436, 440, 44 L. Ed. 1140; *Curran v. Arkansas*, 15 How. 304, 309, 14 L. Ed. 705; *Clark v. Barnard*, 108 U. S. 436, 444, 27 L. Ed. 780. See post, "Waiver of Immunity," XIV, B, 1, b, (4).

22. Cohens v. Virginia, 6 Wheat. 264, 380, 5 L. Ed. 257.

23. Smith v. Reeves, 178 U. S. 436, 443, 44 L. Ed. 1140; *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, pp. 758, 869, 870.

24. Cunningham v. Mason, etc., R. Co., 109 U. S. 446, 451, 27 L. Ed. 992; *Smith v. Reeves*, 178 U. S. 436, 448, 44 L. Ed. 1140. Generally, as to the jurisdiction of the supreme court over cases to which a state is a party, see the title **COURTS**, vol. 4, p. 1008, et seq.

A state may be sued in the supreme court whenever the plaintiff is entitled to sue in that court. *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25.

The supreme court cannot presume that any state would refuse to submit to those decrees of the supreme court, rendered pursuant to its own delegated equity, when, in a monarchy its fundamental law declares that such decree executes itself. *Rhode Island v. Massachusetts*, 12 Pet. 657, 751, 9 L. Ed. 1233. See the title **COURTS**, vol. 4, p. 1009, note 86.

Jurisdiction of federal circuit court over suits against states.—See the title **COURTS**, vol. 4, p. 906.

25. New Hampshire v. Louisiana, 108 U. S. 76, 27 L. Ed. 656; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448. See ante, "Common-Law Doctrine," XIV, B, 1, a.

(c) *Suits by Citizens of Other States or Aliens.*—Prior to the adoption of the eleventh amendment of the federal constitution, the supreme court had original jurisdiction of suits against a state by citizens of other states and aliens; but since the adoption of that amendment, by which it was declared that the judicial power of the United States shall not be construed to extend to such cases, no suit can be maintained in the federal courts against a state, by the citizens of another state or alien; without its consent.²⁶ It has been so held as to suits to enforce contracts;²⁷ as to a suit to enforce a lien upon real property, effect a foreclosure sale or obtain possession of property held by a state;²⁸ and as to a libel in admiralty.²⁹

Nature of Defense.—Whether a suit against an individual by name is a suit against a state within the prohibition of the eleventh amendment, is a defense to the merits rather than the jurisdiction of the court.³⁰

26. Suits by citizens of other states or alien.—*Pennoyer v. McConaughy*, 140 U. S. 1, 9, 35 L. Ed. 363; *Reagan v. Farmer's Loan, etc., Co.*, 154 U. S. 362, 388, 38 L. Ed. 1014; *Virginia Coupon Cases*, 114 U. S. 269, 317, 29 L. Ed. 185; *Rolston v. Missouri Fund Comm'rs*, 120 U. S. 390, 30 L. Ed. 721; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448; *Virginia Coupon Cases*, 114 U. S. 269, 325, 29 L. Ed. 185; *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 243, 33 L. Ed. 589.

Purpose of eleventh amendment.—See *Louisiana v. Texas*, 176 U. S. 1, 16, 44 L. Ed. 347; *New Hampshire v. Louisiana*, 108 U. S. 76, 91, 27 L. Ed. 656.

Suits pending at adoption of amendment.—After the adoption of the eleventh amendment, the supreme court being thereby deprived of jurisdiction, pending actions could be no further prosecuted and were stricken from the docket. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644.

Cases arising under constitution or laws of United States.—A state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the constitution or laws of the United States. *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842; *Smith v. Reeves*, 178 U. S. 436, 447, 44 L. Ed. 1140.

A suit brought against a state by a federal corporation is excluded from the judicial power of the United States even where it is one arising under the constitution and laws of the United States. *Smith v. Reeves*, 178 U. S. 436, 446, 44 L. Ed. 1140.

A federal circuit court has no jurisdiction of such suits.—*Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 283, 50 L. Ed. 477. See the title COURTS, vol. 4, p. 906.

27. Suits to enforce contracts.—Where

the contract is between an individual and a state, no action will lie against the state. For a breach of its contract by the state, there is no remedy by suit against the state itself. This results from the eleventh amendment to the constitution. This immunity includes not only direct actions for damages for the breach of the contract brought against the state by name, but all other actions and suits against it, whether at law or in equity. *In re Ayers*, 123 U. S. 443, 502, 31 L. Ed. 216.

This is the rule even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that "no state shall pass any law impairing the obligation of contracts." *Pennoyer v. McConaughy*, 140 U. S. 1, 9, 35 L. Ed. 363; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 388, 38 L. Ed. 1014; *In re Ayers*, 123 U. S. 443, 503, 31 L. Ed. 216; *Virginia Coupon Cases*, 114 U. S. 269, 317, 29 L. Ed. 185.

A bill in equity for the specific performance of a contract, cannot be brought against a state. *In re Ayers*, 123 U. S. 443, 502, 31 L. Ed. 216; *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805; *Virginia Coupon Cases*, 114 U. S. 269, 317, 322, 29 L. Ed. 185.

28. Cunningham v. Macon, etc., Co., 109 U. S. 446, 27 L. Ed. 992; *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 244, 33 L. Ed. 589.

29. So held in a case where the property was not in custody of a court of admiralty; or brought within its jurisdiction, and in the possession of any private person; but where it was a mere personal suit against a state, to recover proceeds of property illegally seized and sold by the state. *Ex parte Madrazzo*, 7 Pet. 627, 8 L. Ed. 808.

30. Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 37, 45 L. Ed. 410; *Osborn v. United States Bank*, 9 Wheat. 738, 858, 6 L. Ed. 204.

"The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of

How Question Raised.—See note.³¹

(d) *Suits against State by Its Citizens.*—The 11th amendment of the constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a state by citizens of such state;³² but a suit in a federal court against a state by one of its own citizens, the state not having consented to be sued, is unknown to and forbidden by the law.³³

(4) *Waiver of Immunity*—(a) *In General.*—The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure.³⁴ And as this permission is altogether vol-

its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." *Osborn v. United States Bank*, 9 Wheat. 738, 858, 6 L. Ed. 204; *In re Ayres*, 123 U. S. 443, 487, 31 L. Ed. 216. See, also, *Davis v. Gray*, 16 Wall. 203, 220, 21 L. Ed. 447.

31. Question raised by demurrer or plea rather than motion.—See the title DEMURRERS, vol. 5, p. 304.

In *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535, the question whether the state officers to enjoin whom the proceeding was brought, were the representatives of the state, was disposed of upon answers filed by officers of the state. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 39, 45 L. Ed. 410.

32. Suits against state by its citizens.—*Fitts v. McGhee*, 172 U. S. 516, 524, 43 L. Ed. 535.

33. *Fitts v. McGhee*, 172 U. S. 516, 524, 43 L. Ed. 535; *Hans v. Louisiana*, 134 U. S. 1, 10, 15, 33 L. Ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849. See ante, "Common-Law Doctrine," XIV, B, 1, a.

A state cannot be sued in a court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the constitution or laws of the United States. *Smith v. Reeves*, 178 U. S. 436, 446, 44 L. Ed. 1140. Suit in a federal circuit court, see *Hans v. Louisiana*, 134 U. S. 1, 10, 14, 16, 21, 33 L. Ed. 842, questioning *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440; *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849. See the title COURTS, vol. 4, p. 1017.

A suit against the state of North Carolina and against the state auditor by a citizen of that state to compel the levy and collection of a tax for the benefit of the holders of certain bonds of the state, held to be a suit against the state. *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849.

34. And hence where a state voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the eleventh

amendment. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 284, 50 L. Ed. 477; *Clark v. Barnard*, 108 U. S. 436, 447, 27 L. Ed. 780; *Smith v. Reeves*, 178 U. S. 436, 441, 44 L. Ed. 1140. See ante, "Common-Law Doctrine," XIV, B, 1, a; post, "Process and Appearance," XIV, B, 4, b.

And if a state has surrendered any portion of its sovereignty, the question whether its liability to suit being a part of this portion depends on the instrument by which the surrender is made, that instrument, in the case of the states and the United States, being the federal constitution. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with its sovereign right of judging, in every case, on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides, namely, the supreme court of the United States. *Cohens v. Virginia*, 6 Wheat. 264, 280, 5 L. Ed. 257.

Acts constituting and effect.—When a state submits itself, without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. *Louisiana v. Jumel*, 107 U. S. 711, 769, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 68, 29 L. Ed. 805.

A state, through authority conferred upon the county treasurer and attorney general, voluntarily submitted to judicial determination questions concerning alleged limitations of the taxing power of the state, arising from contracts on that subject which were asserted in a suit brought against such treasurer. An appearance in the action "for and on behalf of the state" was made by the attorney general, by virtue of the authority conferred upon him in respect to such suits. It was held that such appearance is a waiver of the state's immunity from suit and the eleventh amendment, and that amendment cannot be invoked to control a federal circuit court acting in a matter ancillary to a decree rendered in the

untary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.³⁵

(b) *State a Stockholder or Copartner*.—When a state enters into a copartnership or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners. In such case a suit against the corporation or copartnership is not a suit against the state.³⁶

2. WHAT CONSTITUTES A SUIT AGAINST A STATE—*a. Suits to Which State a Party on the Record*.—See ante, "Suits by Citizens of Other States or Aliens," XIV, B, 1, b, (3), (c); post, "In General," XIV, B, 2, b, (1).

b. *Suits to Which State Not a Party on the Record*—(1) *In General*.—The question whether a suit is within the prohibition of the 11th amendment is not always determined by reference to the nominal parties on the record; but the court will look behind and through the nominal parties and ascertain the real parties to the suit.³⁷ To secure the manifest purposes of the constitutional exemption guaranteed by that amendment requires that it should be interpreted, not literally and too narrowly, but fairly and with such breadth and largeness

course in which such appearance was entered. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 292, 50 L. Ed. 477.

Waiver by Arkansas constitution.—See *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140.

35. *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140.

Right to exclude federal courts.—It is competent for the state to couple with its consent to be sued, the condition that the suit be brought in one of its own courts, thereby excluding the jurisdiction of the federal courts, subject always to the conditions arising out of the constitution with respect to review of the final judgments of the highest court of the state if it derives any right, etc., specially claimed under the constitution or laws of the United States. *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140, distinguishing *Railroad Co. v. Whitton*, 13 Wall. 270, 286, 20 L. Ed. 571; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014, and *Smyth v. Ames*, 169 U. S. 466, 516, 43 L. Ed. 819. See, to the same effect, *Chandler v. Dix*, 194 U. S. 590, 592, 48 L. Ed. 1129.

So held as to § 3669, Pol. Code Cal., providing for suit in a state court for recovery of taxes exacted under an illegal assessment made by the state board. *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140.

A statute providing that "the auditor general shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state lands," etc., does not warrant the beginning of a suit in the federal court to set aside the title of the state, and should not be construed as expressing a waiver by the state of its constitutional

immunity from suit in a federal court. *Chandler v. Dix*, 194 U. S. 590, 48 L. Ed. 1129, citing *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140.

Suits against county treasurer wherein the validity of state taxes were assailed, under § 137, N. Car. Stat. 1868, are suits against the state in which the state through its officials was made the real defendant, and cannot be brought in a federal court. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 286, 50 L. Ed. 477.

Withdrawal not an impairment of obligation of contracts.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 758, 869, 870.

36. State a stockholder or copartner.—*Pennsylvania v. Wheeling, etc., Bridge Co.*, 13 How. 518, 520, 14 L. Ed. 249; *Curran v. Arkansas*, 15 How. 304, 309, 14 L. Ed. 705; *Louisville, etc., R. Co. v. Letson*, 2 How. 497, 550, 11 L. Ed. 353; *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244; *Bank v. Wistar*, 3 Pet. 431, 7 L. Ed. 731; *Briscoe v. Bank*, 11 Pet. 257, 324, 9 L. Ed. 709; *Darrington v. Bank*, 13 How. 12, 14 L. Ed. 30. See the titles BANKS AND BANKING, vol. 3, p. 124; CORPORATIONS, vol. 4, p. 765; COURTS, vol. 4, p. 1017.

Action for money had and received for recovery of a deposit.—*Bank v. Wister*, 2 Pet. 318, 7 L. Ed. 437.

37. Suits to which state not a party on the record.—In *re Ayers*, 123 U. S. 443, 487, 31 L. Ed. 216, overruling and explaining *Osborn v. United States Bank*, 9 Wheat. 738, 857, 6 L. Ed. 204; *Virginia Coupon Cases*, 114 U. S. 269, 270, 287, 29 L. Ed. 185; *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656; *Pennoyer v. McConaughy*, 140 U. S. 1, 11, 35 L. Ed. 363; In *re Tyler*, 149 U. S. 164, 190, 37 L. Ed. 689; *Fitts v. McGhee*, 172 U. S. 516, 525, 43 L. Ed. 535; *Smith v. Reeves*, 178 U. S. 436, 440, 44 L.

as effectually to accomplish the substance of its purpose.³⁸ In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.³⁹ But suits between individuals, unless the state is the party, in a substantial sense, are left untouched by the eleventh amendment no matter how much their determination may incidently and consequentially affect the interests of a state, or the operations of its government.⁴⁰

Ed. 1140. See, contra, *Osborn v. United States Bank*, 9 Wheat. 738, 758, 6 L. Ed. 204; *United States Bank v. Planters' Bank*, 9 Wheat. 904, 6 L. Ed. 244; *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *Davis v. Gray*, 16 Wall. 203, 220, 21 L. Ed. 447, which have been frequently overruled; *Governor v. Madrazo*, 1 Pet. 110, 7 L. Ed. 73.

Whether the state is the actual party, in the sense of the prohibition of the constitution, must be determined by a consideration of the nature of the case as presented on the whole record. In *re Ayers*, 123 U. S. 443, 492, 31 L. Ed. 216; *Fitts v. McGhee*, 172 U. S. 516, 525, 43 L. Ed. 535.

38. In *re Ayers*, 123 U. S. 443, 505, 31 L. Ed. 216; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 385, 38 L. Ed. 1014; *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535. See, to the same effect, *Virginia Coupon Cases*, 114 U. S. 269, 287, 29 L. Ed. 185; *Pennoyer v. McConnaughy*, 140 U. S. 1, 9, 35 L. Ed. 363.

This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. *Pennoyer v. McConnaughy*, 140 U. S. 1, 9, 35 L. Ed. 363; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 389, 38 L. Ed. 1014.

"But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest." In *re Ayers*, 123 U. S. 443, 506, 31 L. Ed. 216; *Fitts v. McGhee*, 172 U. S. 516, 528, 43 L. Ed. 535. See post, "In General," XIV, B, 2, b. (3), (e), aa.

It is not interpreted as nullifying other provisions of constitution, as, for instance, the fourteenth amendment. *Prout v. Starr*, 188 U. S. 537, 543, 47 L. Ed. 584, citing *Hans v. Louisiana*, 134 U. S. 1, 10, 33 L. Ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 33 L. Ed. 849; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. Ed. 399, and *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed.

535. And see *Virginia Coupon Cases*, 114 U. S. 269, 307, 309, 29 L. Ed. 185. See the title DUE PROCESS OF LAW, vol. 5, p. 679.

39. In *re Ayers*, 123 U. S. 443, 505, 31 L. Ed. 216; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 388, 38 L. Ed. 1014; *Fitts v. McGhee*, 172 U. S. 516, 528, 43 L. Ed. 535.

Whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 451, 27 L. Ed. 992; *Virginia Coupon Cases*, 114 U. S. 269, 287, 29 L. Ed. 185.

Transfer of cause of action to state for purpose of suit.—See the title COURTS, vol. 4, p. 1013. And see, also, *Virginia Coupon Cases*, 114 U. S. 269, 287, 29 L. Ed. 185; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 450, 27 L. Ed. 992.

40. *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185; *Fowler v. Lindsey*, 3 Dall. 411, 1 L. Ed. 658.

"In the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though some interest of hers may be more or less affected by the decision." *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 451, 27 L. Ed. 992.

Although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction. *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *Governor v. Madrazo*, 1 Pet. 110, 122, 7 L. Ed. 73.

The interest of a state in the well-being of its citizens, in the just and equal enforcement of all its laws, while a governmental interest, is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the state, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 390, 38 L. Ed. 1014.

A state is not made a party to the suit

(2) *Adjudication of Right to Property Brought under Jurisdiction of Court.*—It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control, in the regular course of judicial administration without being forcibly taken from the possession of the state, the court will proceed to discharge its duty in regard to that property. And the state, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court.⁴¹

(3) *Suits against State Officers*—(a) *Suits to Enforce State's Contracts.*—Where the contract is between the individual and the state, any action founded upon it against defendants who are officers of the state, the object of which is to enforce its specific performance by compelling those things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be merely breaches of the contract by the state, is in substance a suit against the state itself, and within the prohibition of the constitution.⁴²

by reason of the fact that the land which is the subject of controversy was held under its grant, nor does an issue, whether such land be within the limits of a state, make it a party. *Fowler v. Lindsey*, 3 Dall. 411, 1 L. Ed. 658.

41. Adjudication of right to property brought under jurisdiction of court.—*Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 451, 29 L. Ed. 992, citing *The Siren*, 7 Wall. 152, 157, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 20, 19 L. Ed. 875, and *Clark v. Barnard*, 108 U. S. 436, 27 L. Ed. 780; *Ex parte Madrazzo*, 7 Pet. 627, 8 L. Ed. 808.

"There is a class of cases, undoubtedly, in which the interests of the state may be indirectly affected by a judicial proceeding without making it a party. Cases of this sort may arise in courts of equity where property is brought under its jurisdiction for foreclosure or some other proceeding, and the state, not having the title in fee or the possession of the property, has some lien upon it, or claim against it, as a judgment against the mortgagor, subsequent to the mortgage. In such a case the foreclosure and sale of the property will not be prevented by the interest which the state has in it; but its right of redemption will remain the same as before. Such cases do not affect the present, in which the object is to take and appropriate the state's property for the purpose of satisfying its obligations." *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 243, 33 L. Ed. 589.

"A bill will not lie to effect a foreclosure and sale, or to obtain possession of property belonging to the state; for the very plain reason that, in such a case, the state is a necessary party and cannot be sued. This was distinctly held by this court in the case of *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 27 L. Ed. 992." *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 244, 33 L. Ed. 589.

42. Suits to enforce state's contracts.—In *re Ayers*, 123 U. S. 443, 502, 31 L. Ed. 216; *Pennoyer v. McConaughy*, 140 U. S. 1, 9, 35 L. Ed. 363; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 389, 38 L. Ed. 1014; *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805. See, also, *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 455, 27 L. Ed. 992; In *re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448; *Antonio v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468; *New York Guaranty, etc., Co. v. Steele*, 134 U. S. 230, 33 L. Ed. 891.

A bill in equity for the specific performance of a contract where the state is not nominally a party to the record, brought against its officers and agents, having no personal interest in the subject-matter of the suit, and defending only as representing the state, where "the things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the state," is a suit against the state. *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805; In *re Ayers*, 123 U. S. 443, 502, 31 L. Ed. 216.

Bill to compel specific performance by injunction.—The converse of that proposition is equally true, that is, a bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the state. In such a case, though the state be not nominally a party on the record, if the defendant or its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, though not in form, a suit against the state. In *re Ayers*, 123 U. S. 443, 502, 31 L. Ed. 216.

Tax receivable bond and coupons.—No

(b) *Suits to Enforce Liens*.—A suit to enforce a lien upon real estate in the actual possession of and claimed by a state or to effect a foreclosure suit, where a decree of sale would be fruitless, as no title could be given to the purchaser without the presence of the state as a party, is a suit against the state.⁴³

(c) *Bill to Remove Cloud upon Title*.—A bill to remove a cloud upon the plaintiff's title to certain lands which have been sold for taxes, brought upon the ground that the tax laws of the state under which the sales were made were unconstitutional, where the land had been bought and was held by the state, cannot be maintained in a federal court, without making the state a party, and in the absence of a statute permitting such proceedings the eleventh amendment prohibits it.⁴⁴

(d) *Action for Recovery of Property*.—An action brought against individuals to recover the possession of land of which they have actual possession and control, is not to be deemed an action against the state within the meaning of the constitution, simply because those individuals claimed to be in rightful possession as officers or agents of the state, and asserted title and right of possession in the state. The court in such an action cannot decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right in law to withhold possession. And if the court finds, upon due

proceedings can be instituted by any holder of the tax receivable coupons or bonds of Virginia against the commonwealth of Virginia, either directly by suit against the commonwealth by name, or indirectly against her executive officers who controlled them in the exercise of their official functions as agents of the state. *McGahey v. Virginia*, 135 U. S. 662, 684, 34 L. Ed. 304.

A bill in equity against officers of the state of South Carolina charged with the collection of taxes and administration of the revenue laws, to compel them to prepare the proper blanks and forms and supply them to the proper state officers charged with the actual duty of receiving the taxes, and to compel them to receive the bonds, or scrip, in payment of taxes due to the state, and in general to compel them to specifically perform the state's contract to receive the scrip in payment of taxes and to levy a special tax to pay the same, the state being invited to make itself a party defendant to such bill, is to be deemed a suit against the state itself, and as such, within the prohibition of the 11th amendment of the constitution. *Hagood v. Southern*, 117 U. S. 52, 29 L. Ed. 805. See post, "Suits to Control Administration of Finances," XIV, B, 2, b, (3). (f).

43. *Suit to enforce liens*.—*Cunningham v. Macon, etc.*, R. Co., 109 U. S. 446, 27 L. Ed. 992; *Tindal v. Wesley*, 167 U. S. 204, 221, 42 L. Ed. 137; *Christian v. Atlantic, etc.*, R. Co., 133 U. S. 233, 244, 33 L. Ed. 589.

Where the state of Georgia, having indorsed the bonds of a railroad company, retaining a first lien on its road and other property, took possession of the road through the governor of the state, foreclosed its lien and bought in the road, it

was held, upon a bill filed by the holders of a subsequent issue of bonds, against the governor and the state treasurer, the railroad company and the state's receiver to set aside the previous foreclosure, take the property from the possession and control of the state officers, and subject it to the satisfaction of their claims, that the state was the real party in interest, and that no relief could be granted without making the state a party. The court therefore declined to take jurisdiction. *Cunningham v. Macon, etc.*, R. Co., 109 U. S. 446, 27 L. Ed. 992.

The state of North Carolina subscribed to the stock of a railroad company and issued the bonds of the state for the purpose of obtaining funds to pay for the same. In the legislative act authorizing the subscription and bond issue, it was provided that the stock and dividends received by the state were thereby pledged to the bondholders for the payment of the bonds, and that the dividends which might from time to time be declared should be applied to the payment of the interest accruing upon the bonds. It was held that an action by a bondholder, in behalf of himself and all other bondholders, against the railroad company, its president and directors personally, the treasurer of the state and the proxy representing the stock held by the state, for the purpose of having the bonds declared a lien upon the stock, and for the purpose of having the dividends applied to the payment of the state's obligation and for the sale of the stock in the event the dividends should not be sufficient, was a suit to which the state was an indispensable party, and could not be maintained. *Christian v. Atlantic, etc.*, R. Co., 133 U. S. 233, 245, 33 L. Ed. 589.

44. *Bill to remove cloud upon title*.—*Chandler v. Dix*, 194 U. S. 590, 48 L. Ed. 1129.

inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the state is without legal foundation, it may, as between the plaintiff and the defendant, adjudge that the plaintiff recovered possession. The judgment in such case does not conclude the state unless it becomes a party to the cause.⁴⁵

(e) *Suits to Redress or Prevent Tortious Acts of Officers*—aa. *In General.*—There are many cases involving the application of the eleventh amendment which draw the distinction between acts of public officers *virtute officii*, and their acts without lawful right, *colore officii*; the two classes are those brought against officers of the state as representing the state's action and liability and those against officers of the state when claiming to act as such without lawful authority.⁴⁶ Where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff, to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury; or for a *mandamus*, in a like case, to enforce upon the defendant, the performance of a plain, legal duty, purely ministerial; such suit is not, within the meaning of the eleventh amendment, an action against the state.⁴⁷

45. Action for recovery of property.—*Tindal v. Wesley*, 167 U. S. 204, 212, 222, 42 L. Ed. 137; *Smith v. Reeves*, 178 U. S. 436, 439, 44 L. Ed. 1140. See, also, *United States v. Peters*, 5 Cranch 115, 139, 3 L. Ed. 53; *Osborn v. United States Bank*, 9 Wheat. 738, 810, 6 L. Ed. 204. See the title RES ADJUDICATA, vol. 10, p. 753.

The 11th amendment gives no immunity to officers or agents of the state in withholding the property of a citizen without authority of law. And when such officers or agents asserted that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. *Tindal v. Wesley*, 167 U. S. 204, 222, 42 L. Ed. 137.

46. Suits to redress or prevent tortious acts of officers.—*Barney v. New York City*, 193 U. S. 430, 439, 48 L. Ed. 737; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. Ed. 363. The subject is discussed at length in *Tindal v. Wesley*, 167 U. S. 204, 42 L. Ed. 137, and *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535. See, also, *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. Ed. 468; *Cunningham v. Macon*, etc., R. Co., 109 U. S. 446, 27 L. Ed. 992; *Reagan v. Farmers' Loan*, etc., Co., 154 U. S. 362, 389, 38 L. Ed. 1014.

47. Pennoyer v. McConaughy, 140 U. S. 1, 10, 35 L. Ed. 363, citing *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Litchfield v. Webster County*, 101 U. S. 773, 25 L. Ed. 925; *Virginia Coupon Cases*, 114 U. S. 269, 311, 29 L. Ed. 185; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623, fol-

lowed and approved in *Reagan v. Farmers' Loan*, etc., Co., 154 U. S. 362, 389, 38 L. Ed. 1014; *In re Tyler*, 149 U. S. 164, 190, 37 L. Ed. 689; *Scott v. Donald*, 165 U. S. 58, 69, 41 L. Ed. 632; *Tindal v. Wesley*, 167 U. S. 204, 220, 42 L. Ed. 137; *Fitts v. McGhee*, 172 U. S. 516, 525, 43 L. Ed. 535. See, also, *In re Ayers*, 123 U. S. 443, 506, 31 L. Ed. 216; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171.

A broad line of demarcation separates from cases in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs under color of authority, unconstitutional and void. In these latter cases he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. *Hagood v. Southern*, 117 U. S. 52, 70, 29 L. Ed. 805; *Cunningham v. Macon*, etc., R. Co., 109 U. S. 446, 27 L. Ed. 992; *Pennoyer v. McConaughy*, 140 U. S. 1, 16, 35 L. Ed. 363.

The action has been sustained and the suit against the individual officer and not against the state only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of rights for which plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character. *In re Ayers*, 123 U. S. 443, 502,

bb. *Suit in Tort against Officer as a Wrongdoer*.—Where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government, he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.⁴⁸

cc. *Suits for Injunction, Mandatory Decree or Mandamus*—(aa) *In General*.—Where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process, an action against such officer to enforce the rights of the individual is not a suit against the state; and in this class of cases, where it shall be found necessary to enforce the rights

31 L. Ed. 216; *Pennoyer v. McConaughy*, 140 U. S. 1, 17, 35 L. Ed. 363.

Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014, citing *Cowles v. Mercer County*, 7 Wall. 118, 19 L. Ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. Ed. 766, and *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. Ed. 546; *Smith v. Reeves*, 178 U. S. 436, 443, 44 L. Ed. 1140.

48. *Suit in tort against officer as a wrongdoer*.—*Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 452, 27 L. Ed. 992; *Reagans v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 38 L. Ed. 1014; *Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185, each of which cite *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Meigs v. McClung*, 9 Cranch 11, 3 L. Ed. 639; *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264; *Brown v. Huger*, 21 How. 305, 16 L. Ed. 125; *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863, and *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171. See, to the same effect, *Hagood v. Southern*, 117 U. S. 52, 70, 29 L. Ed. 805; *Tindal v. Wesley*, 167 U. S. 204, 219, 42 L. Ed. 137; *Fitts v. McGhee*, 172 U. S. 516, 529, 43 L. Ed. 535; *Pennoyer v. McConaughy*, 140 U. S. 1, 16, 35 L. Ed. 363. See, also, *Stanley v. Schwalby*, 147 U. S. 508, 518, 37 L. Ed. 259; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Stanley*

v. Schwalby, 162 U. S. 255, 271, 40 L. Ed. 960; *Belknap v. Schild*, 161 U. S. 10, 40 L. Ed. 599. See ante, "In General," XIV, B, 2, b, (3), (e), aa.

A defendant sued as a wrongdoer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The state is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act. *Virginia Coupon Cases*, 114 U. S. 269, 288, 29 L. Ed. 185.

Suits against state constables of South Carolina to recover damages for seizing and carrying away packages of liquors and wines under the act of South Carolina of Jan. 2, 1895, held not to be suits against the state. *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632; *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648.

Action of detainee against tax collectors acting without authority of law.—Under the contract between the state of Virginia and the holders of the bonds issued under the funding act of March 30, 1871, a tender of coupons in payment of taxes was equivalent to a lawful tender and payment in gold and silver coin. The tax collector who refused to accept such tender, and, acting under the alleged authority of a subsequent act repealing the funding act which made said coupons so receivable, proceeded to restrain the property of the person making the tender, acted wholly without authority of law, and was personally liable for his trespass. An action of detainee to recover the property thus unlawfully seized was not an action against the state, nor was the state a party interested therein, but was solely an action against the officer personally. *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185.

of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights in the premises.⁴⁹ But no injunction suit can be maintained where the state is a

49. *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 452, 27 L. Ed. 299. Generally as to mandamus against a state or to state officers, see the title *MANDAMUS*, vol. 8, pp. 22, 23, 66; as to exemption of state from injunctions, see the title *INJUNCTIONS*, vol. 6, p. 1027; and as to injunctions against state officers, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 278; *INJUNCTIONS*, vol. 6, pp. 1028, 1052, 1053; *RECEIVERS*, vol. 10, p. 559.

The objection to proceeding against state officers by mandamus or injunction are, first, that it is in effect proceeding against the state itself; and, second, that it interferes with the official discretion vested in the officers. Neither of these can be done. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. This is as far as the federal supreme court has gone in granting relief in this class of cases. *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 454, 27 L. Ed. 992. See *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448.

In such cases, the writs of mandamus, and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *In re Ayers*, 123 U. S. 443, 506, 31 L. Ed. 216; *Hagood v. Southern*, 117 U. S. 52, 69, 29 L. Ed. 805.

The strongest assertion of this doctrine is found in *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447, in which it is clear that in enjoining the governor of the state in the performance of one of its executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further. *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 453, 27 L. Ed. 992. See, also, *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, in which expressions in *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447, are unfavorably criticised, although the case is not overruled.

In *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 453, 27 L. Ed. 992, it was said, referring to the case of *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447: "Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act," thus holding, by implication, at least, that affirmative relief would not be granted against a state officer, by ordering him to do and perform acts forbidden by the law of his state, even though such law might be unconstitutional. *Pennoyer v. McConaughy*, 140 U. S. 1, 16, 35 L. Ed. 363.

The case of *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, was decided upon this principle, and goes no further; for, in that case, a preliminary injunction of the court forbidding a state officer from placing the money of the bank, which he had seized, in the treasury of the state, having been disregarded, the final decree corrected this violation of the injunction, by requiring the restoration of the money thus removed. *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 454, 27 L. Ed. 992.

In *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623, the owner of new bonds issued in exchange for old ones surrendered by their holder, filed a bill to restrain the board from issuing former class of bonds in exchange for a class of indebtedness not included within the purview of the statute authorizing the exchange. The supreme court affirmed a decree of the circuit court enjoining the board from exceeding its power in taking up by the new issue a class of state indebtedness not within the provisions of the law on that subject. *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 454, 27 L. Ed. 992.

In *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448 the effort was to compel a state officer to do what a statute prohibited him from doing. In *Rolston v. Missouri Fund Comm'rs*, 120 U. S. 390, 411, 30 L. Ed. 721, the suit was to get a state officer to do what a statute required of him. The law made it his duty to assign the liens in question to the trustees when they made a certain payment. The trustees claimed they had made this payment; the officer, that they have not. There was no controversy about his duty if they had. The only inquiry was as to the fact of a payment according to the requirements of the law. If it had been made, the trustees were entitled to their decree—obiter if it had not; but as the parties were all before the court, and the suit was in equity, it was retained so as to determine what the trustees must do in order to ful-

necessary party to it.⁵⁰

(bb) *Injunctions against Enforcement of Unconstitutional Enactment.*—A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment.⁵¹

fill the law, and under what circumstances the governor can be compelled to execute the assignment which had been provided for.

50. *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216.

A bill for injunction brought by the receivers of a railroad company against the attorney general of the state of Alabama and the solicitor of the eleventh judicial district of that state, praying that they and all other persons be restrained from instituting or prosecuting any proceedings against the plaintiffs under the forfeiture clause contained in the act of February 9, 1895, prescribed a maximum rate of toll to be charged on the bridge across the Tennessee River known as the Florence Bridge, is a suit against the state within the meaning of the 11th amendment. Neither the attorney general nor the solicitor of the eleventh judicial district appear to have been charged by law with any special duty in connection with the act of February 9, 1895. *Fitts v. McGhee*, 172 U. S. 516, 43 L. Ed. 535.

Action to enjoin commonwealth attorney from bringing suit to collect taxes.—

A bill in equity against the auditor of the state of Virginia, its attorney general and its commonwealth attorney, to restrain them from bringing any action for the collection of the delinquent taxes under the provisions of the Virginia statute of May 12, 1887, which statute peremptorily requires such actions to be brought in the name of the state of Virginia, in disregard of tenders of tax receivable coupons made by taxpayers in payment of taxes, against all such taxpayers as delinquent, is to be deemed a suit against the state within the purview of the 11th amendment, and as such is not within the jurisdiction of the courts of the United States. *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216. See, also, *Fitts v. McGhee*, 172 U. S. 516, 525, 43 L. Ed. 535.

51. **Injunctions against enforcement of unconstitutional enactment.**—*Smyth v. Ames*, 169 U. S. 466, 518, 43 L. Ed. 819; *Pennoyer v. McConaughy*, 140 U. S. 1, 10, 35 L. Ed. 363; *In re Tyler*, 149 U. S. 164, 190, 37 L. Ed. 689; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632; *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648; *Tindal v. Wesley*, 167 U. S. 204, 220, 42 L. Ed. 137; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 284, 50 L. Ed. 477; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584; *Chandler v. Dix*, 194 U. S. 590, 592, 48 L. Ed. 1129; *Smith v. Reeves*, 178 U. S. 436, 439,

44 L. Ed. 1140; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216.

As a state can act only by its officers, an order restraining those officers from taking any steps by means of judicial proceedings in the execution of a statute of a state, is one which restrains the state itself and the suit is consequently as much against the state as if the state were named as a party defendant on the record. If the individual defendants, the officers of the state, held possession or were about to take possession of, or to commit any trespass upon, any property belonging to or under the control of the plaintiffs, in violation of the latter's constitutional rights, they could not resist the judicial determination in a suit against them, of the question of the right to such possession by simply asserting that they held or were actually to hold the property in their capacity as officers of the state. In the latter case they would be compelled to make good the state's claim to the property, and could not shield themselves against suits because of their official character. *Fitts v. McGhee*, 172 U. S. 516, 524, 43 L. Ed. 535; *Tindal v. Wesley*, 167 U. S. 204, 222, 42 L. Ed. 137.

In cases where injunction suits against officers of the state have been held not to be suits against the state, it will be found that the defendants were officers of the state specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state to prevent them under the sanction of unconstitutional statutes, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. *Fitts v. McGhee*, 172 U. S. 516, 529, 43 L. Ed. 535, distinguishing *Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. Ed. 363; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 388, 38 L. Ed. 1014; *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632; *Smyth v. Ames*, 169 U. S. 466, 43 L. Ed. 819.

"An officer of a state may be enjoined (by a federal circuit court) from execut-

(f) *Suits to Control Administration of Finances*—aa. *In General*.—When a state cannot be sued, a court cannot set up jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state.⁵²

ing a statute of the state which is in conflict with the constitution of the United States, when such execution would violate and destroy the rights and privileges of the complainant." This general doctrine of *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, has never been departed from. *Pennoyer v. McConaughy*, 140 U. S. 1, 12, 35 L. Ed. 363; *Tindal v. Wesley*, 167 U. S. 204, 222, 42 L. Ed. 137; *Smyth v. Ames*, 169 U. S. 466, 43 L. Ed. 819; *In re Tyler*, 149 U. S. 164, 191, 37 L. Ed. 689; *Scott v. Donald*, 165 U. S. 107, 114, 41 L. Ed. 648.

An action against individual state officers to restrain them from seizing or trespassing upon the property of a citizen in an attempt to enforce an unconstitutional law which is unconstitutional and void, is an action against the particular individuals against whom it is directed, and is not to be deemed a suit against the state. *Virginia Coupon Cases*, 114 U. S. 269, 311, 29 L. Ed. 185; *Reagans v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 390, 38 L. Ed. 1014; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 283, 50 L. Ed. 477.

A suit against the Nebraska state board of transportation to enjoin the enforcement of the act of legislature of Nebraska, April 12, 1893, regulating railroad rates, is not a suit against the state. *Smyth v. Ames*, 169 U. S. 466, 43 L. Ed. 819.

A suit to enjoin state constables, sheriffs, etc., from unlawfully seizing liquors and the South Carolina dispensary law of Jan. 2, 1895, held not a suit against the state. *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648.

A suit in equity in the circuit court of the United States in Texas by a citizen of another state against the railroad commissioners of Texas, who feels himself aggrieved and injured by rates prescribed by that commission, is not a suit against the state of Texas. *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 38 L. Ed. 1014; *Peagan v. Mercantile Trust Co.*, 154 U. S. 413, 38 L. Ed. 1028.

A suit for injunction brought by a railroad company of another state against the members of the commission created by the state of Mississippi, under the authority of its constitution and laws, for the purpose of supervising and to some extent controlling the acts of the railroad operating within the state; to restrain the enforcement of an order requiring a railroad to stop its trains at a designated station, is not a suit against the state. *Mississippi R. Commission v. Illinois Cent. R. Co.*, 203 U. S. 335, 340, 51 L. Ed. 209.

A purchaser of swamp and overflowed lands, under the statute of Oregon of October 26, 1870, brought suit against the governor, secretary of state, and treasurer, not as such officers, but against them collectively, as the board of land commissioners, to restrain them from canceling his certificates of sale and reselling the land under the provisions of the acts of January 17, 1879, and February 16, 1887, upon the ground that the latter acts were an impairment of the obligation of his contract with the state for the purchase of the lands and unconstitutional. Held, that the suit was not a suit against the state and could be maintained. *Pennoyer v. McConaughy*, 140 U. S. 1, 18, 19, 35 L. Ed. 363.

Bill to enjoin collection of taxes.—An injunction to restrain the collection of taxes sought to be collected by seizures of property imposed in the name of the state but contrary to the constitution of the United States, the defendants being officers of the state threatening the distraint complained of, is not to be deemed a suit against the state. *In re Ayers*, 123 U. S. 443, 500, 31 L. Ed. 216; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Virginia Coupon Cases*, 114 U. S. 269, 270, 282, 29 L. Ed. 185. See *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 390, 38 L. Ed. 1014; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 283, 50 L. Ed. 477.

52. Suits to control administration of finances.—*Louisiana v. Jumel*, 107 U. S. 711, 769, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 68, 29 L. Ed. 805; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 455, 27 L. Ed. 992.

A court cannot assume all the executive authority of the state, so far as it relates to the enforcement of a law and supervise the conduct of all the persons charged with any official duty in respect to the levy, collection and disbursement of a tax to pay state bonds, and that too in a proceeding to which the state as a state, was not and could not be made a party. *Louisiana v. Jumel*, 107 U. S. 711, 769, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 68, 29 L. Ed. 805.

If the moneys in the state treasury constitute a trust fund, the state is the trustee, and unless it can be sued the trustee cannot be enjoined. *Louisiana v. Jumel*, 107 U. S. 711, 769, 27 L. Ed. 448; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 455, 27 L. Ed. 992.

A suit to which the state, as such, is not made a party defendant, against one of its officers as treasurer, where the relief sought is a judgment against that officer in his official capacity, which would

bb. *Compelling Levy of Tax*.—A suit for mandamus to compel county officers to assess and collect taxes and pay a judgment recovered for township bonds, is not a suit against the state because such officers are also state officers, who have been forbidden by state statute to exercise such power, or because the bonds were issued under legislative authority.⁵³

c. *Suits against County*.—A county is not exempt from suit in a federal circuit court under the eleventh amendment of the federal constitution, because it is an integral part of the state.⁵⁴

3. RULES OF DECISION.—The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one and becomes a judicial one, to be acted upon by the court by the known and settled principles of national or municipal jurisprudence as the case requires.⁵⁵

4. PROCEDURE—*a. In General*.—Generally as to procedure in the supreme court where a state is a party to a suit, see the title COURTS, vol. 4, p. 1018, et seq.

b. *Process and Appearance*.—See the titles COURTS, vol. 4, pp. 1020, 1021; JUDGMENTS AND DECREES, vol. 7, p. 657.

Appearance.—See the titles APPEARANCES, vol. 2, pp. 440, 444, 445; COURTS, vol. 4, p. 1020. In a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction.⁵⁶

compel him to pay out of the public funds in the treasury of the state a certain sum of money, is a suit against the state. *Smith v. Reeves*, 178 U. S. 436, 438, 44 L. Ed. 1140.

A suit in a federal circuit court against the state treasurer of California to compel the state, through such officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment, is a suit against the state and cannot be maintained. *Smith v. Reeves*, 178 U. S. 436, 44 L. Ed. 1140.

Suits to enforce payment of bonds.—A suit against the public officers of the state having the custody of the funds in its treasury, raised by taxation, to compel those officials to apply those funds to the payment of the bonds of the state held by the plaintiff, is to be deemed a suit against the state itself, and cannot be maintained in the federal courts. *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448; *Hagood v. Southern*, 117 U. S. 52, 70, 29 L. Ed. 805; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 455, 27 L. Ed. 992. See ante, "Suits to Enforce State's Contracts," XIV, B, 2, b, (3), (a).

And it was immaterial that the funds thus sought to be reached were raised by taxation under a statute which levied the tax and appropriated the proceeds thereof to the exclusive purpose of paying the bonds in suit, and upon the faith of which the bonds were received. *New Hampshire v. Louisiana*, 108 U. S. 76, 27 L. Ed. 656; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. Ed. 448.

53. *Graham v. Folsom*, 200 U. S. 248, 50 L. Ed. 464.

So a suit against the auditor of the state of Louisiana to compel him to levy and collect a tax as required by a previous statute but contrary to the provisions of subsequent enactments, was held to be against the state and not maintainable. *New York Guaranty, etc., Co. v. Steele*, 134 U. S. 230, 33 L. Ed. 891.

54. The power of a county to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the constitution. *Lincoln County v. Luning*, 133 U. S. 529, 531, 33 L. Ed. 766. See the title COUNTIES, vol. 3, p. 844.

55. *Rules of decision*.—*Rhode Island v. Massachusetts*, 12 Pet. 657, 737, 9 L. Ed. 1233.

56. *Smith v. Reeves*, 178 U. S. 436, 441, 44 L. Ed. 1140; *Clark v. Barnard*, 108 U. S. 436, 446, 27 L. Ed. 780. The voluntary appearance of a state in intervening as a claimant of a fund in court is such a waiver. See ante, "Waiver of Immunity," XIV, B, 1, b, (4).

No question on process can arise where the defendant state has appeared and pleaded. The plea in itself makes the first point in the cause, without any additional proceeding; that is, whether the plea shall be allowed, if sufficient in law to bar the complaint, or be overruled, as not being a bar in law, though true in fact. *Rhode Island v. Massachusetts*, 12 Pet. 657, 749, 9 L. Ed. 1233. See *Massachusetts v. Rhode Island*, 12 Pet. 755, 9 L. Ed. 1272;

c. *Removal of Cause*.—As to the removal from a state to a federal court of a suit between a state and citizens on the ground of citizenship, see the title **REMOVAL OF CAUSES**, vol. 10, p. 679.

d. *Laches*.—See the title **LACHES**, vol. 7, p. 820, et seq.

e. *Limitation of Action*.—As to the running of statutes of limitation in favor of a state, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, pp. 915, 917, 920.

f. *Pleading*.—As to a cross bill in suits between states for the determination of boundaries, see the titles **BOUNDARIES**, vol. 3, p. 502; **CROSS BILLS**, vol. 5, p. 137.

g. *Advancement of Cause*.—As to the advancement of causes wherein a state is a party or where the execution of the revenue laws of a state may be enjoined or stayed, see the title **APPEAL AND ERROR**, vol. 2, pp. 352, 353, 355, 356.

h. *Judgment*.—As to judgments by default against state for want of appearance, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 657.

i. *Appeal and Error*.—As to the right of a state to appeal or sue out a writ of error, see the title **APPEAL AND ERROR**, vol. 2, p. 59, et seq.

Service of Citation.—See the title **APPEAL AND ERROR**, vol. 1, p. 760.

XV. De Facto Governments—Confederate States.

A. Definition.—A de facto government is one in possession of the supreme or sovereign power of a state without a right.⁵⁷

B. Classes of De Facto Governments.—De facto governments are of several degrees or kinds:⁵⁸ (1) Such as exists after it has expelled the regularly constituted authorities from the seats of power and the public offices, and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation.⁵⁹ (2) Such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government.⁶⁰ (3) There is another description of gov-

explaining *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233.

Withdrawal of appearance.—See *Massachusetts v. Rhode Island*, 12 Pet. 755, 9 L. Ed. 1272, citing *New Jersey v. New York*, 5 Pet. 284, 287, 8 L. Ed. 127; *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440.

Demurrers by attorney general as appearance.—See the title **APPEARANCE**, vol. 2, p. 440.

Proceeding ex parte upon failure to appear.—See the title **COURTS**, vol. 4, p. 1020.

57. De facto government defined.—*Mauran v. Insurance Co.*, 6 Wall. 1, 13, 18 L. Ed. 836.

"A government de facto, in firm possession of any country, is clothed, while it exists, with the same rights, powers, and duties, both at home and abroad, as a government de jure. It may send ambassadors and make treaties. Such treaties bind the nation and descend in full force upon any succeeding government that may be established." *Phillips v. Payne*, 92 U. S. 130, 133, 23 L. Ed. 649.

Grants by a government de facto, of parts of a disputed territory in its possession, are valid against the state which had the right. *Rhode Island v. Massachusetts*, 12 Pet. 657, 748, 9 L. Ed. 1233.

58. Degrees or kinds of de facto governments.—*Thorington v. Smith*, 8 Wall. 2, 8, 19 L. Ed. 361.

Character of government of Confederate States.—*Thorington v. Smith*, 8 Wall. 1, 8, 9, 19 L. Ed. 361. See, also, *Texas v. White*, 7 Wall. 700, 732, 19 L. Ed. 227. See post, "Validity of Acts of Confederate Government," XV, D, 4.

59. Williams v. Bruffy, 96 U. S. 176, 177, 24 L. Ed. 716. See, also, *Ford v. Surget*, 97 U. S. 594, 617, 24 L. Ed. 1018; *Texas v. White*, 7 Wall. 700, 732, 19 L. Ed. 227.

As far as other nations are concerned, such a government is treated as in most respects possessing rightful authority; its contracts and treaties are usually enforced; its acquisitions are retained; its legislation is in general recognized; and the rights acquired under it are, with few exceptions, respected after the restoration of the authorities which were expelled. *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Thorington v. Smith*, 8 Wall. 1, 11, 19 L. Ed. 361. See, also, *Mauran v. Insurance Co.*, 6 Wall. 1, 13, 18 L. Ed. 836.

60. Williams v. Bruffy, 96 U. S. 176, 177, 24 L. Ed. 716. See, also, *Ford v. Surget*, 97 U. S. 594, 617, 24 L. Ed. 1018.

The validity of its acts, both against the parent state and the citizens or subjects thereof, depends entirely upon its ultimate success; if it fail to establish itself permanently, all such acts perish with it; if it succeed and become recognized, its acts from the commencement of its existence are upheld as those of an independ-

ernment, called also by publicists a government de facto, but which might, perhaps, be more aptly denominated a government of paramount force.⁶¹

C. Recognition by Other Governments.—Who is the sovereign, de jure or de facto, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government.⁶²

D. Confederate States.—See note.⁶³

ent nation. *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716.

Confederate States.—See *Williams v. Bruffy*, 96 U. S. 176, 177, 24 L. Ed. 716. See, also, *Baldy v. Hunter*, 171 U. S. 388, 393, 43 L. Ed. 208; *Thorington v. Smith*, 8 Wall. 1, 9, 19 L. Ed. 361; *Hickman v. Jones*, 9 Wall. 197, 200, 19 L. Ed. 551. See post, "Validity of Acts of Confederate Government," XV, D, 4.

61. Government of paramount force.—*Thorington v. Smith*, 8 Wall. 1, 19, 19 L. Ed. 361; *Ford v. Surget*, 97 U. S. 594, 616, 617, 24 L. Ed. 1018.

The temporary government of Castine, in Maine, by the British, during the war of 1812, and the temporary government of Tampico, in Mexico, by the United States during the Mexican war, are examples of governments of this class. *Thorington v. Smith*, 8 Wall. 1, 9, 19 L. Ed. 361; *Ford v. Surget*, 97 U. S. 594, 616, 24 L. Ed. 1018.

Confederate States.—See *Thorington v. Smith*, 8 Wall. 1, 10, 19 L. Ed. 361. See, also, *Texas v. White*, 7 Wall. 700, 732, 19 L. Ed. 227.

The so-called Confederate States were in the possession of many of the highest attributes of government, sufficiently so to be regarded as the ruling or supreme power of the country. *Mauran v. Insurance Co.*, 6 Wall. 1, 14, 18 L. Ed. 836. See post, "Validity of Acts of Confederate Government," XV, D, 4.

Confederate notes.—See *Thorington v. Smith*, 8 Wall. 1, 11, 19 L. Ed. 361. See the title PAYMENT, vol. 9, pp. 327, 330, 335.

62. Recognition of de facto governments.—*Pearcy v. Stranahan*, 205 U. S. 257, 265, 51 L. Ed. 793; *Jones v. United States*, 137 U. S. 202, 34 L. Ed. 691; *Smith v. United States*, 137 U. S. 224, 34 L. Ed. 700; *United States v. Lynde*, 11 Wall. 632, 638, 20 L. Ed. 230; *Gelston v. Hoyt*, 3 Wheat. 246, 324, 4 L. Ed. 381; *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512; *Foster v. Neilson*, 2 Pet. 253, 307, 309, 7 L. Ed. 415; *Keene v. McDonough*, 8 Pet. 308, 8 L. Ed. 955; *Garcia v. Let*, 12 Pet. 511, 520, 9 L. Ed. 1176; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226; *United States v. Yorba*, 1 Wall. 412, 423, 17 L. Ed. 635.

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a district government, the courts of the union must view such

newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 233.

63. Confederate States.—As to the power and rights of the United States government in territory conquered and held by conquest during the Civil War, see the title WAR.

Capture and condemnation of property.—As to seizure and condemnation of property in the Confederate States under the confiscation act, see the title WAR.

As to the capture and sale of property within the Confederate States under the captured and abandoned property act, see the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1.

As to the title to property captured by the United States government from the Confederate government during the late Civil War, see the title WAR.

Confederate currency.—As to Confederate currency as a medium of payment, see the titles BILLS, NOTES AND CHECKS, vol. 3, p. 349; PAYMENT, vol. 9, pp. 327, 331, 335, 336.

As to whether notes of the Confederate States, in ordinary use as money during the late Civil War, constituted a valid consideration for a contract, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 809.

As to whether a promise to pay in Confederate notes in consideration of the receipt of such notes and of drafts payable by them is a valid contract, see the title CONTRACTS, vol. 4, p. 567.

As to whether a state constitutional provision declaring void contracts, the consideration for which was Confederate money, was an impairment of the obligation of such contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 809.

As to the validity of a law passed by the legislature of one of the late Confederate States in aid of the rebellion, authorizing and requiring the redemption of bills issued as currency by a municipal corporation, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 566.

As to the deposit of Confederate notes in a bank for collection, see the title BANKS AND BANKING, vol. 3, p. 25.

As to investment by a guardian of his

1. STATUS.—As to the status of the Confederate States government and of the seceding states, see ante, "Classes of De Facto Governments," XV, B; post, "Validity of Acts of Confederate Government," XV, D, 4. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 234, 341.

2. ORDINANCES OF SECESSION.—As to the validity of the ordinances of secession, and as to their effect as taking the seceding states out of the Union, and as to the constitutional status of such states, and their inhabitants, see the title CONSTITUTIONAL LAW, vol. 4, pp. 234, 341. See, also, the title APPEAL AND ERROR, vol. 1, p. 554. Generally as to the indissolubility of the Union and the indestructibility of the states, see the title CONSTITUTIONAL LAW, vol. 4, p. 340, et seq. As to the effect of an ordinance of secession upon the previous jurisdiction of the supreme court of the seceding state, or its relation to the appellate power of the supreme court of the United States, see the titles APPEAL AND ERROR, vol. 1, p. 554; CONSTITUTIONAL LAW, vol. 4, p. 341.

3. RECONSTRUCTION AND READMISSION OF SECEDING STATES.—As to the reconstruction and readmission of the seceding states, and as to the provisional and reconstruction governments, see the title CONSTITUTIONAL LAW, vol. 4, pp. 333, 342. As to the establishment during the late Civil War, of provisional courts in portions of the insurgent territory occupied by the military forces of the United States, see the titles COURTS, vol. 4, pp. 1048, 1049; MILITARY LAW, vol. 8, p. 356. As to the authority of the United States government to suppress rebellion and to provide for the restoration of the governments of the seceding states, see the title CONSTITUTIONAL LAW, vol. 4, pp. 332, 333, 342.

4. VALIDITY OF ACTS OF CONFEDERATE GOVERNMENT—*a. Of Confederate States Government.*—The so-called Confederate States government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. It had no existence except as organized treason, and its purpose while it lasted was to overthrow the lawful government. Therefore there is no validity in any of its acts or legislation which the courts of the United States can recognize.⁶⁴ When the

ward's money in Confederate States bonds, see the title GUARDIAN AND WARD, vol. 6, p. 606.

As to the legality of contracts made in aid of the rebellion, see the titles BILLS, NOTES AND CHECKS, vol. 3, pp. 279, 280; ILLEGAL CONTRACTS, vol. 6, p. 737; WAR.

As to Confederate transactions as a consideration for negotiable paper, see the title BILLS, NOTES AND CHECKS, vol. 3, pp. 279, 280.

As to questions of duress in the sale of property to Confederate States, see the title DURESS, vol. 5, p. 683.

As to whether a state statute providing for the scaling of Confederate contracts is void as impairing the obligation of such contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 808, 809.

As to the nonintercourse acts of 1861 and 1862, prohibiting commercial intercourse between the seceding states and the rest of the United States, and as to all questions of trading with an enemy during the time of war or transactions in the enemy's country, see the title WAR.

As to whether a seizure of a vessel by a vessel of the Confederate States is a capture within the terms of a warranty in a policy of marine insurance, see the title MARINE INSURANCE, vol. 8, p. 170.

As to admissibility in evidence of records of the Confederate government, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 441.

As to impairment of obligation of Confederate contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 808, 809.

64. Validity of acts of Confederate government.—*Baldy v. Hunter*, 171 U. S. 388, 402, 43 L. Ed. 208; *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371; *Williams v. Bruffy*, 96 U. S. 176, 192, 24 L. Ed. 716; *Keith v. Clark*, 97 U. S. 454, 465, 24 L. Ed. 1071; *United States v. Keebler*, 9 Wall. 83, 86, 19 L. Ed. 574; *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018; *Stevens v. Griffith*, 111 U. S. 48, 50, 28 L. Ed. 348; *Hickman v. Jones*, 9 Wall. 197, 200, 19 L. Ed. 551. See, also, *Lamar v. Micou*, 112 U. S. 452, 476, 28 L. Ed. 751; *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *The Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196; *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769; *Alexander v. Bryan*, 110 U. S. 414, 28 L. Ed. 195. See ante, "Classes of De Facto Governments," XV, B.

The statutes of the Confederacy, its decrees, its authority can give no validity to any act done in its service or in aid of its

government of the Confederate States was overthrown, it perished totally. It left no laws, no statutes, no decrees, no authority which can give support to any contract, or any act done in its service, or in aid of its purpose, or which contributed to protract its existence.⁶⁵ The Confederate government is to be regarded by the courts as simply the military representative of the insurrection against the authority of the United States.⁶⁶

purpose. *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371.

The notes and bonds issued in the name of the so-called Confederate government and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust fund might be lawfully invested. *Lamar v. Micou*, 112 U. S. 452, 476, 28 L. Ed. 751, citing *Thorington v. Smith*, 8 Wall. 1, 19 L. Ed. 361; *Horn v. Lockhart*, 17 Wall. 570, 21 L. Ed. 657; *The Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196; *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371; *Fretz v. Stover*, 22 Wall. 198, 22 L. Ed. 769; *Alexander v. Bryan*, 110 U. S. 414, 28 L. Ed. 195.

The whole Confederate power must be regarded by the federal supreme court as a usurpation of unlawful authority, and its congress as incapable of passing any valid laws; whatever weight may be given under some circumstances to its acts of force, on the ground of irresistible power, or to the legislation of the states in domestic matters; as to which the court decides nothing now. *United States v. Keebler*, 9 Wall. 83, 86, 19 L. Ed. 574.

The Confederate States government was an illegal organization formed in the face of the prohibition of the constitution against any treaty, alliance, or confederation of one state with another, and could not be regarded as having any legal existence; whatever efficacy therefore, its enactments possessed in any state entering into that organization arose from the sanction given them by that state. If enforced as a law there it would be considered, as a statute, not of the confederacy, but of the state, and treated accordingly. *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716; *Stevens v. Griffith*, 111 U. S. 48, 50, 28 L. Ed. 348; *Ford v. Surget*, 97 U. S. 594, 24 L. Ed. 1018.

There was no legislation of the Confederate congress which the federal supreme court can recognize as having any validity against the United States, or against any of its citizens who, pending the war, resided outside of the declared limits of the insurrectionary districts. *Ford v. Surget*, 97 U. S. 594, 604, 24 L. Ed. 1018.

The act of the Confederate congress creating a court known as the district court of the Confederate States of America for the northern district of Alabama was void. It was as if it were not. The

court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those, who, assuming to be its officers, were the instruments by which it acted. *Hickman v. Jones*, 9 Wall. 197, 201, 19 L. Ed. 551.

A prosecution in a so-called "court of the Confederate States of America," for treason, in aiding the troops of the United States in the prosecution of a military expedition against the said Confederate States, is a nullity. *Hickman v. Jones*, 9 Wall. 197, 19 L. Ed. 551.

A purchase of the property of a loyal citizen of the United States under a confiscation and sale made pursuant to statutes of the late rebel confederacy, passed in aid of their rebellion, is void. *Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

As to validity of acts done under authority of Confederate States government sequestrating enemies' property and debts, see *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716.

65. Effect of overthrow of Confederacy.—*Sprott v. United States*, 20 Wall. 459, 465, 22 L. Ed. 371; *Williams v. Bruffy*, 96 U. S. 176, 177, 24 L. Ed. 716. See, also, *Baldy v. Hunter*, 171 U. S. 388, 393, 43 L. Ed. 208; *Thorington v. Smith*, 8 Wall. 1, 9, 19 L. Ed. 361.

So far as the actual exercise of its physical power was brought to bear upon individuals that may, under some circumstances, constitute a justification or excuse for acts otherwise indefensible, but no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose. *Sprott v. United States*, 20 Wall. 459, 465, 22 L. Ed. 371.

66. Military representative of insurrection.—*Ford v. Surget*, 97 U. S. 594, 604, 24 L. Ed. 1018; *Stevens v. Griffith*, 111 U. S. 48, 50, 28 L. Ed. 348. See ante, "Classes of De Facto Governments," XV, B.

The concession of belligerent rights to the Confederate government sanctioned no hostile legislation against the citizens of the loyal states. *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716.

The belligerent rights conceded to it in the interest of humanity, to prevent the cruelties which would have followed mutual reprisals and retaliations, were, from their nature, such only as existed during the war. *Stevens v. Griffith*, 111 U. S. 48, 50, 28 L. Ed. 348.

The government of the Confederate

b. *Of Governments of the Several States.*—The recognition of the existence and the validity of the acts of the so-called Confederate government, and that of the states which yielded a temporary support to that government, stand on very different grounds, and are governed by very different considerations. The latter, in most, if not in all, instances, merely transferred the existing state organizations to the support of a new and different national head.⁶⁷ The acts of the several states in the ordinary course of administration of law in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. These acts must be upheld in the interest of civil society to which such a government was a necessity.⁶⁸ As a general rule, all transactions, judgments and decrees which took place in conformity with existing laws in the Confederate States between the citizens thereof during the late war, "except such as were directly in aid of the rebellion, ought to stand good."⁶⁹

States, although in no sense a government de jure, and never recognized by the United States as in all respects a government de facto, yet was an organized and actual government, maintained by military power, throughout the limits of the states that adhered to it, except in those parts of them protected from its control by the presence of the armed forces of the United States; and the United States, from motives of humanity and expediency, had conceded to that government some of the rights and obligations of a belligerent. *Oakes v. United States*, 174 U. S. 778, 794, 43 L. Ed. 1169; *Prize Cases*, 2 Black 635, 673, 674, 17 L. Ed. 459; *Thorington v. Smith*, 8 Wall. 1, 7, 9, 10, 19 L. Ed. 361; *Ford v. Surget*, 97 U. S. 594, 604, 605, 24 L. Ed. 1018. See ante, "Classes of De Facto Governments," XV. B.

67. *Acts of Confederate and state governments distinguished.*—*Sprott v. United States*, 20 Wall. 459, 464, 22 L. Ed. 371; *Johnson v. Atlantic, etc., Transit Co.*, 156 U. S. 618, 646, 39 L. Ed. 556; *United States v. Insurance Companies*, 22 Wall. 99, 102, 22 L. Ed. 816; *Texas v. White*, 7 Wall. 700, 19 L. Ed. 227; *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716.

68. *To what extent acts valid.*—*Horn v. Lockhart*, 17 Wall. 570, 580, 21 L. Ed. 657; *Johnson v. Atlantic, etc., Transit Co.*, 156 U. S. 618, 645, 39 L. Ed. 556; *Baldy v. Hunter*, 171 U. S. 388, 396, 401, 43 L. Ed. 208; *United States v. Insurance Companies*, 22 Wall. 99, 103, 22 L. Ed. 816; *Williams v. Bruffy*, 96 U. S. 176, 192, 24 L. Ed. 716; *Keith v. Clark*, 97 U. S. 454, 464, 24 L. Ed. 1071; *Sprott v. United States*, 20 Wall. 459, 22 L. Ed. 371; *Thomas v. Richmond*, 12 Wall. 349, 357, 20 L. Ed. 453.

All the enactments of the de facto legislatures in the insurrectionary states during the war, which were not hostile to the Union, or to the authority of the general government, and which were not in conflict with the constitution of the United States, or of the states, have the

same validity as if they had been enactments of legitimate legislatures. *United States v. Insurance Companies*, 22 Wall. 99, 101, 103, 22 L. Ed. 816.

The Virginia statute of April 13, 1861, suspending the enforcement of executions upon judgments upon the defendant's executing bond with security for the payment of the debt, interest and costs, and where no such bond was offered, requiring the return of the property to the defendant without lien where it would not sell for its appraised value, was enacted in aid of the approaching rebellion, and was for that reason among others, unconstitutional and void. *Daniels v. Tearney*, 102 U. S. 415, 418, 26 L. Ed. 187.

Recovery of state property aliened by secession government.—*Texas v. White*, 7 Wall. 700, 19 L. Ed. 227.

As to laws passed by the Confederate States impairing the obligation of contracts. see the titles CONSTITUTIONAL LAW, vol. 4, p. 341; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 770.

As to corporations created by the legislature of a state while the state was in armed rebellion against the United States government. see the titles ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 7; CORPORATIONS, vol. 4, p. 674.

69. *Transactions in conformity with Confederate laws.*—*Baldy v. Hunter*, 171 U. S. 388, 396, 400, 43 L. Ed. 208; *Horn v. Lockhart*, 17 Wall. 570, 573, 575, 580, 21 L. Ed. 657.

The exception of such transactions was a political necessity required by the dignity of the government of the United States and by every principle of fidelity to the constitution and laws of our common country. *Baldy v. Hunter*, 171 U. S. 388, 396, 400, 43 L. Ed. 208.

In the consideration of transactions between citizens of the insurrectionary districts, no disposition has been manifested by the federal supreme court, and none exists, to interfere with the regular ad-

STATE'S EVIDENCE.—See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 68. As to power of district attorney to grant immunity, see the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 400.

STATE TAXATION.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; TAXATION.

STATIONS.—As to duties of carriers of passengers as to station facilities, see the title CARRIERS, vol. 3, p. 577. As to liability of railroads for injury to persons or property at stations, see the title RAILROADS, vol. 10, p. 477. See the title ARMY AND NAVY, vol. 2, p. 518. See, also, DEPOT, vol. 5, p. 334, and references given.

STATUARY.—See the title REVENUE LAWS, vol. 10, p. 896.

STATUTE OF DESCENTS AND DISTRIBUTION.—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 335.

STATUTE OF FRAUDS.—See the title FRAUDS, STATUTE OF, vol. 6, p. 451.

STATUTE OF JEOPARDIES.—See the title AMENDMENTS, vol. 1, p. 308.

STATUTE OF LIMITATIONS.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

STATUTE OF USES.—See the title TRUSTS AND TRUSTEES.

ministration of the law, or with the ordinary proceedings of society in their varied forms, civil or political, except when they tended to impair the just authority of the general government, or the rights of loyal citizens. Transactions which thus affect the government or the individual can never be upheld in any tribunal which recognizes the constitution of the United States as the supreme law of the land. *Stevens v. Griffith*, 111 U. S. 48, 52, 28 L. Ed. 348.

A contract for the payment of Confederate States treasury notes, made between parties residing within the so-called Confederate States, can be enforced in the courts of the United States, the contract having been made on a sale of property in the usual course of business, and not for the purpose of giving currency to the notes or otherwise aiding the rebellion. *Thorington v. Smith*, 8 Wall. 1, 19, 19 L. Ed. 361.

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BY T. B. BENSON.

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CROSS REFERENCES.

See the titles COMMON LAW, vol. 3, p. 958; CONSTITUTIONAL LAW, vol. 4, p. 1; FOREIGN LAWS, vol. 6, p. 374; INTERNATIONAL LAW, vol. 7, p. 239; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257; ORDINANCES, vol. 8, p. 1009; TREATIES; USAGES AND CUSTOMS.

I. Definition.

In all countries using the English language and inheriting the English common law, a statute is an enactment of the legislative branch of government.¹

1. *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352.

The statutes of England are the enact-

ments of parliament. *Levy v. McCartee*, 6 Pet. 102, 111, 8 L. Ed. 334.

The statutes of the United States are

II. Distinctions.

A. Between Constitution and Statute.—See elsewhere.²

B. Between Treaty and Statute.—No distinction is made as to the question of supremacy between statutes and treaties, except that both are controlled by the constitution.³

C. Between Memorial and Statute.—A territorial legislature makes use of a memorial to urge legislative action by congress.⁴

III. Classification.

A. Declaratory.—A declaratory statute is one which merely declares the law as it previously existed.⁵ It is very common for the legislature to make laws in affirmance both of the common and statute law.⁶ Such statutes are not without value, as they serve to elucidate the existing law and to remove uncertainty.⁷

B. Remedial.—See elsewhere in this title.⁸

C. Penal.—Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon.⁹ Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature,¹⁰ but in such cases it has been pointed out that neither

the enactments of congress. *The City of Panama*, 101 U. S. 453, 460, 25 L. Ed. 1061.

Within act conferring jurisdiction over state courts.—See *Stevens v. Griffith*, 111 U. S. 48, 50, 28 L. Ed. 348. See the title *APPEAL AND ERROR*, vol. 1, p. 518. And see post, "Of Acts of Confederate States," IX, F.

2. Distinction between constitution and statute.—See the title *CONSTITUTIONAL LAW*, vol. 4, p. 24.

3. Between treaty and statute.—*De Lima v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041; *The Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Whitney v. Robertson*, 124 U. S. 190, 31 L. Ed. 386; *Hijo v. United States*, 194 U. S. 315, 324, 48 L. Ed. 994. See the title *TREATIES*.

4. Murphy v. Utter, 186 U. S. 95, 46 L. Ed. 1070.

5. Declaratory statute.—*Vance v. Vandercock Co.*, 170 U. S. 438, 463, 42 L. Ed. 1100.

6. The Star, 3 Wheat. 78, 92, 4 L. Ed. 338. See, also, *Boyce v. Grundy*, 3 Pet. 210, 7 L. Ed. 655.

"A large portion of the modern codes is but declaratory of the common law as expounded by the court." *Cincinnati v. Morgan*, 3 Wall. 275, 293, 18 L. Ed. 146.

The act of congress relative to the District of Columbia declaring that the laws of the two states, respectively, should remain in force in the parts of the territory ceded by each, was, perhaps, only declaratory of a principle which would have been in full operation without such declaration. *United States v. Simms*, 1 Cranch 252, 256, 2 L. Ed. 98.

7. Vance v. Vandercock Co., 170 U. S. 438, 463, 42 L. Ed. 1100, dissenting opinion of Shiras, J.

8. See post, "Remedial Statutes," XVI, L. 12.

9. Penal statutes.—*United States v. Chouteau*, 102 U. S. 603, 611, 26 L. Ed. 246; *United States v. Reisinger*, 128 U. S. 398, 402, 32 L. Ed. 480; *Huntington v. Attrill*, 146 U. S. 657, 668, 36 L. Ed. 1123; *France v. United States*, 164 U. S. 676, 41 L. Ed. 595. See the titles *CRIMINAL LAW*, vol. 5, p. 49; *PENALTIES AND FORFEITURES*, vol. 9, p. 359.

The definition of a penal statute is that it is a statute which inflicts a penalty for the violation of its provisions. *Stockwell v. United States*, 13 Wall. 531, 555, 20 L. Ed. 491, Field, J., dissenting.

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: private wrongs and public wrongs.'" *Huntington v. Attrill*, 146 U. S. 657, 668, 36 L. Ed. 1123.

The slave trade act of 1794, § 1, which describes the offense of preparing a vessel, and of causing her to sail, is a penal act. *The Emily*, 9 Wheat. 381, 6 L. Ed. 116.

Imposing a fine for tort.—Article 208 of the Mexican Railroad Regulations, imposing a fine to be assessed by the department of public works for the death of a person wrongfully killed by a railroad company, is not penal. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 48 L. Ed. 900.

10. Statutes giving private actions.—The term "penal statute" is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. *Huntington v. Attrill*, 146 U. S. 657, 666, 36 L. Ed. 1123.

The penal character of an act inflicting a penalty by private action is emphasized by the fact that a moiety of the plaintiff's

the liability imposed nor the remedy given is strictly penal.¹¹ They are penal in the sense that they are to be strictly construed,¹² but not in the international sense that they cannot be enforced in another state.¹³ Where a statute for the recovery of damages for an act which violates the rights of the plaintiff, gives the right of action solely to him, the fact that it also provides that such damages shall be measured by the injury suffered¹⁴ or shall not be less than a certain sum, and may be more, if proved, does not transform it into a penal statute.¹⁵ Revenue laws are not, in a strict sense, penal acts, although they impose a penalty.¹⁶

D. Curative.—A curative act in its ordinary sense is a retrospective law, acting on past cases and existing rights,¹⁷ usually passed to validate irregularities in legal proceedings or to give effect to contracts between parties which might otherwise fall for failure to comply with technical legal requirements.¹⁸

recovery is for the use of the United States. *Bolles v. Outing Co.*, 175 U. S. 262, 44 L. Ed. 156.

The usury statute of Texas was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. *Ewell v. Daggs*, 108 U. S. 143, 149, 27 L. Ed. 682.

Against officers of corporation.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 986.

11. *Huntington v. Attrill*, 146 U. S. 657, 667, 36 L. Ed. 1123.

12. **Penal as to construction.**—A statute providing that if any certificate, report or public notice by the officers of a corporation shall be false in any material representation, all the officers who shall have signed the same shall be liable for all the debts of the corporation contracted while they are officers thereof, is penal in the sense that it must be construed strictly. *Huntington v. Attrill*, 146 U. S. 657, 660, 36 L. Ed. 1123. See post, "Penal Statutes," XVI, L, 11.

13. **Not penal as to enforcement in another state.**—*Huntington v. Attrill*, 146 U. S. 657, 660, 36 L. Ed. 1123. See the titles CONFLICT OF LAWS, vol. 3, p. 1034; DEATH BY WRONGFUL ACT, vol. 5, p. 201.

14. *St. Louis, etc., R. Co. v. Mathews*, 165 U. S. 1, 27, 41 L. Ed. 611.

15. The act of August 18, 1856, § 4966, of the Revised Statutes providing for the recovery of "damages" for performing or representing a dramatic composition without the consent of the proprietor of the copyright, is not a penal statute. The statute does not speak of penalties or forfeitures, but refers entirely to "damages" suffered by the wrongful act. If it has nothing in the nature of a qui tam action about it. *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 109, following *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

But a statute which fixes a single and arbitrary measure of compensation to the plaintiff irrespective of actual damages sustained or profits realized by the defendant is penal. Section 4965 of the Revised Statutes providing that an unauthorized reproduction of a photograph shall entail forfeiture of the plates and prints

and shall further forfeit one dollar for every sheet of the same found in the defendant's possession, is penal. *Bolles v. Outing Co.*, 175 U. S. 262, 44 L. Ed. 156, distinguishing *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 109.

16. **Revenue laws.**—*Taylor v. United States*, 3 How. 197, 11 L. Ed. 559. See post, "Construed Liberally," XVI, L, 24, c.

17. **Curative statutes.**—A curative act is a retrospective law and the power of the legislature to pass such act is confined within comparatively narrow limits. *Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 330, 44 L. Ed. 786. See the title CONSTITUTIONAL LAW, vol. 4, p. 452.

18. **Purpose and object.**—*Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 330, 44 L. Ed. 786.

Act invalidating tax sales held curative.—See *Turner v. New York*, 168 U. S. 90, 93, 42 L. Ed. 392. And see the title TAXATION.

To cure irregularities in judicial proceedings.—See the title CONSTITUTIONAL LAW, vol. 4, p. 453.

In judicial sales.—See the title JUDICIAL SALES, vol. 7, p. 733.

In tax sales.—See the title CONSTITUTIONAL LAW, vol. 4, p. 456; TAXATION.

In sales by executors and administrators.—See the title CONSTITUTIONAL LAW, vol. 4, p. 453.

To cure defective acknowledgments.—See the titles ACKNOWLEDGMENTS, vol. 1, p. 91; CONSTITUTIONAL LAW, vol. 4, p. 453; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 877.

To cure defective recordings.—See the title CONSTITUTIONAL LAW, vol. 4, p. 455.

To cure defective municipal and county securities.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 457; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 661.

Do not impair obligation of contract.—See the title IMPAIRMENT OF OBLIGATIONS OF CONTRACTS, vol. 6, p. 877.

Special act presumed to be curative.—*Ritchie v. Franklin County*, 22 Wall. 67, 22 L. Ed. 825.

E. Public.—A statute which is so declared by the legislature¹⁹ or which is applicable to all persons bringing themselves within its provisions²⁰ is public.

A statute imposing a penalty,²¹ imposing revenue,²² incorporating a bank²³ or a railroad²⁴ establishing a county seat,²⁵ legalizing a municipal election,²⁶ or amending a public act,²⁷ is public.

F. Private.—Special or private acts are rather exceptions than rules; being those which operate only upon particular persons and private concerns, the judges are not bound to take notice, unless they be formally shown and pleaded.²⁸ An act to incorporate a municipality is private.²⁹ And an act to amend the articles of association of a railroad company is a private or local law within the Illinois constitution.³⁰ Special acts are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterwards be given.³¹

G. Perpetual.—All statutes are perpetual unless limited to a particular time.³²

H. Temporary.—The act of congress, which made intercourse between citizens of those parts of the United States in insurrection against its government with citizens of the rest of the United States, unlawful so long as hostilities should continue, was not a temporary act.³³ Where the legislature declares an organic act to be perpetual it implies that the prior system had been only temporary and provisional.³⁴

I. Mandatory.—A statute containing an imperative³⁵ and unconditional³⁶

19. Public statutes.—*Beatty v. Knowler*, 4 Pet. 152, 7 L. Ed. 813; *Unity v. Burrage*, 103 U. S. 447, 456, 26 L. Ed. 405.

20. A statute which applies to all who can do what is prohibited is general. *Railroad Co. v. Richmond*, 96 U. S. 521, 529, 24 L. Ed. 734.

The act of congress of March 3, 1875, granting the right of way through the public lands of the United States to railroads is a public statute and applicable to any railroad bringing itself within the language of the statute. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548.

21. Imposing penalty.—*Young v. Bank*, 4 Cranch 384, 388, 2 L. Ed. 655.

22. A statute imposing a duty on tea.—*Gardner v. Collector*, 6 Wall. 499, 508, 18 L. Ed. 890.

23. Young v. Bank, 4 Cranch 384, 388, 2 L. Ed. 655.

24. Incorporating railroad.—*Unity v. Burrage*, 103 U. S. 447, 450, 26 L. Ed. 405.

But such an act was held to be private under the Illinois constitution in *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982.

25. A statute establishing a county seat is a public statute and not within the rule of impairment of obligation of contract. *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710.

26. Legalizing municipal election voting aid to railroad.—*Unity v. Burrage*, 103 U. S. 447, 450, 26 L. Ed. 405.

27. Amending public act.—*Unity v. Burrage*, 103 U. S. 447, 456, 26 L. Ed. 405.

28. Private statutes.—*Unity v. Burrage*, 103 U. S. 447, 454, 26 L. Ed. 405. As to validity of private acts, see post, "Of Special and Local Acts," IX, G.

29. Incorporating municipality.—*Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 523, 28 L. Ed. 1098.

30. Incorporating railroad.—The act of Illinois of 1867, entitled an act to amend articles of association of the railroad company, is a local or private law within the constitution of 1848, article 3, § 23. *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982. Compare *Unity v. Burrage*, 103 U. S. 447, 26 L. Ed. 405.

31. Operations and effect—As judgment.—*Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585.

32. United States v. Gear, 3 How. 120, 131, 11 L. Ed. 523.

33. The Reform, 3 Wall. 617, 18 L. Ed. 105. See post, "Expiration," XIV.

34. Eckloff v. District of Columbia, 135 U. S. 240, 34 L. Ed. 120; *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. Ed. 60.

35. Mandatory statutes.—*Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 46 L. Ed. 860; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Ex parte Jordan*, 94 U. S. 248, 251, 24 L. Ed. 123. See *SHALL*, vol. 10, p. 1130.

Statutes which reads "shall."—A statute which reads "shall" is mandatory. *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 103, 24 L. Ed. 71; *United States v. Thomas*, 156 U. S. 353, 359, 39 L. Ed. 450. See *SHALL*, vol. 10, p. 1030.

The act of March 3, 1891, known as the circuit court of appeals act, providing "no complaint shall at any time be dismissed," etc., is mandatory. *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 46 L. Ed. 860.

36. Unconditional statutes.—A statute which reads "no employee shall be re-

requirement is mandatory. Although its language be permissive,³⁷ if a statute contain directions to a corporation³⁸ or a public officer³⁹ for the performance of or furtherance from a certain act affecting the public or a third person,⁴⁰ it is mandatory.⁴¹ The power of the corporation or officer in the exercise of a power under a mandatory statute is limited to the manner and conditions prescribed for its exercise.⁴² Whether a statute is mandatory or directory is to be determined from its general scope and object, not from isolated words.⁴³

J. Directory.—Statutes containing requirements intended for the guide of officers in the conduct of business devolved upon them and designed to secure order, system, and dispatch in proceedings,⁴⁴ and by a disregard of which the rights of parties interested cannot be injuriously affected, is not usually regarded as mandatory,⁴⁵ unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.⁴⁶ Usually a statute which reads “may”⁴⁷ or “empowered”⁴⁸ is directory. The provisions of a directory statute ought to be followed, but facts may be effectually exercised without observing them.⁴⁹

quired or permitted to work” more than ten hours per day, with no provision for special emergency, is mandatory in all cases. It was so held in construing article 8, ch. 415, of the labor laws of New York of 1897. *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937. See the title LABOR, vol. 7, p. 788.

37. Where language permissive.—See MAY, vol. 8, p. 325.

38. *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. Ed. 1116, following *Equitable Life Assur. Society v. Clements*, 140 U. S. 226, 35 L. Ed. 497.

A statute imposing conditions upon foreign corporations doing business within a state is mandatory. *Knights Templars, etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139; *Equitable Life Assur. Society v. Clements*, 140 U. S. 226, 35 L. Ed. 497.

39. *Gantly v. Ewing*, 3 How. 707, 11 L. Ed. 794.

40. A statute containing requirements intended for the protection of a citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights may be and generally are injuriously affected, is not directory but mandatory. *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702.

“The protection of the convenience only of a taxpayer is not of such a vital nature as to authorize a court to treat a statute primarily directed to public officers for their guidance, and the substantial protection of the government, as mandatory, and to consider official acts not in strict conformity with the statute as void. The protection must be substantial, and must be intended as a guard of rights or property.” *Erhardt v. Schroeder*, 155 U. S. 124, 129, 39 L. Ed. 94.

41. *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125; *Supervisors v. United States*, 4 Wall. 435, 446, 18 L. Ed. 419; *Jaffray v. McGehee*, 107 U. S. 361, 364, 27 L. Ed. 495; *Lyon v. Alley*, 130 U. S. 177, 184, 32 L. Ed. 899.

“Whenever it is provided that a corporation or officer ‘may’ act in a certain way, or it ‘shall be lawful’ for them to act

in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons.” *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125. See the title INSURANCE, vol. 7, p. 94.

42. Compliance with mandatory statutes.—*French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702.

43. Determining whether statute mandatory or directory.—*Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 201, 212, 8 L. Ed. 917; *Thompson v. Carroll*, 22 How. 422, 16 L. Ed. 387; *United States v. Thoman*, 156 U. S. 353, 359, 39 L. Ed. 450; *United States Bank v. Dandridge*, 12 Wheat. 64, 81, 6 L. Ed. 552.

44. Directory statutes.—*United States v. Eaton*, 169 U. S. 331, 42 L. Ed. 767; *Meister v. Moore*, 96 U. S. 76, 79, 24 L. Ed. 826. See the title MARRIAGE, vol. 8, p. 251.

A statute intended for the benefit of the government is not mandatory and official acts are not invalidated for want of strict compliance therewith. *United States v. Ranlett*, 172 U. S. 133, 142, 43 L. Ed. 393; *Erhardt v. Schroeder*, 155 U. S. 124, 125, 39 L. Ed. 94; *Origet v. Hedden*, 155 U. S. 228, 39 L. Ed. 130.

45. “Where the act to be done affects no third persons, and is not clearly beneficial to them or the public, the words ‘may’ do an act, or it is ‘lawful’ to do it, do not mean ‘must,’ but rather indicate an intent in the legislature to confer a discretionary power.” *Mason v. Fearson*, 9 How. 248, 259, 13 L. Ed. 125.

46. *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702.

47. Statute which reads “may.”—See MAY, vol. 8, p. 325.

48. Statute which reads “empowered.”—*Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 201, 8 L. Ed. 917. See the title CANALS, vol. 3, p. 550.

49. Compliance with directory statutes.—*Hubbert v. Campbellville Lumber Co.*, 191 U. S. 70, 76, 48 L. Ed. 101.

“If a regulation be merely directory,

K. Prospective.—See elsewhere.⁵⁰

L. Retrospective.—See elsewhere.⁵¹

M. Foreign.—See elsewhere.⁵²

N. Revised Statutes and Codes.—The act of congress of June 27, 1866, authorized the revision of the federal statutes. The revision was adopted June 22, 1874,⁵³ as an embodiment of the laws of congress as of December 1, 1873,⁵⁴ and as a repeal of all omitted provisions.⁵⁵ On February 18, 1875, an act was passed entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States."⁵⁶ By an act of March 2, 1877, the preparation and publication of a new edition of the Revised Statutes was provided for.⁵⁷ The laws included in a code may be substantive law, criminal law and legislation that may be properly classified under any category whatever.⁵⁸

IV. Enactment.

A. In General.—The statutes of the United States are made by the president, the senate and the house of representatives.⁵⁹

B. Compliance with Constitution and Statutes—1. **CONSTITUTION.**—A statute of the United States cannot become a law unless passed by congress in compliance with the United States constitution.⁶⁰ A state legislature cannot pass an act in evasion of the state constitution.⁶¹

2. **STATUTES.**—As a prior legislature cannot enact a law which may not be repealed, amended or disregarded by a subsequent legislature,⁶² the provisions of a general statute in regard to the enactment of special statutes are not binding at a subsequent term in the enactment of a special statute.⁶³

C. The Legislature—1. **CONSTITUTION**—a. *In General.*—See elsewhere.⁶⁴

b. *Election of Members*—(1) *In General.*—See elsewhere.⁶⁵

(2) *Judicial Notice.*—Whenever the courts take judicial notice of the public statutes of a state, they also take notice of the election of the members of the legislature which enacted such statutes.⁶⁶

then any deviation from it, though it may subject the officers to responsibility both to the government and the stockholders, cannot be taken advantage of by third persons." *United States Bank v. Dandridge*, 12 Wheat. 64, 81, 6 L. Ed. 552; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199; *United States v. Vanzandt*, 11 Wheat. 184, 6 L. Ed. 448.

50. Prospective statute.—See post, "Construed as Prospective or Retrospective," XVI, I, 6.

51. Retrospective statute.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 412. See post, "Construed as Prospective or Retrospective," XVI, I, 6.

52. Foreign statutes.—See the title **FOREIGN LAWS**, vol. 6, p. 375.

53. Revised statutes.—*Barrett v. United States*, 169 U. S. 218, 227, 42 L. Ed. 723.

54. As law of December 1, 1873.—See post, "Revised Statutes and Codifications," XVI, L, 3.

55. As repeal of omitted provisions.—See post, "Of Acts Omitted from Revision," XI, E, 3; "By Omission from Revision," XI, F, 5.

56. Act to correct errors in revised statutes.—*United States v. Auffmordt*, 122 U. S. 197, 209, 30 L. Ed. 1182.

57. New edition of revised statutes.—*Barrett v. United States*, 169 U. S. 218, 227, 42 L. Ed. 723.

58. Codes—What may be included in.—*Ross v. Aguirre*, 191 U. S. 60, 48 L. Ed. 94.

59. Head Money Cases, 112 U. S. 580, 599, 28 L. Ed. 798.

60. Field v. Clark, 143 U. S. 649, 669, 36 L. Ed. 294.

61. The legislature of Illinois could not, in 1869, give validity to a void act passed in 1857, which was not constitutionally passed in that year in compliance with the constitution of 1848 requiring the vote of a majority of all members elected in each house of the general assembly; for that would be an evasion of the constitution. It could at most give it vitality as a new act from the date of the act of 1869. *South Ottawa v. Perkins*, 94 U. S. 260, 270, 24 L. Ed. 154.

62. Compliance with statutes.—See post, "Restricted by Prior Legislature," IV, C, 3, b; "Power to Repeal," XI, C.

63. So held of a statute providing that no bill for a private purpose should be introduced except by petition and publication. *Manigault v. Springs*, 199 U. S. 473, 486, 50 L. Ed. 274.

64. Legislature—Constitution.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 293.

65. Election of members.—See the title **ELECTIONS**, vol. 5, pp. 722, 729.

66. Judicial notice of.—*Mills v. Green*, 159 U. S. 651, 657, 40 L. Ed. 651.

2. ORGANIZATION—*a. In General.*—See elsewhere.⁶⁷

b. *Quorum.*—The presence of a quorum may be determined by a rule previously established by the legislature.⁶⁸

3. POWERS—*a. In General.*—See elsewhere.⁶⁹

b. *Restricted by Prior Legislature.*—A prior legislature cannot restrict the powers of a subsequent.⁷⁰

D. *The Bill*—1. *IN GENERAL.*—See elsewhere in this title.⁷¹

2. *INTRODUCTION.*—What bills are bills for raising revenue which the constitution declares shall originate in the house of representatives is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible case.⁷² But the court has gone so far as to decide that revenue bills are those which levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue;⁷³ as does an act of congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, imposes a tax on the notes in circulation of the banking associations organized under it,⁷⁴ and an act providing for the elimination of certain grade crossings of railroads and requiring the construction of a union station, which provides for the assessment of taxes on property to pay a part of the cost.⁷⁵

E. *Readings.*—A state constitutional provision which requires three readings on separate days, but which does not require such fact to appear on the journal may be conclusively presumed to have been complied with when the enrolled bill, certified and duly authenticated by the presiding officers of the houses, has been approved by the governor; but, if the entry on the journal is expressly required, the requirement cannot be defeated by such presumption.⁷⁶

F. *Passage of Bill*—1. *NECESSITY FOR.*—A bill signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, and delivered by the latter to the secretary of state, as an act passed by congress, does not become a law of the United States if it had not in fact been passed by congress, in view of the express requirements of the constitution.⁷⁷

2. *CONCURRENCE OF BOTH HOUSES.*—In order to become a law an act of congress must be assented to by both houses.⁷⁸

67. *Organization.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 294, 297.

68. *Quorum.*—United States v. Ballin, 144 U. S. 1, 9, 36 L. Ed. 321.

69. *Powers—In general.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 297, 317.

Control of discretion by judiciary.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 255; INJUNCTIONS, vol. 6, p. 1028.

Delegation of legislative powers.—See the title CONSTITUTIONAL LAW, vol. 4, p. 284.

70. *Restricted by prior legislature.*—The Aurora, 7 Cranch 382, 3 L. Ed. 378; Manigault v. Springs, 199 U. S. 473, 486, 50 L. Ed. 274.

71. *The bill.*—See post, "Form," VIII.

72. *Introduction of bill—For raising revenue.*—Twin City Bank v. Nebeker, 167 U. S. 196, 202, 42 L. Ed. 134. See post, "As Evidence," IV, L, 2.

73. *Revenue incidental to main purpose.*—Twin City Bank v. Nebeker, 167 U. S. 196, 202, 42 L. Ed. 134; Millard v. Rob-

erts, 202 U. S. 429, 50 L. Ed. 1090.

74. *Act providing for national currency not a revenue bill.*—Twin City Bank v. Nebeker, 167 U. S. 196, 202, 42 L. Ed. 134. See, also, Lumberman's Bank v. Huston, 167 U. S. 203, 42 L. Ed. 136.

75. *Act providing for construction of railroad station.*—It was held, that whatever taxes are imposed are but means to the purposes provided by the act. Millard v. Roberts, 202 U. S. 429, 434, 437, 50 L. Ed. 1090, following Twin City Bank v. Nebeker, 167 U. S. 196, 42 L. Ed. 134.

76. *Readings.*—Wilkes County v. Coler, 180 U. S. 506, 521, 45 L. Ed. 642.

77. *Passage—Necessity for.*—"There is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, nor in the president to approve, nor in the secretary of state to receive and cause to be punished, as a legislative act, any bill not passed by congress." Field v. Clark, 143 U. S. 649, 669, 36 L. Ed. 294.

78. *Concurrence of both houses.*—De Lima v. Bidwell, 182 U. S. 1, 195, 45 L. Ed. 1041. See the title TREATIES.

3. **VOTE NECESSARY**.—*a. In General.*—The power of a legislative body is not vested in any one individual, but in the aggregate of the members who compose it and the question which has often been raised is, what is necessary to constitute the official action of the body?⁷⁹ The general rule of all parliamentary bodies, except where a constitutional provision requires a majority of all members elected, is that, when a quorum is present, the act of a majority of the quorum is the act of the body. No such limitation is found in the federal constitution, and therefore the general law of such bodies obtains.⁸⁰ A constitutional provision requiring a majority vote of all members elected is not directory.⁸¹ The constitution of Michigan required the assent of two-thirds of each house to any act of incorporation. An act to incorporate a banking association was held within this provision.⁸²

b. On Passage Over Veto.—On the passage of a bill over the veto of the president a vote of two-thirds of each house of congress is required.⁸³

4. **TAKING VOTE.**—A constitutional requirement for the taking of a vote of ayes and noes is mandatory.⁸⁴

5. **RECORDING VOTE.**—A constitutional requirement that the yeas and nays on the second and third reading of the bill shall have been entered on the journal, cannot be dispensed with by the act of the presiding officers of the two houses of the general assembly in certifying a bill as passed, when the journal does not contain entries showing that to have been done which was necessary to be done before there was power to enact the bill into a law.⁸⁵

6. **OVER DISAPPROVAL OF EXECUTIVE.**—See elsewhere in this title.⁸⁶

7. **AMENDMENT DURING PASSAGE.**—It is provided by the constitution of Missouri that no bill shall be so amended in its passage through either house as to change its original purpose.⁸⁷

G. Signing by Presiding Officers.—Although the constitution does not expressly require bills that have passed congress to be attested by the signatures of the presiding officers of the two houses, usage, the orderly conduct of legislative proceedings and the rules under which the two bodies have acted since the organization of the government, require that mode of authentication.⁸⁸ A constitutional requirement of the signing of an act by the presiding officers of the two houses may be for the purpose of attestation only.⁸⁹

H. Presentation to Executive.—After a bill has been presented to the president, no further action is required by congress in respect to the bill, unless it be disapproved by him and within the time prescribed by the constitution be returned for consideration.⁹⁰ No evidence is required of the president, either

79. **Vote necessary.**—United States *v.* Ballin, 144 U. S. 1, 7, 36 L. Ed. 321.

80. **Majority of quorum—Members elected.**—United States *v.* Ballin, 144 U. S. 1, 6, 36 L. Ed. 321.

81. *Post v. Supervisors*, 105 U. S. 667, 668, 26 L. Ed. 1204.

82. *Nesmith v. Sheldon*, 7 How. 812, 12 L. Ed. 925.

83. **On passage over veto.**—*Kilbourn v. Thompson*, 103 U. S. 168, 191, 26 L. Ed. 377.

84. **Taking vote.**—*Post v. Supervisors*, 105 U. S. 667, 668, 26 L. Ed. 1204. See *post*, "What to Be Entered," IV, K, 2, a.

85. **Recording vote.**—It has been so held by the supreme court of North Carolina in the cases arising under the acts of February 20, 1897, April 11, 1868, March 2, 1881. *Wilkes County v. Coler*, 180 U. S. 506, 522, 45 L. Ed. 642.

86. **Over disapproval of executive.**—See *ante*, "On Passage Over Veto," IV, F, 3,

b; *post*, "Necessity for," IV, F, 1.

87. **Amendment during passage.**—*Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

88. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the constitution. *Field v. Clark*, 143 U. S. 649, 672, 36 L. Ed. 294; *Twin City Bank v. Nebeker*, 167 U. S. 196, 200, 42 L. Ed. 134; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 46 L. Ed. 1144.

89. *Memphis v. United States*, 97 U. S. 293, 296, 24 L. Ed. 920.

90. **Presentation to executive.**—*La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 454, 44 L. Ed. 223.

by the constitution or in actual practice, to show that he has ever received or considered a bill.⁹¹

I. Approval of Executive—1. NATURE OF ACT OF APPROVAL.—The president in approving bills passed by congress may be said to participate in the enactment of laws which the constitution requires him to execute, and his action is not strictly an executive function, but is legislative in its nature.⁹²

2. NECESSITY FOR APPROVAL.—The president is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of congress.⁹³ This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the president to approve it, by a vote of two-thirds of each house of congress.⁹⁴

3. DUTY TO APPROVE.—It is made the duty of the president by the constitution to examine and act upon every bill passed by congress.⁹⁵

4. TIME OF APPROVAL.—a. *Within Ten Days*.—The time within which the president must approve or disapprove a bill passed by congress is prescribed by the constitution, and must be within ten days, Sundays excepted after presentation.⁹⁶

b. *During Recess*.—Although the constitution is silent as to the power of the president to approve a bill while congress is not in session, there is nothing in its provisions making the approval of a bill a nullity, if such approval occurs while the two houses of congress are in recess for a named time; and, in the absence of such a provision, the court cannot so restrict the power of the executive.⁹⁷

c. *After Adjournment*.—Whether the president can sign a bill after the final adjournment of congress for the session, is a question that has not been considered or decided.⁹⁸

d. *Proof of Time of Approval*.—The record of the secretary of state of the time of filing such a paper, the journals of the two houses of congress, the message of the president, and other circumstantial facts, may produce stronger conviction of the day and of the year in which the bill was signed, than the date affixed by the president.⁹⁹

5. MANNER OF APPROVAL.—a. *By Signing*.—There are two courses of action by the president in reference to a bill presented to him, each of which results in the bill becoming a law. One of them is by signing the bill within ten days.¹

91. Proof of presentation.—Gardner v. Collector, 6 Wall. 499, 506, 18 L. Ed. 890.

92. Approval of executive—Nature of act.—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 453, 44 L. Ed. 223; Kilbourn v. Thompson, 103 U. S. 168, 191, 26 L. Ed. 377. See the title CONSTITUTIONAL LAW, vol. 4, p. 219.

93. Necessity for approval.—Kilbourn v. Thompson, 103 U. S. 168, 191, 26 L. Ed. 377; De Lima v. Bidwell, 182 U. S. 1, 195, 45 L. Ed. 1041.

94. When approval not necessary.—Kilbourn v. Thompson, 103 U. S. 168, 191, 26 L. Ed. 377.

Under constitution of Tennessee.—Memphis v. United States, 97 U. S. 293, 296, 24 L. Ed. 920.

95. Duty to approve.—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 453, 44 L. Ed. 223; Gardner v. Collector, 6 Wall. 499, 506, 18 L. Ed. 890.

Duty to sign.—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 454, 44 L. Ed. 223.

Governor of territory of New Mexico.—Lyons v. Woods, 153 U. S. 649, 658, 38 L. Ed. 854.

96. Time of approval—Ten days.—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 454, 44 L. Ed. 223.

97. Recess.—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 453, 44 L. Ed. 223.

98. After adjournment.—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 455, 44 L. Ed. 223.

Under the constitution of Illinois.—Seven Hickory v. Ellery, 103 U. S. 423, 424, 26 L. Ed. 435.

99. Proof of time of approval.—In the case of Gardner v. Collector, 6 Wall. 499, 511, 18 L. Ed. 890, the question decided was as to the time when an act of congress took effect, the doubt, upon that point, arising from the fact that the month and day, but not the year, of the approval of the act by the president appeared upon the enrolled act in the custody of the department of state. This omission, it was held, could be supplied in support of the act from the legislative journals. Field v. Clark, 143 U. S. 649, 678, 36 L. Ed. 294.

1. Manner of approval—Signing.—Gardner v. Collector, 6 Wall. 499, 506, 18 L. Ed. 890; La Abra Silver Min. Co. v.

It is not required that he shall write on the bill the word approved, nor that he shall date it,² nor that he shall inform congress by message of his approval.³

b. *By Failure to Act.*—The other course is by his keeping it ten days and refusing to sign it.⁴

6. **WHAT ACTS MAY BE APPROVED.**—The power of the president to approve or disapprove an act applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution.⁵ The president has no authority to approve a bill not constitutionally passed by congress.⁶

7. **EFFECT OF APPROVAL.**—A bill becomes a law from the moment it is signed by the executive.⁷

J. Submission to Popular Vote.—See elsewhere.⁸

K. Legislative Journal.—1. **NECESSITY FOR JOURNAL.**—The constitution of the United States provides that each house shall keep a journal of its proceedings.⁹

2. **ENTRIES IN JOURNAL.**—a. *What to Be Entered.*—The constitution of the United States requires that the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.¹⁰ It is not required that each amendment shall be entered at large on the journal of congress.¹¹ The effect upon legislation of the failure to enter upon the journals that which is expressly required by a state constitution to be entered on them before an act can become a law, is a question not decided;¹² but it has been held that such a requirement is not merely directory.¹³

b. *How Entries Made.*—In respect to the particular mode in which, or with what fullness, shall be kept the proceedings of either house relating to matters not expressly required to be entered on the journals; whether bills, orders, resolutions, reports and amendments shall be entered at large on the journal, or only referred to and designated by their titles or by numbers; these and like

United States, 175 U. S. 423, 454, 44 L. Ed. 223.

2. **Fixing date of approval.**—Gardner v. Collector, 6 Wall. 499, 506, 18 L. Ed. 890.

3. **Informing congress of approval.**—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 454, 44 L. Ed. 223.

4. **Failure to act.**—Gardner v. Collector, 6 Wall. 499, 506, 18 L. Ed. 890; La Abra Silver Min. Co. v. United States, 175 U. S. 423, 454, 44 L. Ed. 223.

Under constitution of Illinois.—Seven Hickory v. Ellery, 103 U. S. 423, 425, 26 L. Ed. 435.

5. **What acts may be approved—Constitutional amendments.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 28.

6. **Act not passed by congress.**—Field v. Clark, 143 U. S. 649, 672, 36 L. Ed. 294.

7. **Effect of approval—Bill becomes law.**—La Abra Silver Min. Co. v. United States, 175 U. S. 423, 454, 44 L. Ed. 223; Seven Hickory v. Ellery, 103 U. S. 423, 425, 26 L. Ed. 435.

Everything done after that is with a view to preserving the evidence of its passage and approval. Seven Hickory v. Ellery, 103 U. S. 423, 425, 26 L. Ed. 435. When a bill receives the approval of the executive, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. Field v.

Clark, 143 U. S. 649, 672, 36 L. Ed. 294; Twin City Bank v. Nebeker, 167 U. S. 196, 200, 42 L. Ed. 134. See post, "Enrolled Bill," IV, L.

8. **Submission to popular vote.**—See the title INTOXICATING LIQUORS, vol. 7, p. 520.

9. **United States v. Ballin,** 144 U. S. 1, 4, 36 L. Ed. 321.

The constitution of Illinois requiring each house of the legislature to keep and publish a journal of its proceedings, is not merely directory. Post v. Supervisors, 105 U. S. 667, 668, 26 L. Ed. 1204.

10. **Yea and nay vote.**—In United States v. Ballin, 144 U. S. 1, 11, 36 L. Ed. 321, it was assumed that by reason of this clause reference may be had to the journal, to see whether the yeas and nays were ordered, and if so, what was the vote disclosed thereby.

North Carolina.—Wilkes County v. Coler, 180 U. S. 506, 521, 45 L. Ed. 642.

Illinois.—South Ottawa v. Perkins, 94 U. S. 260, 263, 24 L. Ed. 154.

11. **Amendments.**—Harwood v. Wentworth, 162 U. S. 547, 557, 40 L. Ed. 1069.

12. **Effect of failure to enter proper matters.**—Field v. Clark, 143 U. S. 649, 36 L. Ed. 294; Wilkes County v. Coler, 180 U. S. 506, 524, 45 L. Ed. 642.

13. **Post v. Supervisors,** 105 U. S. 667, 668, 26 L. Ed. 1204.

matters are left to the discretion of the respective houses of congress.¹⁴

3. **JOURNAL AS EVIDENCE**—a. *In General*.—In all public matters, the journals of congress and of the state legislatures are evidence.¹⁵ It has been said, that the journals are not evidence of particular facts stated in the resolutions, which are not a part of the proceedings of the house.¹⁶ It is provided by act of congress that extracts from the journals of the houses certified by the secretary of state shall be admitted as evidence in the courts of the United States and have the same force as the originals.¹⁷ As to matters in regard to which reference may be had to the journal, it must be assumed to speak the truth.¹⁸ The constitutional provision requiring each house to keep a journal does not make such journals conclusive evidence that an act has in fact been passed.¹⁹

b. *To Impeach Enrolled Bill*.—See elsewhere.²⁰

4. **JUDICIAL NOTICE OF JOURNAL**.—See elsewhere.²¹

5. **CONTRADICTING JOURNAL**.—Where the journal is referred to for the purpose of impeaching a statute properly authenticated and approved, it is not admissible to show that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force to the impeachment.²²

L. Enrolled Bill—1. **FILING**.—The proper place of filing an enrolled bill that has passed congress is the office of the secretary of state,²³ and of one that has passed the legislature of the territory of New Mexico, the office of the secretary of the territory.²⁴

2. **AS EVIDENCE**.—An enrolled bill which has passed congress and is found in the custody of the secretary of state,²⁵ and having the official attestations of the speaker of the house of representatives, of the president of the senate,²⁶ and of the president of the United States,²⁷ carries, on its face, a solemn assurance by the legislative and executive departments of the government, charged, respectfully, with the duty of enacting and executing the laws, that it was passed by congress.²⁸ Such act cannot be invalidated by an appeal to the journal

14. **How entries made**.—*Field v. Clark*, 143 U. S. 649, 671, 36 L. Ed. 294.

Mandamus to compel making of entries.—See the title **MANDAMUS**, vol. 8, p. 66.

15. **Journal as evidence**.—"The journals of the house of lords have always been admitted as evidence of their proceedings, even in criminal cases; and the journals of the house of commons are also admissible." *Watkins v. Holman*, 16 Pet. 25, 56, 10 L. Ed. 873. See ante, "Readings," IV, E.

16. **Matters not part of proceedings of legislature**.—As, for instance of this principle, a resolution stating the existence of a popish plot would not be evidence of the fact in a criminal case. *Watkins v. Holman*, 16 Pet. 25, 56, 10 L. Ed. 873.

The congressional record does not make that evidence which is intrinsically not so. *Watkins v. Holman*, 16 Pet. 25, 56, 10 L. Ed. 873.

17. **Copy of journals as evidence**.—*Field v. Clark*, 143 U. S. 649, 679, 36 L. Ed. 294. See the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 456.

The same provision exists in the statutes of some of the states. *Post v. Supervisors*, 105 U. S. 667, 670, 26 L. Ed. 1204. See the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 436.

18. **Weight as evidence**.—*United States*

v. Ballin, 144 U. S. 1, 4, 36 L. Ed. 321.

19. *Field v. Clark*, 143 U. S. 649, 671, 36 L. Ed. 294. See the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 436.

20. **To impeach enrolled bill**.—See post, "Enrolled Bill," IV, L.

21. **Judicial notice of journal**.—See the title **JUDICIAL NOTICE**, vol. 7, p. 688.

22. **Contradicting journal**.—*United States v. Ballin*, 144 U. S. 1, 4, 36 L. Ed. 321; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819.

23. *United States v. Ballin*, 144 U. S. 1, 3, 36 L. Ed. 321; *Gardner v. Collector*, 6 Wall. 499, 507, 18 L. Ed. 890.

24. *Lyons v. Woods*, 153 U. S. 649, 658, 38 L. Ed. 854.

25. **Enrolled bill as evidence**.—See ante, "Filing," IV, L, 1.

26. See ante, "Signing by Presiding Officers," IV, G.

27. See ante, "Approval of Executive," IV, I.

28. *Field v. Clark*, 143 U. S. 649, 672, 679, 36 L. Ed. 294; *United States v. Ballin*, 144 U. S. 1, 36 L. Ed. 321; *Jones v. United States*, 137 U. S. 202, 216, 34 L. Ed. 691; *Lyons v. Woods*, 153 U. S. 649, 663, 38 L. Ed. 854; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204.

"An enrolled act, thus authenticated, is

of either house,²⁹ by showing that a section of the act as passed was not contained in the enrolled act,³⁰ nor by showing that a bill for raising revenue did not originate in the house of representatives.³¹ This rule may be changed by act of congress,³² the constitution not precluding the adoption of any mode to that end which the wisdom of congress may suggest,³³ but the act making certified extracts from the journals admissible as evidence in the courts of the United States does not so operate.³⁴ As the organic act of New Mexico, taken with the Revised Statutes, conforms quite closely to the provisions of the federal constitution, the same rule applies to an act passed by its legislature and submitted to congress.³⁵ The same rule applies to an act of the legislature of the territory of Arizona.³⁶ The courts of many of the states under constitutional or statutory provisions of a peculiar character, which, expressly or by necessary implication, required or authorized the court to go behind the enrolled act, when the question was whether the act, when authenticated and deposited in the proper office, was duly passed by the legislature, have announced a different conclusion.³⁷

V. Adoption.

An English statute enacted prior to the separation of the American colonies not expressly made applicable to the colonies may be adopted by express legislative action, and it seems by judicial decisions and usage.³⁸ The statutes of Maryland and Virginia were adopted in the District of Columbia by congress.³⁹

sufficient evidence of itself—nothing to the contrary appearing upon its face—that it passed congress.” *Field v. Clark*, 143 U. S. 649, 672, 36 L. Ed. 294.

29. *Field v. Clark*, 143 U. S. 649, 672, 36 L. Ed. 294; *Harwood v. Wentworth*, 162 U. S. 547, 560, 40 L. Ed. 1069.

30. *Field v. Clark*, 143 U. S. 649, 680, 36 L. Ed. 294.

31. *Field v. Clark*, 143 U. S. 649, 670, 36 L. Ed. 294; *Twin City Bank v. Nebeker*, 167 U. S. 196, 203, 42 L. Ed. 134.

32. Referring to the above case, it was said in *Harwood v. Wentworth*, 162 U. S. 547, 560, 40 L. Ed. 1069, that if the principle announced in *Field v. Clark*, 143 U. S. 649, 672, 36 L. Ed. 294, involves any danger to the public, it is competent for congress to meet it by declaring under what circumstances, or by what kind of evidence, an enrolled act of congress or of a territorial legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it was committed by statute, may be shown not to be in the form in which it was when passed by congress or by the territorial legislature. *Twin City Bank v. Nebeker*, 167 U. S. 196, 201, 42 L. Ed. 134.

33. *Field v. Clark*, 143 U. S. 649, 670, 36 L. Ed. 294.

34. *Field v. Clark*, 143 U. S. 649, 679, 36 L. Ed. 294.

35. Thus the courts will not go behind the enrolled bill and hold it void because certain members of the quorum were seated without having certificates of election. *Lyons v. Woods*, 153 U. S. 649, 660, 38 L. Ed. 854, following *Field v. Clark*, 143 U. S. 649, 671, 36 L. Ed. 294.

36. Thus it cannot be shown that an act contained, at the time of its final passage, provisions that were omitted from it with-

out authority of the council or the house, before it was presented to the governor for his approval. *Harwood v. Wentworth*, 162 U. S. 547, 557, 40 L. Ed. 1069, following *Field v. Clark*, 143 U. S. 649, 671, 36 L. Ed. 294.

37. **Acts of state legislatures.**—*Lyons v. Woods*, 153 U. S. 649, 663, 38 L. Ed. 854.

No conclusive presumption of authenticity of an enrolled act can arise to defeat an express constitutional inhibition. *Wilkes County v. Coler*, 180 U. S. 506, 521, 45 L. Ed. 642; *United States v. Ballin*, 144 U. S. 1, 4, 36 L. Ed. 321.

It is the settled construction of the constitution of Illinois that no act can be deemed a valid law unless, by the journals of the legislature, it appears to have been regularly passed by both houses. *Wilkes County v. Coler*, 180 U. S. 506, 520, 45 L. Ed. 642, distinguishing *Field v. Clark*, 143 U. S. 649, 671, 36 L. Ed. 294.

The journals of the two houses are the only evidence of the validity of the legislative enactments, under the Nebraska constitution, article 3, §§ 8, 10. *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819.

“To the government’s brief was attached an appendix containing a list of the authorities, by states, upon the question whether the legislative journals could be used to impeach the completely enrolled act, duly recorded and authenticated. This list is printed in the margin.” *Field v. Clark*, 143 U. S. 649, 661, 36 L. Ed. 294. See citations for appellees.

38. **Adoption of English statutes.**—*Taylor v. Thomson*, 5 Pet. 358, 8 L. Ed. 154. See the title COMMON LAW, vol. 3, p. 968.

39. **Adoption of state statutes.**—See the title DISTRICT OF COLUMBIA, vol. 5, p. 407.

VI. Publication.

Publication by outcry is unknown in this country.⁴⁰ The statutes of the United States are published in a printed volume of statutes published and distributed under the authority of the United States by the congressional printer from a copy of every act certified and furnished by the secretary of state.⁴¹ Where a law, as published, has been acknowledged by the people and received a harmonious interpretation for a long series of years, the propriety may well be doubted of referring to an ancient manuscript to show that the law as published was not an exact copy of the original manuscript.⁴² The acts of the legislature of Louisiana were formerly promulgated in both the English and French languages, but the constitution of the state ever since its admission into the union, has provided that all laws shall be promulgated in the language in which the constitution of the United States is written.⁴³

VII. Time of Taking Effect.

A. First Day of Session.—By a rule of the common law, statutes take effect from the first day of the term of the legislature.⁴⁴ This rule formerly prevailed in Virginia but was changed by an early statute which, however, does not apply where a law is passed during any session of the legislature changing or repealing a former law of the same session, and both acts have the same commencement, that is the first day of the session.⁴⁵

B. Date of Enactment.—In the absence of a statute fixing the time when enactments shall take effect, it is a settled rule that they take effect from their date,⁴⁶ which in the case of acts of congress,⁴⁷ and of some of the states, is the date of approval by the executive, unless passed over his objection;⁴⁸ but, in the case of acts of the legislature of other states which do not require the approval of the executive, from the date of passage.⁴⁹ Where the language employed is from and after the passing of this act, the same result follows.⁵⁰ It is a general rule that where a statute takes effect from the date of its passage, the day on which passed is to be computed as a part of the time it is in force.⁵¹

40. *Lapeyre v. United States*, 17 Wall. 191, 198, 21 L. Ed. 606.

41. *Field v. Clark*, 143 U. S. 649, 668, 36 L. Ed. 294.

The secretary of state alone can give certified copies of an act and from his office only can the legally authorized publisher receive copy from which it is printed. *Gardner v. Collector*, 6 Wall. 499, 507, 18 L. Ed. 890.

42. *Impeaching act as published.*—*Pease v. Peck*, 18 How. 595, 15 L. Ed. 518.

43. *Acts of Louisiana legislature.*—*Viterbo v. Friedlander*, 120 U. S. 707, 725, 30 L. Ed. 776. See post, "Language," VIII, D.

44. *Time of taking effect—First of session.*—*Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638.

45. *Brown v. Barry*, 3 Dall. 365, 367, 1 L. Ed. 638.

46. *Date of enactment—In absence of statute.*—*Lapeyre v. United States*, 17 Wall. 191, 198, 21 L. Ed. 606; *Matthews v. Zane*, 7 Wheat. 164, 211, 5 L. Ed. 425; *Taylor v. Brown*, 147 U. S. 640, 643, 37 L. Ed. 313; *Arnold v. United States*, 9 Cranch 104, 120, 3 L. Ed. 671; *De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041; *Robertson v. Bradbury*, 132 U. S. 491, 492, 33 L. Ed. 405.

Repealing acts.—See post, "Time of Taking Effect," XI, D.

47. *Date of approval—Acts of Congress.*—*Burgess v. Salmon*, 97 U. S. 381, 383, 24 L. Ed. 1104.

48. *Acts of state legislature.*—*Memphis v. United States*, 97 U. S. 293, 296, 24 L. Ed. 920.

49. *Memphis v. United States*, 97 U. S. 293, 296, 24 L. Ed. 920.

50. *Arnold v. United States*, 9 Cranch 104, 120, 3 L. Ed. 671; *Lapeyre v. United States*, 17 Wall. 191, 198, 21 L. Ed. 606; *Taylor v. Brown*, 147 U. S. 640, 643, 37 L. Ed. 313.

Under a provision that an act shall take effect from and after its passage, it takes effect from the very day on which passed and not from the day of its promulgation and publication. *Arnold v. United States*, 9 Cranch 104, 3 L. Ed. 671.

51. *Arnold v. United States*, 9 Cranch 104, 3 L. Ed. 671; *Burgess v. Salmon*, 97 U. S. 381, 384, 24 L. Ed. 1104; *Taylor v. Brown*, 147 U. S. 640, 643, 37 L. Ed. 313.

It was so held in construing the act of July 1, 1812, providing "that an additional duty of 100 per cent, upon the permanent duties now imposed by law, etc., shall be levied and collected upon all goods, wares and merchandises which shall, from and after the passing of this act, be imported into the United States from any foreign port or place." *Arnold v. United States*, 9 Cranch 104, 119, 3 L. Ed. 371.

In such cases it becomes operative from the first moment of that day. Fractions of the day are generally not recognized,⁵² but the rule is otherwise in regard to revenue laws,⁵³ especially where a penalty is imposed.⁵⁴ This rule which excludes the terminus a quo is not absolute. It may be included when necessary to give effect to the obvious intention.⁵⁵

C. Past Date.—Congress may direct a statute to take effect as of a date prior to its passage and the result is the same as if it had been passed previous thereto.⁵⁶ A legislative ratification of an act done without authority relates back and takes effect from the time the act was done.⁵⁷

D. Future Date.—An act may be made to take effect on a future date by its own provisions,⁵⁸ or by the provisions of a suspending act passed during the same session of the legislature.⁵⁹ In order that business men and importers may understand them, tariff laws are usually enacted to take effect at a future day.⁶⁰

E. Upon Contingency.—The ascertainment of a contingency upon which an act shall take effect may be left to such agencies as the legislative power may designate.⁶¹ It may be left to the president to be declared by proclamation.⁶² A statute which provides that it shall be lawful for a county to subscribe to railroad stock does not become operative until acted upon.⁶³

F. Upon Proclamation of President.—An act of congress may be passed

52. *Lapeyre v. United States*, 17 Wall. 191, 198, 21 L. Ed. 606; *Louisville v. Savings Bank*, 104 U. S. 469, 476, 26 L. Ed. 775; *Arnold v. United States*, 9 Cranch 104, 3 L. Ed. 671; *United States v. Norton*, 97 U. S. 164, 170, 24 L. Ed. 907; *Burgess v. Salmon*, 97 U. S. 381, 384, 24 L. Ed. 1104.

53. With regard to the time of taking effect of revenue laws the law will take notice of the fraction of a day. Accordingly it has been held that the time of the approval of a revenue law by the president points out the earliest possible moment at which it could become law. Accordingly where acts are done in the forenoon, but the statute is not approved by the president until the afternoon of the same day, such acts must be governed by the pre-existing law. Thus, an act increasing the tax on tobacco does not apply to tobacco which is stamped, sold, and removed on the very day the act went into effect, but before it had been approved by the president. *Burgess v. Salmon*, 97 U. S. 381, 24 L. Ed. 1104.

54. Moreover to impose upon the owner of the goods a criminal punishment or a penalty for not paying an additional tax of four cents a pound, would subject him to the operation of an ex post facto law, the rule being that the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal. *Burgess v. Salmon*, 97 U. S. 381, 24 L. Ed. 1104.

55. **Exceptions to rule.**—*Arnold v. United States*, 9 Cranch 104, 120, 3 L. Ed. 671; *Taylor v. Brown*, 147 U. S. 640, 643, 37 L. Ed. 313; *Lapeyre v. United States*, 17 Wall. 191, 21 L. Ed. 606; *Burgess v. Salmon*, 97 U. S. 381, 383, 24 L. Ed. 1104.

56. **Past date.**—*United States v. Green*, 138 U. S. 293, 296, 34 L. Ed. 960.

57. **Ratifying acts.**—*United States v. Arredondo*, 6 Pet. 691, 713, 8 L. Ed. 547; *Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491, 497, 24 L. Ed. 1095.

58. **Future date—By provisions of act.**—The bankruptcy act of April 4, 1800, took effect June 1, 1800, according to its provision. *Wood v. Owings*, 1 Cranch 239, 2 L. Ed. 94. And see the title BANKRUPTCY, vol. 2, p. 803.

59. **By provisions of suspending act.**—*Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638. See post, "Suspension," XII.

60. **Revenue laws.**—*United States v. American Sugar Ref. Co.*, 202 U. S. 563, 577, 50 L. Ed. 1149; *United States v. Burr*, 159 U. S. 78, 40 L. Ed. 82.

61. *Miller v. Mayor*, 109 U. S. 385, 394, 27 L. Ed. 971; *South Carolina v. Georgia*, 93 U. S. 4, 13, 23 L. Ed. 782.

62. **Proclamation of president.**—"Thus in the leading case of *The Aurora*, 7 Cranch 382, 3 L. Ed. 378, it was held that congress might make the revival of a law conditional upon a fact then contingent, and empower the president to declare by proclamation that such fact has occurred and the law revived." *St. Louis Consol. Coal Co. v. Illinois*, 185 U. S. 203, 210, 46 L. Ed. 872.

63. **Action of municipality.**—The acts of *Missouri*, 1859, 1860, which provide that it shall be lawful for the county court of any county in the state to subscribe to the capital stock of a railroad company, do not confer a self-executing power, but an authority to the county, and, until affirmatively acted upon, possesses no more force than if it did not exist. *County of Dallas v. MacKenzie*, 94 U. S. 660, 663, 24 L. Ed. 182.

to take effect upon a date proclaimed by the president.⁶⁴

G. Upon Publication and Notification.—The repeal of a colonial law of Pennsylvania by the king and council took effect from the time of its notification in the colony.⁶⁵ The votes of the legislative body and its minutes may be produced in evidence to establish the date of notification.⁶⁶

H. Of Particular Acts.—See elsewhere.⁶⁷

I. Suspension of Time of Taking Effect.—The time of taking effect of a repealing act may be suspended by another act at the same session of the legislature.⁶⁸

J. Proof of Time of Taking Effect.—Upon the question of the date when a public statute takes effect, the court may consult the original roll or other official records.⁶⁹

VIII. Form.

A. In General.—It is provided by the constitution of some of the states that no law shall be passed except by bill.⁷⁰

B. Title and Subject—1. CONSTITUTIONAL PROVISIONS—*a. In General.*—The constitutions of many of the different states require that every law enacted by their legislatures shall contain but one subject,⁷¹ and that shall be expressed in the title of the act.⁷² This provision is found in the constitutions of California,⁷³ Illinois,⁷⁴ Iowa,⁷⁵ Kentucky,⁷⁶ Louisiana,⁷⁷ Michigan,⁷⁸ Missouri,⁷⁹ Nebraska,⁸⁰ New Jersey,⁸¹ South Carolina,⁸² Texas and other

64. Upon proclamation of president.—See ante, "Upon Contingency," VII, E.

The act of August 19, 1890, declares that where one of two vessels is to keep out of the way, the other shall keep her course and speed. The proclamation of the president declaring it in effect did not become operative before. *The Britannia*, 153 U. S. 130, 142, 38 L. Ed. 660.

The tariff act in regard to imports from Cuba took effect upon the date affixed by the proclamation of the presidents of the two countries as the date when the treaty should go into effect. *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 50 L. Ed. 1149; *Franklin Sugar Ref. Co. v. United States*, 202 U. S. 580, 50 L. Ed. 1153.

Embargo and nonintercourse acts.—See the title EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 734.

65. Upon publication and notification.—*Albertson v. Robeson*, 1 Dall. 9, 1 L. Ed. 14.

66. Albertson v. Robeson, 1 Dall. 9, 1 L. Ed. 14.

67. Repealing acts.—See ante, "Date of Enactment," VII, B; "Upon Publication and Notification," VII, G; "Suspension of Time of Taking Effect," VII, I; post, "Time of Taking Effect," XI, D.

Reviving acts.—See post, "Revival," XV. **Statutes of limitations.**—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 910.

Of United States constitution.—See the title CONSTITUTIONAL LAW, vol. 4, p. 28.

68. Suspension of time of taking effect.—*Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638.

69. Jones v. United States, 137 U. S. 202, 216, 34 L. Ed. 691; *Gardner v. Collector*, 6 Wall. 499, 18 L. Ed. 890; *South Ottawa v. Perkins*, 94 U. S. 260, 267, 269,

277, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204. See ante, "Journal as Evidence," IV, K, 3; "Upon Publication and Notification," VII, G.

70. Knights Templars', etc., Co. v. Jarman, 187 U. S. 197, 47 L. Ed. 139.

71. See post, "Singleness of Subject," VIII, B, 2.

72. See post, "Expression of Subject," VIII, B, 3.

73. Ross v. Aguirre, 191 U. S. 60, 48 L. Ed. 94.

74. Jonesboro City v. Cairo, etc., R. Co., 110 U. S. 192, 198, 28 L. Ed. 116; *Unity v. Burrage*, 103 U. S. 447, 457, 26 L. Ed. 405; *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982. See, also, *Blair v. Chicago*, 201 U. S. 400, 451, 50 L. Ed. 801.

75. Ackley School District v. Hall, 113 U. S. 135, 28 L. Ed. 954; *Mahomet v. Quackenbush*, 117 U. S. 508, 513, 29 L. Ed. 982.

76. Carter County v. Sinton, 120 U. S. 517, 522, 30 L. Ed. 701.

77. Louisiana v. Pilsbury, 105 U. S. 278, 289, 26 L. Ed. 1090.

78. Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368, 392, 46 L. Ed. 592.

79. Woodson v. Murdock, 22 Wall. 351, 373, 22 L. Ed. 716; *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 205, 47 L. Ed. 139.

80. Otoe County v. Baldwin, 111 U. S. 1, 16, 28 L. Ed. 331; *Mahomet v. Quackenbush*, 117 U. S. 508, 513, 29 L. Ed. 982; *Read v. Plattsmouth*, 107 U. S. 568, 573, 27 L. Ed. 414.

81. Montclair v. Ramsdell, 107 U. S. 147, 27 L. Ed. 431; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 687, 31 L. Ed. 543.

82. Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 563, 33 L. Ed. 537; *Myer v. Car Co.*, 102 U. S. 1, 11, 12, 26 L. Ed. 59.

states.⁸³

b. *Construction*.—These constitutional provisions are to be given a reasonable construction and effect.⁸⁴

c. *Purpose and Object*.—The purpose of such provisions is to prevent the use of deceptive titles as a cover for vicious legislation by enabling members of the general assembly to form opinions of the nature of the bill by merely hearing its title read.⁸⁵

d. *Compliance with*.—In some states these constitutional provisions are construed to be mandatory, and not directory only.⁸⁶ However, even in such states, it has generally been held that the requirement is satisfied if the law has but one general object, and that is clearly⁸⁷ or even fairly expressed in the title.⁸⁸ It is only in cases of palpable conflict between the statute and the constitutional provision that the statute will be declared void.⁸⁹

2. SINGLENESSE OF SUBJECT.—A statute, though it contains numerous provisions,⁹⁰ all of which are germane to the general subject indicated by its title⁹¹ and seek the accomplishment of one general purpose,⁹² relates to a single subject matter. A state may constitutionally create a municipal corporation and grant to it the powers usually exercised by such corporations;⁹³ incorporate a railroad company and empower municipal corporations along its proposed line to subscribe to its stock;⁹⁴ legalize a county election to issue bonds to aid the construction of a railroad and authorize certain townships thereof to subscribe to stock in such railroad;⁹⁵ legalize municipal bonds and levy taxes for their payment;⁹⁶ authorize a school district to borrow money and issue bonds therefor, for the purpose of erecting and completing school houses, legalizing bonds heretofore issued, and making school orders draw six

83. *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816.

84. *Blair v. Chicago*, 201 U. S. 400, 452, 50 L. Ed. 801; *Carter County v. Sinton*, 120 U. S. 517, 30 L. Ed. 701.

85. *Carter County v. Sinton*, 120 U. S. 517, 30 L. Ed. 701; *Montclair v. Ramsdell*, 107 U. S. 147, 153, 27 L. Ed. 431. See, also, *Louisiana v. Pilsbury*, 105 U. S. 278, 289, 26 L. Ed. 1090.

86. *Mahomet v. Quackenbush*, 117 U. S. 508, 511, 29 L. Ed. 982.

87. *Mahomet v. Quackenbush*, 117 U. S. 508, 511, 29 L. Ed. 982.

88. *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. Ed. 431; *Otoe County v. Baldwin*, 111 U. S. 1, 16, 28 L. Ed. 331; *Ackley School District v. Hall*, 113 U. S. 135, 28 L. Ed. 954; *Mahomet v. Quackenbush*, 117 U. S. 508, 513, 29 L. Ed. 982.

"It is enough if the law has but one general object, and that object is fairly expressed in its title." *Carter County v. Sinton*, 120 U. S. 517, 523, 30 L. Ed. 701.

89. *Montclair v. Ramsdell*, 107 U. S. 147, 155, 27 L. Ed. 431.

90. *Singleness of subject*.—*Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 392, 46 L. Ed. 592; *Woodson v. Murdock*, 22 Wall. 351, 373, 22 L. Ed. 716; *Montclair v. Ramsdell*, 107 U. S. 147, 155, 27 L. Ed. 431.

91. *Mahomet v. Quackenbush*, 117 U. S. 508, 511, 29 L. Ed. 982; *Louisiana v. Pilsbury*, 105 U. S. 278, 289, 26 L. Ed. 1090.

Under the Illinois constitution the generality of the title is no objection to the validity of a law so long as it does not

cover a legislation incongruous in itself and which by no fair intendment can be included as having necessary and proper connection. *Blair v. Chicago*, 201 U. S. 400, 451, 50 L. Ed. 801.

The act of New Jersey of March 31, 1869, entitled a "supplement to an act entitled 'An act to ascertain the rights of the state, and of riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in this state,' approved April 11, 1864," relates to a single subject. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 684, 31 L. Ed. 543.

92. *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 198, 28 L. Ed. 116; *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 392, 46 L. Ed. 592.

"The unity of the object must be sought in the end which the legislative act purposes to accomplish." *Montclair v. Ramsdell*, 107 U. S. 147, 153, 27 L. Ed. 431.

The constitutional provision of New Jersey does not prohibit the uniting of any number of provisions having one general object. *Montclair v. Ramsdell*, 107 U. S. 147, 153, 27 L. Ed. 431.

93. *Montclair v. Ramsdell*, 107 U. S. 147, 153, 27 L. Ed. 431; *Louisiana v. Pilsbury*, 105 U. S. 278, 289, 26 L. Ed. 1090.

94. *Mahomet v. Quackenbush*, 117 U. S. 508, 511, 29 L. Ed. 982; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816.

95. *Unity v. Burrage*, 103 U. S. 447, 457, 26 L. Ed. 405.

96. *Read v. Plattsouth*, 107 U. S. 568, 573, 579, 27 L. Ed. 414.

per centum interest in certain cases;⁹⁷ provide for the sale of railroad, the foreclosure of liens thereon and the amendment of its charter;⁹⁸ provide for the formation of street railways, the government and regulation thereof and for the extension of the act to other companies already organized;⁹⁹ regulate insurance companies on the assessment plan and provide in regard to the effect of the suicide of the insured.¹

3. **EXPRESSION OF SUBJECT**—*a. Sufficiency of Title.*—The manner, form² and degree of particularity in which an act shall be entitled rests in the discretion of the legislature.³ It is sufficient if the title be comprehensive enough to reasonably include the general object which a statute seeks to effect,⁴ without expressing each and every end and means necessary or convenient for the accomplishing of that object.⁵ Mere details need not be set forth.⁶ Nor is it necessary to state the reasons which induce the legislature to enact a bill.⁷ The title need not be an abstract or index of the act.⁸ Under the laws of California if the title of an amendatory act give the title of the original act in

97. *Ackley School District v. Hall*, 113 U. S. 135, 142, 28 L. Ed. 954. See, also, *Montclair v. Ramsdell*, 107 U. S. 147, 153, 27 L. Ed. 431.

98. *Woodson v. Murdock*, 22 Wall. 351, 373, 22 L. Ed. 716.

99. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 391, 46 L. Ed. 592.

1. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

2. *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982.

3. *Montclair v. Ramsdell*, 107 U. S. 147, 153, 27 L. Ed. 431.

4. **General title sufficient.**—*Walnut v. Wade*, 103 U. S. 683, 26 L. Ed. 526; *Carter County v. Sinton*, 120 U. S. 517, 523, 30 L. Ed. 701; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 31 L. Ed. 543; *Blair v. Chicago*, 201 U. S. 400, 451, 50 L. Ed. 801.

The subject of an act need not be specifically and exactly expressed in the title; it is sufficient if it calls attention to the subject thereof in general terms. *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 28 L. Ed. 116.

The title of the act of Illinois of February 14, 1859, is "An act to promote the construction of horse railways in the city of Chicago;" the title of the act of February 21, 1861, is "An act to authorize the extension of horse railways in the city of Chicago;" the title of the act of February 6, 1865, is "An act concerning horse railways in the city of Chicago." The different titles above set out it was held sufficiently expressed their general object under § 23 of article 3 of the constitution of Illinois of 1848. *Blair v. Chicago*, 201 U. S. 400, 451, 50 L. Ed. 801.

It is objected that the title of the act of Nebraska of February 15, 1869, is limited to bonds issued or to be issued to aid works in Nebraska, while the body of the act extends to works anywhere; and that also the subject of the act is not expressed in its title. "It would, we think, be a strained construction, to hold

that the title of the act is to be so interpreted as to be limited to works situated in the state, when such limitation does not exist in the body of the act, and when the words 'in this state,' in the title, may fairly be regarded as applicable to the prior words 'counties, cities, and precincts,' to which words they are applied in the body of the act." *Otoe County v. Baldwin*, 111 U. S. 1, 16, 28 L. Ed. 331.

The title of the act of March 3, 1869, was "An act to amend the charter of the Cairo and St. Louis Railroad Company." It was held that this title contained a sufficient expression of the subject of a provision of the act legalizing the election held in the town of Jonesboro, Illinois, April 6, 1868, at which the people voted in favor of a subscription of stock to that company and the granting of authority to issue bonds in payment of the subscription. *Jonesboro City v. Cairo, etc., R. Co.*, 110 U. S. 192, 28 L. Ed. 116.

The act of New Jersey of March 31, 1869, entitled a "Supplement to an act entitled 'An act to ascertain the rights of the state, and of riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in this state,' approved April 11, 1864," contains a sufficient expression of its subject matter in its title. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 684, 31 L. Ed. 543.

5. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

6. *Montclair v. Ramsdell*, 107 U. S. 147, 155, 27 L. Ed. 431; *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 392, 46 L. Ed. 592.

The title of an act for the enforcement of municipal bonds issued by a county prior to its subdivision need not state that the old county is to act as the representative of the new. *Carter County v. Sinton*, 120 U. S. 517, 30 L. Ed. 701.

7. *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982.

8. *Montclair v. Ramsdell*, 107 U. S. 147, 155, 27 L. Ed. 431.

full and the number of the section in its amended form, it is sufficient.⁹

b. Matters Covered by Title.—The title of an act covers all matters set out in its body which are germane to the general statement in the title, and of which the title puts every person interested on his guard.¹⁰ But matters which are foreign to the expressions in a title are not covered by it.¹¹

c. Change of Title.—There is no rule of parliamentary law, and there is no provision of the constitution of Illinois, which requires a bill to preserve the same title through all its stages in its passage through both houses.¹²

C. Enacting Clause.—The constitution of Connecticut declares that the style of the laws shall be: "It is enacted by the general assembly as follows." If this requirement is anything more than directory, it cannot be decreed to apply to that species of enactments which are usually denominated joint resolutions, and which are often used to express the legislative will in cases not requiring a general law.¹³

D. Language.—The constitution of the state of Louisiana, ever since its admission into the Union, has provided that all laws shall be promulgated in the language in which the constitution of the United States is written.¹⁴

E. Reference to Other Statutes, etc.—A prior act of the legislature,¹⁵ the common law,¹⁶ laws of other states¹⁷ and customs and usages may be incorporated into an act by a general reference and need not be specifically set out.¹⁸ The reference in a statute to another statute by its title should be accurate.¹⁹

9. *Ross v. Aguirre*, 191 U. S. 60, 63, 48 L. Ed. 94.

10. *Carter County v. Sinton*, 120 U. S. 517, 30 L. Ed. 701; *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

The title of the act of Illinois of 1867 reads "An act to amend the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and to extend the powers of and confer a charter upon the same." The body of the act provided that incorporated towns or townships in counties along the railroad route may subscribe to its capital stock, and further provided the manner of holding elections in regard to the subscription. It was held that the title of the act covered the provisions in its body within the purposes of § 23 of article 3 of the constitution of 1848. *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. Ed. 982.

11. *Carter County v. Sinton*, 120 U. S. 517, 30 L. Ed. 701.

12. *Change of title.*—"The omission of the word 'Illinois' from the title, as given in the journals of the senate, was a mere clerical error, which could deceive or mislead no one." *Walnut v. Wade*, 103 U. S. 683, 692, 26 L. Ed. 526.

13. *Enacting clause.*—*Hoyt v. Sprague*, 103 U. S. 613, 635, 26 L. Ed. 585.

14. *Viterbo v. Friedlander*, 120 U. S. 707, 725, 30 L. Ed. 776.

15. "Prior acts may be incorporated in a subsequent one in terms or by relation." *In re Heath*, 144 U. S. 92, 93, 36 L. Ed. 358.

The statute of a state may make a contract as well by reference to a previous enactment making one, and extending

the rights, etc., granted by such enactment to a new party, as by direct enactment setting forth the contract in all its particular terms. And a third contract may be made in a subsequent statute by importation from the previously imported contract, in the former statute, and a fourth contract by importation from a third. *The Binghamton Bridge*, 3 Wall. 51, 18 L. Ed. 137.

16. *United States v. Arredondo*, 6 Pet. 691, 714, 8 L. Ed. 547.

17. *Laws of states in acts of congress.*—This has been the course of legislation by congress in many instances where state laws of practice and process have been adopted. *In re Heath*, 144 U. S. 92, 99, 36 L. Ed. 358; *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181.

Laws of England in acts of states.—"It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes." *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181. *In re Heath*, 144 U. S. 92, 94, 36 L. Ed. 358.

18. *Customs and usages.*—The court so held in construing the treaty with Spain of 1819 with reference to Florida lands. *United States v. Arredondo*, 6 Pet. 691, 714, 8 L. Ed. 547.

19. *Sufficiency of reference.*—The 35th section of the act of February 18, 1793, for the enrolling and licensing ships, provides that penalties incurred under the act shall be sued for in the same manner as penalties incurred under an act entitled "An act to regulate the collection of the duties imposed by law on goods, wares and merchandises imported into the United States, and on the tonnage of ships or vessels." There is no

IX. Validity.

A. Where Constitution Not Violated.—See elsewhere.²⁰

B. Where Constitution Violated.—An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.²¹

C. Where Treaty Violated.—When a law is clear in its provision, its validity cannot be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed.²²

D. Where Act Uncertain or Repugnant.—A statute may be void for uncertainty.²³ But one is not invalid for uncertainty because its language is in general terms.²⁴ Nor is one void which leaves to the discretion of administrative officers the determination of that state of facts which amounts to a violation of its general prohibitions.²⁵ A person cannot be convicted of a crime under a statute void for repugnancy.²⁶

E. Of Acts Procured by Fraud or Mistake.—A vague allegation of fraud in the procurement of an act not pressed upon the court will not be noticed.²⁷ A mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, there is no principle which can deny them this effect.²⁸

F. Of Acts of Confederate States.—While an act passed by the legislature of one of the Confederate States in aid of the rebellion cannot be recognized or enforced, as law in any court recognizing the constitution of the United States as the supreme law of the land,²⁹ if enforced as a law of one of the states composing that confederation, it is a statute of such state, within the meaning of the act regulating the appellate jurisdiction of the federal supreme court over the judgments and decrees of the state courts.³⁰

G. Of Special and Local Acts—1. IN GENERAL.—Where not prohibited by its constitution, a state legislature may pass a special act.³¹

2. UNDER UNITED STATES CONSTITUTION.—The United States constitution permits special legislation in all its varieties.³²

act of congress whose title exactly corresponds with the reference. The defendant claimed the reference was to the act of July 31, 1789, while the plaintiff insisted it was to the act of August 4, 1790. The court denied both contentions and held that the penalties should be sued for under the 9th section of the judiciary act of 1789. *Keene v. United States*, 5 Cranch 304, 3 L. Ed. 108.

20. Validity—Where constitution not violated.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 255, 298.

21. Where constitution violated.—*Norton v. Shelby Co.*, 118 U. S. 425, 442, 30 L. Ed. 178; *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60; *Copper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721. See the title CONSTITUTIONAL LAW, vol. 4, p. 56.

22. Where treaty violated.—*Whitney v. Robertson*, 124 U. S. 190, 195, 31 L. Ed. 386. See the title TREATIES.

23. Where statute uncertain.—"A statute so badly drawn as to vest a right to the property in hostile claimants, would, in itself, be a nullity." *Mobile v. Eslava*, 16 Pet. 234, 247, 10 L. Ed. 948.

24. A statute which uses the words "wholesale" and "retail" without any definitions thereof is not void for uncertainty.

Lloyd v. Dollinson, 194 U. S. 445, 48 L. Ed. 1062.

25. The act of August 2, 1886, amended May 19, 1902, in regard to the manufacture of oleomargarine artificially colored, is not void because it leads to the discretion of administrative officers the determination of what constitutes artificial coloration. *McCray v. United States*, 195 U. S. 27, 49 L. Ed. 78.

26. *United States v. Cantril*, 4 Cranch 167, 2 L. Ed. 584.

27. *Marquez v. Frisbie*, 101 U. S. 473, 478, 25 L. Ed. 800.

28. Act procured by mistake.—*Postmaster-General v. Early*, 12 Wheat. 136, 143, 6 L. Ed. 577; *The Amelia*, 1 Cranch 1, 35, 2 L. Ed. 15.

29. Of acts of Confederate States.—*Thomas v. Richmond*, 12 Wall. 349, 20 L. Ed. 453; *Stevens v. Griffith*, 111 U. S. 48, 28 L. Ed. 348.

30. See the title APPEAL AND ERROR, vol. 1, p. 548.

31. Special and local statutes.—*Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585. See ante, "Curative," III, D.

Thus a private act settling an estate has been held valid. *Croxall v. Shererd*, 5 Wall. 268, 18 L. Ed. 572.

32. *Clark v. Kansas City*, 176 U. S. 114,

3. UNDER STATE CONSTITUTIONS.—Some of the state constitutions prohibit special legislation.³³ A typical constitutional provision is that all laws of a general nature shall have uniform operation throughout a state,³⁴ and that the legislature shall pass no special act conferring corporate powers.³⁵

4. UNDER ACT OF CONGRESS IN REGARD TO TERRITORIES.—It is provided by an act of congress that where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislatures thereof, and it also provides that the territorial legislature shall not pass local or special laws in certain enumerated cases.³⁶

5. WHAT ACTS ARE SPECIAL AND LOCAL.—A statute which operates upon all persons of a state within a certain class, is not in contravention of a constitutional inhibition against special legislation.³⁷

H. Of Retrospective Acts.—See elsewhere.³⁸

119, 44 L. Ed. 392; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Herrick*, 127 U. S. 210, 32 L. Ed. 109; *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 42 L. Ed. 1037.

"There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States." *Williams v. Norris*, 12 Wheat. 117, 128, 6 L. Ed. 571.

23. *Hoyt v. Sprague*, 103 U. S. 613, 634, 26 L. Ed. 585.

California.—*Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 573, 44 L. Ed. 886.

Iowa.—*Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94.

Nebraska.—*Sherman County v. Simons*, 109 U. S. 735, 738, 27 L. Ed. 1093. See the title MUNICIPAL CORPORATIONS, vol. 8, p. 555.

Ohio.—*Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 269, 36 L. Ed. 963.

The constitution of South Carolina provides that its legislature shall not enact "local or special laws," concerning, among other subjects, that "to lay out, open, alter or work roads or highways." This provision is inapplicable to waterways. *Manigault v. Springs*, 199 U. S. 473, 486, 50 L. Ed. 274.

34. **Laws of general nature.**—*Shepard v. Barron*, 194 U. S. 553, 564, 48 L. Ed. 1115.

35. **Conferring corporate powers.**—See the titles CORPORATIONS, vol. 4, p. 667; MUNICIPAL CORPORATIONS, vol. 8, p. 555.

36. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 533, 43 L. Ed. 796; *Harwood v. Wentworth*, 162 U. S. 547, 563, 40 L. Ed. 1069.

One of the enumerated cases is a law to regulate the practice in courts of justice. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 533, 43 L. Ed. 796.

The statute of the territory of Oklahoma of December 25, 1890, which creates

a special tribunal for hearing and deciding upon claims against a municipal corporation, is not within the act of congress of July 30, 1886, as a regulation of the practice of courts. *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 534, 43 L. Ed. 796.

Among the enumerated cases are laws "regulating county and township affairs," "for the assessment and collection of taxes for territorial, county, township or road purposes;" "creating, increasing or decreasing fees, percentage or allowance of public offices during the term for which said officers are elected." *Harwood v. Wentworth*, 162 U. S. 547, 563, 40 L. Ed. 1069.

"Whether a general law can be made applicable to the subject matter in regard to which a special law is enacted by a territorial legislature, is a matter which we think rests in the judgment of the legislature itself." *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528, 533, 43 L. Ed. 796.

37. The act of California of March 15, 1883, amended March 1, 1893, in regard to bonded indebtedness of cities of a certain class with respect to their population, is not in contravention of the constitutional provision. *Waite v. Santa Cruz*, 184 U. S. 302, 321, 46 L. Ed. 552.

The territorial act of Arizona of March 21, 1895, was not local or special, simply because, under its operation, county treasurers, district attorneys, county recorders, assessors and probate judges will receive larger salaries in a certain class of counties than like officers will receive in other counties. *Harwood v. Wentworth*, 162 U. S. 547, 563, 40 L. Ed. 1069.

A statute divides the railroads of the state into classes according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the constitution requires. It does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155, 163, 24 L. Ed. 94.

38. **Of retrospective acts.**—See the title CONSTITUTIONAL LAW, vol. 4, p. 412.

I. Of Ex Post Facto Acts.—See elsewhere.³⁹

J. Of Acts of Attainder.—See elsewhere.⁴⁰

K. Presumption of Validity.—See elsewhere.⁴¹

L. Who May Raise Question of Validity—1. IN GENERAL.—See elsewhere.⁴²

2. PERSONS ESTOPPED.—There can be no estoppel to deny the existence of a statute.⁴³

M. Determination of Validity.—The determination of the question of the constitutionality of an act is a judicial as distinguished from a legislative question to be determined by the legislature;⁴⁴ and as distinguished from a question of fact to be determined by a jury.⁴⁵ In so determining, the court is called upon to construe both the constitution and the statute.⁴⁶

N. Extent of Invalidity—1. IN GENERAL.—A statute is unconstitutional only to the extent of its collision, with a constitutional provision.⁴⁷

2. TOTAL INVALIDITY.—A constitutional part of a statute may be so connected with that which is unconstitutional, as to make it impossible, if the unconstitutional part is stricken out, to give effect to what, taking the whole together, appears to have been the legislative will.⁴⁸ In such a case the whole statute is void;⁴⁹ but in this, as in every other case of statutory construction,

39. Of ex post facto acts.—See the title CONSTITUTIONAL LAW, vol. 4, p. 515.

40. Of acts of attainder.—See the title CONSTITUTIONAL LAW, vol. 4, p. 518.

41. Presumption of validity.—See the title CONSTITUTIONAL LAW, vol. 4, p. 250.

42. Who may raise question of validity.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 73, 254.

43. Persons estopped.—*Wilkes County v. Coler*, 180 U. S. 506, 520, 45 L. Ed. 642; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154. See, also, *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 578, 44 L. Ed. 886. See, also, the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 756.

44. Determination of validity.—*Field v. Clark*, 143 U. S. 649, 672, 36 L. Ed. 294.

"When counsel, in *Ogden v. Blackledge*, 2 Cranch 272, 277, 2 L. Ed. 276, announced that, to declare what the law is, or has been, is a judicial power to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative power shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point." *Koshkonong v. Burton*, 104 U. S. 668, 678, 26 L. Ed. 886.

As to the power of the judiciary to declare a statute void, see the title CONSTITUTIONAL LAW, vol. 4, p. 250.

45. *South Ottawa v. Perkins*, 94 U. S. 260, 267, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204; *Lyons v. Woods*, 153 U. S. 649, 663, 38 L. Ed. 854; *Wilkes County v. Coler*, 180 U. S. 506, 520, 45 L. Ed. 642.

46. *Bank v. Dudley*, 2 Pet. 492, 524, 7 L. Ed. 496.

47. *McPherson v. Blacker*, 146 U. S. 1, 41, 36 L. Ed. 869; *Houston v. Moore*, 5 Wheat. 1, 49, 5 L. Ed. 19.

48. Total invalidity.—*Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 409, 50 L. Ed. 246; *United States v. Ju Toy*, 198 U. S. 253, 263, 49 L. Ed. 1040; *Virginia Coupon Cases*, 114 U. S. 269, 270, 29 L. Ed. 185.

Where different parts dependent.—"It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole act will fall with the invalidity of one clause." *Huntington v. Worthen*, 120 U. S. 97, 102, 30 L. Ed. 588. See, also, cases cited under post, "Partial Invalidity," IX, N, 3.

The provisions of § 1512 of the Code of Georgia cannot be separated so as to reject the unconstitutional exceptions merely. The whole section must be treated as annulled and abrogated by § 4237 of the Revised Statutes. *Sprague v. Thompson*, 118 U. S. 90, 95, 30 L. Ed. 115.

49. The income tax act of 1894, being unconstitutional in §§ 27, 37, inclusive, is void in toto, as its different parts are mutually dependent. *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 635, 39 L. Ed. 1108.

The first section of the trust act of Illinois of 1893 here in question embraces by its terms all persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in

all depends on the intention of the legislature, as shown by the general scope of the law.⁵⁰ If the main part of a statute be unconstitutional, a mere proviso or qualification thereto cannot be treated as valid and be given effect to.⁵¹

3. **PARTIAL INVALIDITY.**—Where its different parts are independent and separable,⁵² the unconstitutional part of a statute may be omitted and the remaining constitutional part be enforced,⁵³ provided the constitutional part be

hand. The statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565, 46 L. Ed. 679.

Trademarks act.—*Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550. See the title **TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.**

Chinese exclusion act.—Where the relevant portion of a statute to a particular case consists of a single section, which accomplishes all its results by the same general words, it must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. The Chinese exclusion act of August 18, 1894, ch. 301, in regard to an appeal to the secretary of commerce and labor from the decision of the immigration officer, is to be treated as valid or void as a whole. *United States v. Ju Toy*, 198 U. S. 253, 49 L. Ed. 1040.

50. **Intention prevails.**—*Railroad Companies v. Schutte*, 103 U. S. 118, 142, 26 L. Ed. 327; *Sprague v. Thompson*, 118 U. S. 90, 95, 30 L. Ed. 115.

51. *People v. Commissioners*, 94 U. S. 415, 418, 24 L. Ed. 164; *Scott v. Donald*, 165 U. S. 58, 105, 41 L. Ed. 632.

"That which is merely auxiliary to the main design must also fall with the principal of which it is merely an incident." *Virginia Coupon Cases*, 114 U. S. 269, 270, 304, 29 L. Ed. 185.

52. **Partial invalidity.—Where parts independent.**—*Ogden v. Saunders*, 12 Wheat. 213, 316, 6 L. Ed. 606; *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496; *Austin v. The Aldermen*, 7 Wall. 694, 19 L. Ed. 224; *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Trade-Mark Cases*, 100 U. S. 82, 89, 99, 25 L. Ed. 550; *Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. Ed. 318; *Penniman's Case*, 103 U. S. 714, 717, 26 L. Ed. 602; *Unity v. Buraage*, 103 U. S. 447, 459, 23 L. Ed. 405; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053; *United States v. Harris*, 106 U. S. 629, 641, 642, 27 L. Ed. 290; *Virginia Coupon Cases*, 114 U. S. 269, 305, 29 L. Ed. 185; *Presser v. Illinois*, 116 U. S. 252, 263, 29 L. Ed. 615; *Sprague v. Thompson*, 118 U. S. 90, 94, 30 L. Ed. 115; *Baldwin v. Franks*, 120 U. S. 678, 685, 689, 30 L. Ed. 766; *Hunt-*

ington v. Worthen, 120 U. S. 97, 102, 30 L. Ed. 588; *Eilenbecker v. District Court*, 134 U. S. 31, 40, 33 L. Ed. 801; *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294; *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 635, 39 L. Ed. 1108; *Scott v. Donald*, 165 U. S. 58, 105, 41 L. Ed. 632; *Hamilton v. Brown*, 161 U. S. 256, 274, 40 L. Ed. 691; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. Ed. 657; *Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 45 L. Ed. 280; *Smiley v. Kansas*, 196 U. S. 447, 455, 49 L. Ed. 546; *Gatewood v. North Carolina*, 203 U. S. 531, 542, 51 L. Ed. 305.

"The general proposition must be conceded, that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded." *Supervisors v. Stanley*, 105 U. S. 305, 312, 26 L. Ed. 1044.

"Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power." *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 395, 38 L. Ed. 1014.

53. **Act granting appeal and retrial.**—In *United States v. Coe*, 155 U. S. 76, 39 L. Ed. 76, it was held that an act granting a right of appeal or a retrial was to be held constitutional as to the right to appeal though invalid as to the right to a retrial.

Military laws of Illinois.—It is not necessary to consider the validity of the entire military code of Illinois, for the sections under which the plaintiff in error was convicted may be separated from the residue and held valid, even if the other sections of the act were invalid. *Presser v. Illinois*, 116 U. S. 252, 263, 29 L. Ed. 615.

Act giving conclusiveness to tax deeds and imposing penalty.—*Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 396, 38 L. Ed. 1014.

Act creating commission and imposing penalties.—*Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 395, 38 L. Ed. 1014.

Act of state in regard to presidential election.—The law of the state of Michigan providing for the appointment of presidential electors fixes the first Wednesday of December as the day for the meeting of the electors, as originally des-

complete in itself,⁵⁴ and the intention of the legislature is not violated.⁵⁵ The statute is to be treated as if no unconstitutional part were present.⁵⁶ Even a criminal statute may be good in part and bad in part, provided the two parts can be separated, and it is apparent that the legislative body would have enacted the one without the other.⁵⁷ The court cannot introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only in order to sustain its constitutionality in part.⁵⁸ The mandatory and the penal parts of a statute must stand or fall together.⁵⁹ Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be in-

igned by congress. In this respect it is in conflict with the act of congress of February 3, 1887, and must necessarily give way. But this part of the act is not so inseparably connected in substance with the other parts as to work the destruction of the whole act. Striking out the day for the meeting, which had already been otherwise determined by the act of congress, the act remains complete in itself, and capable of being carried out in accordance with the legislative intent. *McPherson v. Blacker*, 146 U. S. 1, 41, 36 L. Ed. 869.

Act imposing criminal and civil liability.—"If the criminal liability created by § 4058 is open to doubt, which we do not affirm, the civil liability may remain for the damages caused by the willful conduct designated in § 4059." *Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 695; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Allen v. Louisiana*, 103 U. S. 80, 26 L. Ed. 318.

Act provided for improvements and tax assessments.—*Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 489, 45 L. Ed. 280.

Act of state affecting commerce.—"If it were well settled that a separate coach law was unconstitutional, as applied to interstate commerce, the law applying on its face to all passengers should be limited to such as the legislature were competent to deal with." *Chesapeake, etc., R. Co. v. Kentucky*, 179 U. S. 388, 394, 40 L. Ed. 244; *Case of The State Freight Tax*, 5 Wall. 232, 21 L. Ed. 146.

In *Tiernan v. Rinker*, 102 U. S. 123, 26 L. Ed. 103, this court held an act of the legislature of Texas, taxing intoxicating liquors, to be inoperative only so far as it discriminated against imported wines or beers; and that as defendant was also engaged in selling other liquors, an injunction was properly refused. *Scott v. Donald*, 165 U. S. 58, 105, 41 L. Ed. 632, dissenting opinion of Brown, J.

The Virginia coupon act of March 30, 1871, authorized the payment of taxes in coupons. A prior provision of the state constitution required certain taxes to be paid in cash. It was held that the act of 1871 was not wholly void. *McCullough v. Virginia*, 172 U. S. 102, 113, 43 L. Ed. 382.

The first section of the trust act of Illinois of 1893 embraces by its terms all

persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. The statute must be regarded as an entirety, and in that view it must be adjudged to be constitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565, 46 L. Ed. 679.

54. Where constitutional part complete.—*New York v. Miln*, 11 Pet. 102, 9 L. Ed. 648.

55. Where intention not violated.—*Virginia Coupon Cases*, 114 U. S. 269, 270, 304, 29 L. Ed. 185; *Railroad Companies v. Schutte*, 103 U. S. 118, 142, 26 L. Ed. 327. See ante, "Total Invalidity," IX, N, 2.

56. Unconstitutional part omitted.—"The striking out is not necessarily by erasing words, but it may be by disregarding the unconstitutional provision, and reading the statute as if that provision was not there." *Railroad Companies v. Schutte*, 103 U. S. 118, 142, 26 L. Ed. 327.

57. Penal laws.—*James v. Bowman*, 190 U. S. 127, 140, 47 L. Ed. 979; *Jaehne v. New York*, 128 U. S. 189, 194, 32 L. Ed. 398; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 395, 38 L. Ed. 1014; *Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 695.

58. United States v. Reese, 92 U. S. 214, 320, 23 L. Ed. 563; *Trade-Mark Cases*, 100 U. S. 82, 98, 25 L. Ed. 550.

Section 5507 of the Revised Statutes purports to punish bribery at all elections, in the exercise of a power supposed to be granted to congress by the fifteenth amendment of the constitution. Congress has power to punish bribery at some but not all elections. Therefore the statute is partially void. It was held that courts are not at liberty to convert a criminal statute broad and comprehensive in its terms and extending beyond the power of congress into one less comprehensive and within the power of congress. *James v. Bowman*, 190 U. S. 127, 47 L. Ed. 979.

59. Easton v. Iowa, 188 U. S. 220, 223, 47 L. Ed. 452.

valid.⁶⁰ A statute may be held valid so far as it operates prospectively and invalid so far as it attempted retrospective operations.⁶¹ Matters in the body of an act not expressed in its title may be rejected and the effect be given to the rest of the act.⁶²

X. Amendment.

A. Power to Amend.—See elsewhere.⁶³

B. Form of Amendatory Act.—Brackets are frequently used in an amendatory act to include terms not found in the old act.⁶⁴

C. Reference to Amended Act.—The constitution of California provides "no law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended."⁶⁵

D. Amendment during Passage.—See elsewhere in this title.⁶⁶

XI. Repeal.

A. In General.—A statute can be repealed only by an express provision of or by necessary implication from a subsequent law⁶⁷ of the legislature of the state of enactment.⁶⁸ The suspension of an act for a limited time does not amount to its repeal.⁶⁹

B. Statutes Subject to Repeal.—In the absence of a constitutional inhibition,⁷⁰ the legislature which enacted a statute,⁷¹ or a subsequent legislature,⁷² may repeal it.⁷³ The constitution of the United States has imposed such a limitation upon the legislative power of all the states, by declaring that no state shall pass any law impairing the obligation of a contract.⁷⁴ But this provision does not make a statute irrepealable where the state, by a provision

60. *Field v. Clark*, 143 U. S. 649, 696, 36 L. Ed. 294.

61. *Jaehne v. New York*, 128 U. S. 189, 194, 32 L. Ed. 398; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529.

62. *Unity v. Burrage*, 103 U. S. 447, 459, 26 L. Ed. 405; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377.

63. **Power to amend.**—See post, "Power to Repeal," XI, C.

64. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

65. **Reference to amended act.**—The act of California of March 3, 1893, entitled "an act to amend §§ 204, 205, 206, 208, of the code of civil procedure," is not in violation of the constitutional provision. *Ross v. Aguirre*, 191 U. S. 60, 62, 48 L. Ed. 94.

66. **Amendment during passage.**—See ante, "Amendment during Passage," IV, F, 7.

67. *County of Clay v. Society*, 104 U. S. 579, 588, 26 L. Ed. 856; *United States v. Gear*, 3 How. 120, 131, 11 L. Ed. 523.

"As regards statutes in pari materia of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one." *Wilmot v. Mudge*, 103 U. S. 217, 221, 26 L. Ed. 536.

68. See post, "Power to Repeal," XI, C.

69. *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638.

70. *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352.

71. *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352.

72. *Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469; *State Bank v. Knoop*, 16 How. 369, 384, 14 L. Ed. 977; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Williams v. Wingo*, 177 U. S. 601, 44 L. Ed. 905.

"One legislature is competent to repeal any act which a former legislature was competent to pass; and * * * one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted." *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L. Ed. 162.

73. "The power to make rules is not one which, once exercised, is exhausted. It is a continuous power." *United States v. Ballin*, 144 U. S. 1, 5, 36 L. Ed. 321.

"A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. Being a penalty imposed by law, the legislature had a right to remit it." *Maryland v. Baltimore, etc.*, R. Co., 3 How. 534, 11 L. Ed. 714.

74. *New Jersey v. Yard*, 95 U. S. 104, 113, 24 L. Ed. 352; *Williams v. Wingo*, 177 U. S. 601, 44 L. Ed. 905; *Commissioners v. Bancroft*, 203 U. S. 112, 51 L. Ed. 112. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 781.

in the same act or in a prior act⁷⁵ or constitution,⁷⁶ reserves the power to repeal.⁷⁷ Where a state legislature passes an act providing that all subsequent statutes shall be subject to amendment and repeal, unless plainly expressed not to be, the act is to be read into and as a part of every subsequent statute where it is not otherwise expressly declared.⁷⁸ A statute cannot be repealed where a vested right will be divested⁷⁹ or where its repeal will operate as *ex post facto* legislation.⁸⁰

C. Power to Repeal.—The power to repeal a statute abides in the legislative, not in the judicial⁸¹ or executive⁸² departments of the government, and the reasons which influenced the legislature to repeal a statute cannot be inquired into by the judiciary.⁸³ An act of a territorial legislature may be repealed by an act of congress,⁸⁴ but an original act of congress cannot be repealed by an act of a territorial legislature.⁸⁵

D. Time of Taking Effect.—A repealing act expressed in words of the present tense goes into effect immediately.⁸⁶ Where certain provisions of a statute are repealed by omission from a later statute, the repeal takes effect from the date of approval of the later act.⁸⁷ An act of congress annulling a contract for the carriage of the mails passed during a round trip of a vessel does not take effect until after the return of the vessel.⁸⁸ In the colony of Pennsylvania the repeal of an act by parliament took effect only from the time of notification.⁸⁹

E. Express Repeal.—1. **REPEALING CLAUSE.**—A repealing clause is not necessary to the repeal of a prior act.⁹⁰ The usual formula of a repealing

75. *Covington v. Kentucky*, 173 U. S. 231, 238, 43 L. Ed. 679. This case was one of exemption from taxation. See the title **TAXATION**.

"The views we have expressed as to the power of the legislature under a reservation made by general statute of the right to amend or repeal, are supported by many adjudged cases." *Covington v. Kentucky*, 173 U. S. 231, 239, 43 L. Ed. 679; *Tomlinson v. Jessup*, 15 Wall. 454, 458, 21 L. Ed. 204; *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836; *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185; *Hoge v. Railroad Co.*, 99 U. S. 348, 353, 25 L. Ed. 303; *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Greenwood v. Freight Co.*, 105 U. S. 13, 21, 26 L. Ed. 961; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 696, 29 L. Ed. 510; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 108, 34 L. Ed. 898; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12, 36 L. Ed. 55.

76. *Hamilton Gas Light, etc., Co. v. Hamilton City*, 146 U. S. 258, 269, 36 L. Ed. 963.

77. **Charters of corporations.**—See the title **CORPORATIONS**, vol. 4, p. 695.

78. *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55. See the title **TAXATION**.

79. **Where rights divested.**—*United States v. Central Pac. R. Co.*, 118 U. S. 235, 238, 30 L. Ed. 173; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496;

Kring v. Missouri, 107 U. S. 221, 250, 27 L. Ed. 506. See the titles **CONSTITUTIONAL LAW**, vol. 4, p. 1; **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 907; **DESCENT AND DISTRIBUTION**, vol. 5, p. 338.

A legislative grant is not revocable. *Terrett v. Taylor*, 9 Cranch 43, 3 L. Ed. 650; *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. Ed. 542; *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

80. *Fletcher v. Peck*, 6 Cranch 87, 138, 3 L. Ed. 162.

81. **Power to repeal.**—*Ward v. Chamberlain*, 2 Black 430, 442, 17 L. Ed. 319.

82. A regulation of a department cannot repeal a statute. *Merritt v. Cameron*, 137 U. S. 542, 551, 34 L. Ed. 772.

83. *Greenwood v. Freight Co.*, 105 U. S. 13, 18, 26 L. Ed. 961.

84. *Mormon Church v. United States*, 136 U. S. 1, 45, 34 L. Ed. 481.

85. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

Power to repeal particular acts.—See ante, "Statutes Subject to Repeal," XI, B.

86. *Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199; *Robertson v. Bradbury*, 132 U. S. 491, 33 L. Ed. 405.

87. *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429.

88. *Steamship Co. v. United States*, 103 U. S. 721, 729, 26 L. Ed. 419.

89. **In colony of Pennsylvania.**—*Albertson v. Robeson*, 1 Dall. 9, 1 L. Ed. 14.

90. *The Eliza*, 4 Dall. 37, 40, 1 L. Ed. 731; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235. See, also, *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637.

clause, when intended to be universal, is that all acts on this subject, or all acts coming within its purview, are repealed, or the acts intended to be repealed are named or specifically referred to.⁹¹ That portion of a prior act which is not embraced by it remains in force.⁹²

2. OF INCONSISTENT ACTS.—Although a later act does not specifically refer to prior acts, but declares that all laws and parts of laws in conflict therewith be and are repealed, if it comprehend and be variant from the prior acts, the legislature must be assumed to intend it as a substitute for and to repeal the prior acts;⁹³ but, if it be consistent with prior acts, such acts remain in force.⁹⁴

3. OF ACTS OMITTED FROM REVISION.—The act of congress authorizing the compilation of the Revised Statutes expressly repeals all prior acts not embraced in the revision;⁹⁵ but, as to subsequent acts, it declares that the revision shall not operate as a repeal.⁹⁶

91. *Hess v. Reynolds*, 113 U. S. 73, 79, 28 L. Ed. 927.

92. **Where part of prior act not embraced in repealing clause.**—The repealing clause of the judiciary act of 1887-1888, § 738 of the Revised Statutes, did not reach the eighth section of the act of March 3, 1875, 18 Stat. 470, which authorized proceedings by publication against absent defendants to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought. That section is still in force, as was expressly held in *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 10, 44 L. Ed. 647. *Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 54, 51 L. Ed. 703.

"That section was expressly saved from repeal by the fifth section of the act of March 3, 1887, 24 Stat. 552, 553, c. 373, as corrected by § 5 of the act of August 13, 1888, 25 Stat. 433, 436, c. 866, and is in full force." *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 10, 44 L. Ed. 647; *Mellen v. Moline, etc., Iron Works*, 131 U. S. 352, 33 L. Ed. 178.

93. *Hess v. Reynolds*, 113 U. S. 73, 79, 28 L. Ed. 927; *United States v. Auffmordt*, 122 U. S. 197, 208, 30 L. Ed. 1182; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079; *Tom Hong v. United States*, 193 U. S. 517, 519, 48 L. Ed. 772; *Gibson v. United States*, 194 U. S. 182, 183, 48 L. Ed. 926; *Lowe v. United States*, 194 U. S. 193, 28 L. Ed. 931.

The act of March 3, 1887 as corrected by the act of August 13, 1888, in regard to removal of causes, impliedly repeals the prior inconsistent acts of 1789, 1866, 1867, and 1875, which had not previously been repealed. *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079.

"Section 847 of the Revised Statutes, relating to the District of Columbia, is in irreconcilable conflict with the act of 1879. The one gives us jurisdiction when the amount in dispute is \$1,000 or more; the other in effect says we shall not have jurisdiction unless the amount exceeds \$2,500. It is clear, therefore, that the repealing clause in the act of 1879 covers

this section of the Revised Statutes." *Railroad Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231.

94. *Holden v. Minnesota*, 137 U. S. 483, 491, 34 L. Ed. 734; *Hess v. Reynolds*, 113 U. S. 73, 79, 28 L. Ed. 927; *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865.

The language of the Removal of Clauses Act of 1875 is, "That all acts and parts of acts in conflict with the provisions of this act are hereby repealed." This implies very strongly that there may be acts on the same subject which are not hereby repealed. *Hess v. Reynolds*, 113 U. S. 73, 79, 28 L. Ed. 927.

The dispensary law of South Carolina of March 5, 1897, was passed subsequent to the decision in *Scott v. Donald*, 165 U. S. 58, 41 L. Ed. 632, holding that the discriminatory clauses in the previous act of March 6, 1896, were void, and it entirely omits them. Its repealing clause, however, only repeals laws inconsistent therewith, and the argument is, that as the provisions found in the previous law, and which were declared unconstitutional by this court, are not inconsistent with the present law, therefore they continue to exist, and the present law must be interpreted as if they were written in it. The error of the argument is so self-evident as to require only a passing notice. The very fact that the omitted provisions had been before the enactment of the new law declared to be unconstitutional affords a conclusive demonstration of their inconsistency with the present law. *Vance v. Vandercook Co.*, 170 U. S. 438, 453, 42 L. Ed. 1100.

95. *Bank v. Earle*, 13 Pet. 519, 595, 10 L. Ed. 274; *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429; *United States v. Farden*, 99 U. S. 10, 25 L. Ed. 267; *Deffebach v. Hawke*, 115 U. S. 392, 402, 29 L. Ed. 423; *Cane Girardeau County Court v. Hill*, 118 U. S. 68, 30 L. Ed. 73; *United States v. Le Bris*, 121 U. S. 278, 280, 30 L. Ed. 946; *Dwight v. Merritt*, 140 U. S. 213, 217, 35 L. Ed. 450.

96. *United States v. Auffmordt*, 122 U. S. 197, 208, 30 L. Ed. 1182. See post, "By Revision and Codification," XI, J.

F. Implied Repeal—1. IN GENERAL.—While repeals by implication are not favored,⁹⁷ where the same subject matter⁹⁸ is covered by two acts which cannot

97. Implied repeal—Not favored.—*Harford v. United States*, 8 Cranch 109, 3 L. Ed. 504; *United States v. Furlong*, 5 Wheat. 184, 5 L. Ed. 64; *Wood v. United States*, 16 Pet. 342, 362, 10 L. Ed. 987; *Daviess v. Fairbairn*, 3 How. 636, 11 L. Ed. 760; *United States v. 67 Packages of Dry Goods*, 17 How. 85, 93, 15 L. Ed. 54; *United States v. Nine Cases of Silk Hats*, 17 How. 97, 15 L. Ed. 57; *United States v. One Package of Merchandise*, 17 How. 98, 15 L. Ed. 58; *United States v. One Case of Clocks*, 17 How. 99, 15 L. Ed. 58; *United States v. Walker*, 22 How. 299, 312, 16 L. Ed. 382; *McCool v. Smith*, 1 Black 459, 468, 17 L. Ed. 218; *The Reform*, 3 Wall. 617, 633, 18 L. Ed. 105; *Galena v. Amy*, 5 Wall. 705, 709, 18 L. Ed. 560; *Furman v. Nichol*, 8 Wall. 44, 61, 19 L. Ed. 370; *Ex parte v. Yerger*, 8 Wall. 85, 105, 19 L. Ed. 332; *United States v. Tynen*, 11 Wall. 88, 92, 20 L. Ed. 153; *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Henderson's Tobacco*, 11 Wall. 652, 20 L. Ed. 235; *Osborn v. Nicholson*, 13 Wall. 654, 662, 20 L. Ed. 689; *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650; *Telegraph Co. v. Eyser*, 19 Wall. 419, 432, 22 L. Ed. 42; *Board of Supervisors v. Lackawana Iron, etc., Co.*, 93 U. S. 619, 624, 23 L. Ed. 989; *Fabbri v. Murphy*, 95 U. S. 191, 196, 24 L. Ed. 468; *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503; *United States v. Claffin*, 97 U. S. 546, 551, 24 L. Ed. 1028; *Barney v. Dolph*, 97 U. S. 652, 656, 24 L. Ed. 1063; *Wilmot v. Mudge*, 103 U. S. 217, 220, 26 L. Ed. 536; *Red Rock v. Henry*, 106 U. S. 596, 601, 27 L. Ed. 251; *King v. Cornell*, 106 U. S. 395, 396, 27 L. Ed. 60; *Ex parte Crow Dog*, 109 U. S. 556, 570, 27 L. Ed. 1030; *Chew Heong v. United States*, 112 U. S. 536, 549, 28 L. Ed. 770; *Relfe v. Wilson*, 131 U. S., appx. clxxxix, cxc, 26 L. Ed. 121; *Tracy v. Tuffly*, 134 U. S. 206, 223, 33 L. Ed. 879; *Eckloff v. District of Columbia*, 135 U. S. 240, 243, 34 L. Ed. 120; *Cope v. Cope*, 137 U. S. 682, 686, 34 L. Ed. 832; *Fisk v. Henarie*, 142 U. S. 459, 468, 35 L. Ed. 1079; *Louisville Water Co. v. Clark*, 143 U. S. 1, 11, 36 L. Ed. 55; *District of Columbia v. Hutton*, 143 U. S. 18, 26, 36 L. Ed. 60; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 587, 37 L. Ed. 284; *Lees v. United States*, 150 U. S. 476, 479, 37 L. Ed. 1150; *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. Ed. 614; *United States v. Healey*, 160 U. S. 136, 147, 40 L. Ed. 369; *United States v. Rider*, 163 U. S. 132, 140, 41 L. Ed. 101; *United States v. Allen*, 163 U. S. 499, 501, 41 L. Ed. 242; *Ward v. Race Horse*, 163 U. S. 504, 511, 41 L. Ed. 244; *Rosencrans v. United States*, 165 U. S. 257, 262, 41 L. Ed. 708; *United States v. Greathouse*, 166 U. S. 601, 605, 41 L. Ed. 1130; *North America Commercial Co. v. United States*, 171 U. S.

110, 130, 43 L. Ed. 98; *The Paquete Habana*, 175 U. S. 677, 685, 44 L. Ed. 320; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 500, 46 L. Ed. 289; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 688, 47 L. Ed. 651; *Morris v. Hitchcock*, 194 U. S. 384, 48 L. Ed. 1030; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 497, 50 L. Ed. 281; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436, 51 L. Ed. 553; *Johnson v. Browne*, 205 U. S. 309, 321, 51 L. Ed. 816.

The repeal of statutes by implication is unfavored in the law. It is not to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. *Osborn v. Nicholson*, 13 Wall. 654, 662, 20 L. Ed. 689.

Where rights affected.—That construction which would declare the later of two statutes to be a repeal of the powers conferred by a prior, and have the effect of unsettling title to lands, a court should be astute in avoiding. *Doolittle v. Bryan*, 14 How. 563, 14 L. Ed. 543.

Repeal of revenue laws.—Implied repeals must always meet with disfavor where the attempt is made to apply the principle in the construction of the revenue laws of the United States. *Wood v. United States*, 16 Pet. 342, 363, 10 L. Ed. 987; *Aldridge v. Williams*, 3 How. 9, 23, 11 L. Ed. 469; *United States v. 67 Packages of Dry Goods*, 17 How. 85, 93, 15 L. Ed. 54; *United States v. Walker*, 22 How. 299, 311, 16 L. Ed. 382; *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Fabbri v. Murphy*, 95 U. S. 191, 196, 24 L. Ed. 468; *Saxonville Mills v. Russell*, 116 U. S. 13, 21, 29 L. Ed. 554.

98. Acts relating to same subject matter.—Where there is nothing in a late act which relates to the same subject matter, as a prior act, the presumption is that it was intended that the prior act should stand. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *Board of Supervisors v. Lackawana Iron, etc., Co.*, 93 U. S. 619, 624, 23 L. Ed. 989; *Relfe v. Wilson*, 131 U. S., appx. clxxxix, 26 L. Ed. 212; *Savannah v. Kelly*, 108 U. S. 184, 188, 27 L. Ed. 696; *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637; *Johanson v. Washington*, 190 U. S. 179, 47 L. Ed. 1008.

The repealing act must directly bear in terms upon the particular matter of the first act. *United States v. Gear*, 3 How. 120, 131, 11 L. Ed. 523.

It may be doubtful whether a statute relating to one subject can be construed to repeal by implication a prior statute relating entirely to another subject. The act of Feb. 24, 1855, establishing the court

be harmonized⁹⁹ with a view to giving effect to the provisions of both of

of claims, does not expressly or by necessary implication repeal any of the provisions of the act of Feb. 26, 1853, entitled "An act to prevent frauds upon the treasury of the United States." *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503.

Must cover whole subject.—In order for a later statute to repeal a former inconsistent therewith, it must provide for the cases to which the earlier act extends. *United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304; *Edgington v. United States*, 164 U. S. 361, 41 L. Ed. 467.

"It must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute." *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. Ed. 614.

Where the old law contains exceptions from its general operation and the new law does not, this fact is to be taken into consideration in determining whether or not the old law is impliedly repealed. The general statute of limitation, § 1044 of the Revised Statutes, in force in the District of Columbia, contains an exception in capital offences; § 939 of the code of the district providing that a person committed or admitted to bail shall be discharged therefrom if not indicted in nine months, contains no such exception. The difference in the general scope of two acts was taken into consideration in determining whether or not the prior was repealed by the latter. *United States v. Cadarr*, 197 U. S. 475, 49 L. Ed. 842.

99. Repugnant acts.—The enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. *Locke v. United States*, 7 Cranch 339, 3 L. Ed. 364; *Furman v. Nichol*, 8 Wall. 44, 19 L. Ed. 370; *United States v. Greathouse*, 166 U. S. 601, 605, 41 L. Ed. 1130; *Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 27 L. Ed. 309; *Cope v. Cope*, 137 U. S. 682, 686, 34 L. Ed. 832; *United States v. Matthews*, 173 U. S. 381, 388, 43 L. Ed. 738. And see cases cited below.

Irreconcilable acts.—It is elementary that a repeal will not be implied, unless there be an irreconcilable conflict between the two statutes. *Harford v. United States*, 8 Cranch 109, 3 L. Ed. 504; *Wood v. United States*, 16 Pet. 342, 362, 10 L. Ed. 987; *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469; *United States v. Gear*, 3 How. 120, 131, 11 L. Ed. 523; *Taylor v. United States*, 3 How. 197, 11 L. Ed. 559; *Daviess v. Fairbairn*, 3 How. 636, 646, 11 L. Ed. 760; *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *United States v. 67 Packages of Dry*

Goods, 17 How. 85, 15 L. Ed. 54; *McCool v. Smith*, 1 Black 459, 17 L. Ed. 218; *United States v. Scott*, 3 Wall. 642, 648, 18 L. Ed. 218; *Ex parte Yenger*, 8 Wall. 85, 105, 19 L. Ed. 332; *McKee v. United States*, 8 Wall. 163, 167, 19 L. Ed. 329; *United States v. Tynen*, 11 Wall. 88, 92, 20 L. Ed. 153; *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *United States v. Wiley*, 11 Wall. 508, 515, 20 L. Ed. 211; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *State v. Stoll*, 17 Wall. 425, 430, 21 L. Ed. 650; *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429; *Board of Supervisors v. Lackawana Iron, etc., Co.*, 93 U. S. 619, 624, 23 L. Ed. 989; *Fabbri v. Murphy*, 95 U. S. 191, 196, 24 L. Ed. 468; *Arthur v. Homer*, 96 U. S. 137, 140, 24 L. Ed. 811; *United States v. Clafin*, 97 U. S. 546, 24 L. Ed. 1028; *Barney v. Dolph*, 97 U. S. 652, 656, 24 L. Ed. 1063; *United States v. Taylor*, 104 U. S. 216, 218, 26 L. Ed. 721; *County of Clay v. Society*, 104 U. S. 579, 588, 26 L. Ed. 856; *Venable v. Richards*, 105 U. S. 636, 638, 26 L. Ed. 1196; *Red Rock v. Henry*, 106 U. S. 596, 27 L. Ed. 251; *United States v. Fisher*, 109 U. S. 143, 145, 27 L. Ed. 885; *Ex parte Crow Dog*, 109 U. S. 556, 570, 27 L. Ed. 1030; *Chew Heong v. United States*, 112 U. S. 536, 549, 28 L. Ed. 770; *United States v. Langston*, 118 U. S. 389, 393, 30 L. Ed. 164; *Baltimore, etc., Railroad v. Bates*, 119 U. S. 464, 467, 30 L. Ed. 436; *Tracy v. Tuffly*, 134 U. S. 206, 223, 33 L. Ed. 879; *Fish v. Henarie*, 142 U. S. 459, 467, 35 L. Ed. 1379; *District of Columbia v. Hutton*, 143 U. S. 18, 26, 36 L. Ed. 60; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 587, 37 L. Ed. 284; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 315, 41 L. Ed. 1007; *North American Commercial Co. v. United States*, 171 U. S. 110, 129, 43 L. Ed. 98; *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637; *United States v. Lee Yen Tai*, 185 U. S. 213, 46 L. Ed. 878; *Carter v. Gear*, 197 U. S. 348, 49 L. Ed. 787; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 497, 50 L. Ed. 281; *Johnson v. Browne*, 205 U. S. 309, 321, 51 L. Ed. 816.

Unless the pre-existing statute is so repugnant to the subsequent statute that its survivor would deprive the subsequent of its efficacy, the prior statute will not be impliedly repealed. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 436, 51 L. Ed. 553.

"There is no inconsistency between a remedy for an illegal act which works a private wrong, securing pecuniary compensation, and a statute making the same act a criminal offense and punishing it accordingly." *Stockwell v. United States*, 13 Wall. 531, 552, 20 L. Ed. 491.

A repeal is not to be implied where the powers or directions under the later act are such as may well subsist together

with those under the earlier. Held, on an application of this principle, that the act of July 20, 1868, imposing taxes on distilled spirits and tobacco, did not repeal the proviso to the 25th section of the Internal Revenue Act of March 2, 1867, which limits to twenty days the time for commencing proceedings to enforce forfeitures. *Henderson's Tobacco*, 11 Wall. 652, 20 L. Ed. 235.

Section 1, chapter 90, of the general statutes of Missouri, revised in 1865, which gives damages in actions against insurance companies for a vexatious refusal to pay policies, was not repealed by the act of March 10, 1869, for the incorporation and regulation of insurance companies. That section is not inconsistent with any of the provisions of the later acts. *Relfe v. Wilson*, 131 U. S., appx. clxxxix, 26 L. Ed. 212.

There were two statutes of the state of Michigan, both passed on the same day, namely, the 12th of April, 1827. One was "An act concerning deeds and conveyances," which directed that such deeds or conveyances should be recorded in the office of register of probate for the county, or register for the city, where such lands, etc., were situated. This act became operative from its passage. The other was "An act concerning mortgages," which provided "that every mortgage, being proven or acknowledged according to law, may be registered in the county in which the land or tenements so mortgaged are situated." This act did not go into operation until several months after its passage. These statutes are not so contrary or repugnant to each other as necessarily to imply a contradiction. Both can stand. *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865.

Section 603 of the Tennessee code of 1858, which enacted that besides federal money, controllers' warrants, and wild-cat certificates, the collector should receive "such bank notes as are current and passing at par," did not amount to a repeal of the provision in § 12 of the charter of 1838 of the Bank of Tennessee, "that the bills or notes of said corporation, originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the state, and by all tax collectors and other public officers, in all payments for taxes or other moneys due to the state," the words of the code having no words of negation, the two enactments being capable of standing together, and implied repeals not being to be favored. *Furman v. Nichol*, 8 Wall. 44, 19 L. Ed. 370.

So repugnant as to imply a negative.—"A second law on the same subject does not, without a repealing clause or negative words, repeal a former one, unless its provisions are so clearly repugnant as to imply a negative." *Welch v. Cook*, 97 U. S. 541, 543, 24 L. Ed. 1112; *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503.

Where enforcement of prior act not affected.—*Ah How v. United States*, 193 U. S. 65, 48 L. Ed. 619.

Where government injured.—Where a repeal by implication, if admitted, would operate to the prejudice of the government, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. *The Reform*, 3 Wall. 617, 633, 18 L. Ed. 105; *Wood v. United States*, 16 Pet. 342, 363, 10 L. Ed. 987; *United States v. Walker*, 22 How. 299, 311, 16 L. Ed. 382.

The general statute of limitations, § 1044 of Revised Statutes.—*United States v. Cadarr*, 197 U. S. 475, 49 L. Ed. 842. See the title **CRIMINAL LAW**, vol. 5, p. 99.

The act of congress of March, 1799, respecting salvage, are inconsistent with and repeal the provisions of the act of June, 1798. *The Eliza*, 4 Dall. 37, 40, 1 L. Ed. 731. See the title **SALVAGE**.

The act of March 3, 1885, taking away right of appeal from any fund of \$5,000, does not repeal the act of March 3, 1891, giving appeal in habeas corpus cases. *Simms v. Simms*, 175 U. S. 162, 44 L. Ed. 115.

Removal of causes act.—*Venable v. Richards*, 105 U. S. 636, 638, 26 L. Ed. 1196.

The Arizona act of March 6, 1891, concerning attachments, in so far as it is repugnant to the act of 1887, operates as a repeal of the latter act. *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637. See the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 679.

Of revenue laws.—There must be a positive repugnancy between the new and old laws for the collection of the revenue, before the old law can be considered as repealed; and even then the old law is repealed by implication, only pro tanto, to the extent of the repugnancy. *Harford v. United States*, 8 Cranch 109, 3 L. Ed. 504; *Fabbri v. Murphy*, 95 U. S. 191, 196, 24 L. Ed. 468, citing *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469; *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167.

The addition of other powers to custom house officers to carry into effect the object of the former laws, and sedulously introduced to meet the case of a palpable fraud, should not be considered as repealing the former laws. *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987; *United States v. 67 Packages of Dry Goods*, 17 How. 85, 93, 15 L. Ed. 54, reaffirmed in *Stuart v. Maxwell*, 16 How. 150, 14 L. Ed. 883; *United States v. Nine Cases of Silk Hats*, 17 How. 97, 15 L. Ed. 57; *United States v. One Package of Merchandise*, 17 How. 98, 15 L. Ed. 58; *United States v. One Case of Clocks*, 17 How. 99, 15 L. Ed. 58; *Saxonville Mills v. Russell*, 116 U. S. 13, 21, 29 L. Ed. 554.

Where such repeal would operate to reopen accounts at the treasury department long since settled and closed, the supposed

them,¹ to the extent of the repugnancy between them,² the prior act is impliedly

repugnancy ought to be clear and controlling before it can be held to have that effect. *United States v. Walker*, 22 How. 299, 311, 16 L. Ed. 382.

The act of congress of March 2, 1833, commonly called the compromise act, did not, prospectively, repeal all duties upon imports after the 30th of June, 1842. Repealing only such parts of previous acts as were inconsistent with itself, it left in force, after the 30th of June, 1842, the same duties which were levied on the 1st of June, 1842. *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469.

The duty imposed on embroidered linen goods by the twenty-second section of the act of March 2, 1861 (12 Stat. 192), is not reconsidered in the seventh section of the act of June 30, 1864 (13 id. 209), but remains as fixed by the former act. *Arthur v. Homer*, 96 U. S. 137, 24 L. Ed. 811, citing *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987; *McCool v. Smith*, 1 Black 459, 17 L. Ed. 218; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

It was held in *United States v. Aufmordt*, 122 U. S. 197, 30 L. Ed. 1182, that § 12 of the act of June 22, 1874, which provides for the forfeiture of merchandise fraudulently entered and for penalties against the guilty party, was clearly inconsistent and therefore repealed § 2864 of the Revised Statutes, which provided for an alternative forfeiture of the goods of their value.

The abandoned and captured property act of March 12, 1863 (12 Stat. 820), did not repeal the act approved July 17, 1862 (id. 589), entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." *United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479.

Of Chinese exclusion acts.—See the title CHINESE EXCLUSION ACTS, vol. 3, p. 771.

1. Effect to be given both acts.—*Harford v. United States*, 8 Cranch 109, 110, 3 L. Ed. 504; *Wood v. United States*, 16 Pet. 342, 363, 10 L. Ed. 987; *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *McCool v. Smith*, 1 Black 459, 17 L. Ed. 218; *United States v. Tynen*, 11 Wall. 88, 92, 20 L. Ed. 153; *The Distilled Spirits*, 11 Wall. 356, 20 L. Ed. 167; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *State v. Stoll*, 17 Wall. 425, 431, 21 L. Ed. 650; *Arthur v. Homer*, 96 U. S. 137, 140, 24 L. Ed. 811; *Barney v. Dolph*, 97 U. S. 652, 656, 24 L. Ed. 1063; *Wilmot v. Mudge*, 103 U. S. 217, 221, 26 L. Ed. 536; *Ex parte Crow Dog*, 109 U. S. 556, 570, 27 L. Ed. 1030; *Red Rock v. Henry*, 106 U. S. 596, 601, 27 L. Ed. 251; *Chew Heong v. United States*, 112 U. S. 536, 550, 28 L. Ed. 770; *Bernier v. Bernier*, 147 U. S. 242, 246, 37 L. Ed. 152; *Smithmeyer v. United States*, 147 U.

S. 342, 37 L. Ed. 196; *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. Ed. 614; *United States v. Healey*, 160 U. S. 136, 146, 40 L. Ed. 369; *United States v. Greathouse*, 166 U. S. 601, 605, 41 L. Ed. 1130; *United States v. Matthews*, 173 U. S. 381, 388, 43 L. Ed. 738; *United States v. Lee Yen Tai*, 185 U. S. 213, 222, 46 L. Ed. 878.

"Repeal by implication, when the prior and the later act can consistently stand together, is never admitted." *Galena v. Amy*, 5 Wall. 705, 709, 18 L. Ed. 560.

"Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both." *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. Ed. 614.

"Statutes which apparently conflict with each other are to be reconciled, as far as may be on any fair hypothesis, and validity given to each, if it can be and is necessary to conform to usages under them, or to preserve the titles of property undisturbed." *Beals v. Hale*, 4 How. 37, 51, 11 L. Ed. 865.

"If both can exist the repeal by implication will not be adjudged." *Johnson v. Browne*, 205 U. S. 309, 321, 51 L. Ed. 816.

2. Repealed to extent of repugnancy.—*Wood v. United States*, 16 Pet. 342, 362, 10 L. Ed. 987; *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *McKee v. United States*, 8 Wall. 163, 167, 19 L. Ed. 329; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *District of Columbia v. Hutton*, 143 U. S. 18, 26, 36 L. Ed. 60; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 565, 41 L. Ed. 1114; *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637; *United States v. Matthews*, 173 U. S. 381, 388, 43 L. Ed. 738; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 500, 46 L. Ed. 289; *United States v. Lee Yen Tai*, 185 U. S. 213, 221, 46 L. Ed. 878; *Gibson v. United States*, 194 U. S. 182, 192, 48 L. Ed. 926.

"It must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it." *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235.

The act of congress of March 2, 1833, commonly called the compromise act, did not, prospectively, repeal all duties upon imports after the 30th of June, 1842. Repealing only such parts of previous acts as were inconsistent with itself, it left in force, after the 30th of June, 1842, the same duties which were levied on the 1st of June, 1842. *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469.

repealed, particularly in cases where it is apparent that the latter act is intended to operate as a substitute for the earlier one,³ and to provide an ex-

3. Where later act substitutes prior.—

Norris v. Crocker, 13 How. 429, 14 L. Ed. 210; *United States v. Tynen*, 11 Wall. 88, 92, 20 L. Ed. 153; *Henderson's Tobacco*, 11 Wall. 652, 20 L. Ed. 235; *United States v. Claflin*, 97 U. S. 546, 550, 551, 24 L. Ed. 1028; *Phillips v. Moore*, 100 U. S. 208, 25 L. Ed. 603; *Van Wyck v. Knevals*, 106 U. S. 360, 27 L. Ed. 201; *King v. Cornell*, 106 U. S. 395, 396, 27 L. Ed. 60; *Red Rock v. Henry*, 106 U. S. 596, 601, 27 L. Ed. 251; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 451, 27 L. Ed. 537; *Savannah v. Kelly*, 108 U. S. 184, 188, 27 L. Ed. 696; *Hess v. Reynolds*, 113 U. S. 73, 79, 28 L. Ed. 927; *Smith v. Lyon*, 133 U. S. 315, 33 L. Ed. 635; *Tracy v. Tuffly*, 134 U. S. 206, 223, 33 L. Ed. 879; *Fisk v. Henarie*, 142 U. S. 459, 468, 35 L. Ed. 1079; *District of Columbia v. Hutton*, 143 U. S. 18, 27, 36 L. Ed. 60; *Tennessee v. Union, etc., Bank*, 152 U. S. 454, 38 L. Ed. 511; *Hanrick v. Hanrick*, 153 U. S. 192, 197, 38 L. Ed. 685; *United States v. Healey*, 160 U. S. 136, 147, 40 L. Ed. 369; *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637; *McDonnell v. Jordan*, 178 U. S. 229, 238, 44 L. Ed. 1048; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 500, 46 L. Ed. 289.

"Where a statute provides for a writ of error to a specified court of appeals it must be regarded as a repeal of any previous statute which provides for a writ of error to another and different court." *Brown v. United States*, 171 U. S. 631, 637, 43 L. Ed. 312.

A statute punishing an offense as a felony is impliedly repealed by a subsequent statute punishing the same act as a misdemeanor. *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865.

The grant of an exemption from taxation to a railroad company by a state legislature, is repealed by a subsequent act directing a new assessment of the property of a state and expressly declaring that the property of every railroad in the state should be valued and assessed. *Commissioners v. Bancroft*, 203 U. S. 112, 119, 51 L. Ed. 112.

The second section of the act of congress of March 3, 1823, entitled "An act to amend an act entitled 'An act further to regulate the entry of merchandise imported into the United States from any adjacent territory,'" was supplied by the fourth section of the act of July 18, 1866, and thereby repealed. *United States v. Claflin*, 97 U. S. 546, 24 L. Ed. 1028.

The navy personnel act of March 3, 1899, equalizing the pay of army and navy officers and providing that naval officers shall be entitled to army pay "when detailed for shore duty beyond seas," is not repealed by the acts of May 26, 1900, and March 2, 1901, providing for an increase in pay of army officers for particu-

lar services. *United States v. Thomas*, 195 U. S. 418, 49 L. Ed. 259.

The act of the state of Minnesota of March 6, 1868, authorizing certain towns to issue bonds to aid the construction of certain railroads, requires only the vote of a majority of the legal voters of the town before the bonds authorized thereby could be lawfully issued; the act of March 5, 1870, requires a vote of a majority of the supervisors, as well as a vote of the majority of the legal voters, to warrant the issue of bonds under its authority. The latter act was neither repugnant to, nor was it intended as a substitute for, the former. *Red Rock v. Henry*, 106 U. S. 596, 602, 27 L. Ed. 251.

The acts of March 8, 1867, of March 3, 1869, and of February 17, 1871, of Wisconsin, under which certain bonds were issued to the Green Bay and Lake Pepin Railroad Company, were not repealed, either directly or by implication, by the acts of the legislature of that state of March 8, 1870, and of March 11, 1872, permitting "any town, incorporated city, or village, into, near to, or through" which the line of any railroad should be located, to take the stock of the company to such amount as should be authorized by a majority of the voters. *Board of Supervisors v. Lackawana Iron, etc., Co.*, 93 U. S. 619, 624, 23 L. Ed. 989.

The act of congress of February 8, 1875, provided: "That bags, other than of American manufacture, in which grain shall have been actually exported from the United States, may be returned empty to the United States free of duty, under regulations to be prescribed by the secretary of the treasury." In the act of March 3, 1883, the provision in regard to empty returned bags of American manufacture was re-enacted in substance in the free list, but the above provision of the act of 1875 was omitted, and bags, excepting bagging for cotton, were made dutiable. The court held that the act of 1883 was a substitute for the act of 1875, and repealed it. *United States v. Ranlett*, 172 U. S. 133, 140, 43 L. Ed. 393.

In an act relating to the city of Savannah, passed on the 27th of December, 1838, the legislature of Georgia enacted that the mayor and aldermen of said city be and they are hereby authorized and empowered to obtain money on loan on the faith and credit of said city, for the purpose of contributing to works of internal improvement. This act is not impliedly repealed by the act of the legislature on the 4th of March, 1856, providing: "That all bonds heretofore issued by the constituted authorities of the city of Savannah, are hereby declared legal and valid, and from and after the passage of this act, the mayor and aldermen of the city of Savan-

clusive rule of law.⁴

nah, * * * shall have power and authority to cause bonds to be issued and disposed of in such manner as they may direct, for purposes of internal improvement." *Savannah v. Kelly*, 108 U. S. 184, 185, 27 L. Ed. 696.

Where new provisions added.—When there are two acts of congress on the same subject, and the latter act embraces all the provisions of the first, and also new provisions, and imposes different or additional penalties, the latter act operates, without any repealing clause, as a repeal of the first. *Norris v. Crocker*, 13 How. 429, 438, 14 L. Ed. 210; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Stockwell v. United States*, 13 Wall. 531, 556, 20 L. Ed. 491; *United States v. Claffin*, 97 U. S. 546, 24 L. Ed. 1028; *King v. Cornell*, 106 U. S. 395, 396, 27 L. Ed. 60; *Murphy v. Utter*, 186 U. S. 95, 105, 46 L. Ed. 1070.

Section 639, in its first subdivision, provides for a removal by the defendant, where the suit is against an alien, or is by a citizen of the state in which the suit is brought against a citizen of another state. This is a reproduction and a repeal of the provisions of § 12 of the act of 1789, c. 20. *King v. Cornell*, 106 U. S. 395, 396, 27 L. Ed. 60.

Where act not repugnant.—All the provisions of the two acts need not be repugnant to work an entire repeal of the prior one, where it is evident the later statute was intended to supersede the earlier one. *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865; *King v. Cornell*, 106 U. S. 395, 27 L. Ed. 60; *Fisk v. Henarie*, 142 U. S. 459, 468, 35 L. Ed. 1079; *The Paquete Habana*, 175 U. S. 677, 685, 44 L. Ed. 320.

Providing additions to prior act.—That a repeal was not intended is indicated by the fact that the authority conferred by the new act is expressly declared to be "in addition" to the authority conferred by the former acts. Addition is not substitution. *Ex parte Yerger*, 8 Wall. 85, 105, 19 L. Ed. 332.

4. Where later act provides exclusive rule.—*United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429; *United States v. Claffin*, 97 U. S. 546, 24 L. Ed. 1028; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 451, 27 L. Ed. 537; *United States v. Auffmordt*, 122 U. S. 197, 208, 30 L. Ed. 1182; *Fisk v. Henarie*, 142 U. S. 459, 468, 35 L. Ed. 1079; *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. Ed. 614; *United States v. New York*, 160 U. S. 598, 609, 40 L. Ed. 551; *United States v. Rider*, 163 U. S. 132, 138, 140, 41 L. Ed. 101; *The Paquete Habana*, 175 U. S. 677, 685, 44 L. Ed. 320.

"If a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to

that subject." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 451, 27 L. Ed. 537; *Daviess v. Fairbairn*, 3 How. 63d, 11 L. Ed. 760; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

Where a prior and a subsequent act are each complete in themselves and independent of the other, the latter is not an amendatory but a repealing act. *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *United States v. 67 Packages of Dry Goods*, 17 How. 85, 91, 96, 15 L. Ed. 54; *Murphy v. Utter*, 186 U. S. 95, 105, 46 L. Ed. 1070.

"When a later statute is a complete revision of the subject to which the earlier statute related, and the new legislation was manifestly intended as a substitute for the former legislation, the prior act must be held to have been repealed." *United States v. Ranlett*, 172 U. S. 133, 140, 43 L. Ed. 393.

The act of March 3, 1891, upon its face, read in the light of settled rules of statutory construction, and of the decisions of the federal supreme court, clearly manifests the intention of congress to cover the whole subject of the appellate jurisdiction from the district and circuit courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of congress, including those that imposed pecuniary limits upon such jurisdiction. *The Paquete Habana*, 175 U. S. 677, 685, 44 L. Ed. 320; *United States v. Rider*, 163 U. S. 132, 140, 41 L. Ed. 101.

Section 1578 of the Revised Statutes provides "all officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a seagoing vessel," and § 1585 provides, "thirty cents shall in all cases be deemed the commutation price of the navy ration." Section 18 of the navy personnel act of March 3, 1899, provides that officers of the navy "shall receive the same pay and allowances, except forage, as or may be provided by or in pursuance of law for the officers of corresponding rank in the army," and § 26 provides that all acts and parts of acts, so far as they conflict with its provisions, shall be repealed. It was held that the act of 1899 was intended to cover all pay and allowances for naval officers except forage, and to that extent the prior acts were repealed. *Gibson v. United States*, 194 U. S. 182, 183, 48 L. Ed. 926, followed in *Lowe v. United States*, 194 U. S. 193, 23 L. Ed. 931.

Where later act provides complete system of law.—A prior act is impliedly repealed where a later act constitutes a complete system of law in itself. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 688, 47 L. Ed. 651.

2. **QUESTION OF INTENTION.**—Whether or not an act is impliedly repealed is a question of legislative intention, to be ascertained by an examination of both statutes,⁵ in the light of the reason, purpose and object of both.⁶

3. **BY ADMISSION OF TERRITORY AS STATE.**—An act of congress placing restrictions upon the powers of the legislature of a territory ceases to have any effect upon the admission of the territory as a state.⁷

4. **BY ADOPTION OF COMMON LAW.**—The adoption of the common law, subject to changes, as a system does not repeal prior statutory provisions.⁸

5. **BY OMISSION FROM REVISION.**—A statute is not impliedly repealed by its omission from a codification, authorized by law, but not declared to be effective as law;⁹ nor is it repealed by subsequent amendments of the compiled laws, which do not re-enact the omitted statute.¹⁰

6. **WHERE LANGUAGE OF PRIOR ACT REPEATED.**—An act is not necessarily repealed because a subsequent act repeals some of its provisions,¹¹ but where a subsequent act re-enacts a prior act substantially verbatim, with an immaterial addition, the prior act is repealed.¹²

7. **WHERE IMPLIED REPEAL PROVIDED AGAINST.**—The legislature by the use of the provision, "unless otherwise provided by law," intends thereby to guard against implied repeals by subsequent acts.¹³ Where an act repeals such prior acts as are inconsistent with its provisions, it impliedly saves all prior acts which are consistent with it.¹⁴

8. **OF AMENDATORY ACTS.**—It is a general rule that the repeal of an original act amounts also to a repeal of an act amendatory thereof;¹⁵ but, where the original and amendatory acts are complete in themselves and independent of each other, the rule does not apply.¹⁶ There is a plain distinction between an act of congress amending a territorial act by adding or striking out particular provisions, and one re-enacting it substantially in all its provisions.¹⁷

9. **OF AMENDED ACTS.**—An amendatory act intended as a substitute, pro tanto, for an original act operates as a repeal, by implication of the original act.¹⁸

10. **OF GENERAL ACTS.**—A provision of a general law may be superseded by a subsequent special law granting a charter to a municipal corporation, although

5. **Question of intention.**—*Barney v. Dolph*, 97 U. S. 652, 656, 24 L. Ed. 1063; *Eckloff v. District of Columbia*, 135 U. S. 240, 243, 34 L. Ed. 120; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 499, 46 L. Ed. 289.

6. *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 500, 46 L. Ed. 289.

7. **By admission of territory as state.**—*De Lima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041.

By the admission of Wisconsin as a state, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in the federal supreme court. *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303.

8. *Luhrs v. Hancock*, 181 U. S. 567, 45 L. Ed. 1005. See the title **COMMON LAW**, vol. 3, p. 972.

9. *Cherokee Intermarriage Cases*, 203 U. S. 76, 51 L. Ed. 96. See the title **INDIANS**, vol. 6, p. 932.

"It is a rule of law that where a revising statute, or one enacted for another, emits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled."

Stewart v. Kahn, 11 Wall. 493, 502, 20 L. Ed. 176.

10. *Cherokee Intermarriage Cases*, 203 U. S. 76, 94, 51 L. Ed. 96.

11. "In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act." *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 409, 32 L. Ed. 180.

The fact that the numbers of the sections of the prior act are contained in the subsequent acts does not necessarily prevent the subsequent act being amendatory. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

12. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

13. *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. Ed. 340.

14. See ante, "Of Inconsistent Acts," XI, E, 2.

15. **Of amendatory acts.**—*Murphy v. Utter*, 186 U. S. 95, 109, 46 L. Ed. 1070.

16. *Murphy v. Utter*, 186 U. S. 95, 105, 46 L. Ed. 1070.

17. *Murphy v. Utter*, 186 U. S. 95, 106, 46 L. Ed. 1070.

18. *Pana v. Bowler*, 107 U. S. 529, 538, 27 L. Ed. 424.

the special law is silent with reference to the provision, where it is clearly the intent of the legislature to supersede the general law in that particular.¹⁹ An appropriation act which is a special and later enactment may operate to engraft an exception upon a prior and general statute.²⁰

11. OF SPECIAL ACTS.—It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute.²¹ In

19. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 22, 43 L. Ed. 341.

20. *United States v. Matthews*, 173 U. S. 381, 387, 43 L. Ed. 738.

A statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law. *Mathews v. United States*, 123 U. S. 182, 185, 31 L. Ed. 127; *United States v. Langston*, 118 U. S. 389, 394, 30 L. Ed. 164.

The present case does not come within the rule in *United States v. Langston*, 118 U. S. 389, 394, 30 L. Ed. 164, for the consular appropriation acts for the fiscal years ending June 30, 1883, 1884, 1885, and 1886, while recognizing the division made by the act of 1874 of consulates into classes, put the office of consul at Tangier in "Class V, at \$2,000 per annum." "Clearly, those acts, placing this consul in the fifth class, at \$2,000 per annum, repealed, by necessary implication, so much of previous enactments, including that of June 11, 1874, as placed the consul at Tangier in the third class, at \$3,000 per annum." *Mathews v. United States*, 123 U. S. 182, 185, 186, 31 L. Ed. 127.

21. Of special acts.—*Steamboat Co. v. Collector*, 18 Wall. 478, 493, 21 L. Ed. 769; *Cass County v. Gillett*, 100 U. S. 585, 25 L. Ed. 585; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 357, 41 L. Ed. 1007; *Minnesota v. Hitchcock*, 185 U. S. 373, 396, 46 L. Ed. 954; *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 497, 50 L. Ed. 281; *United States v. Nix*, 189 U. S. 199, 204, 47 L. Ed. 775; *Rodgers v. United States*, 185 U. S. 83, 89, 46 L. Ed. 616.

"The rule is, *generalia specialibus non derogant*." *Ex parte Crow Dog*, 109 U. S. 556, 570, 27 L. Ed. 1030; *Rodgers v. United States*, 185 U. S. 83, 88, 46 L. Ed. 816.

"The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townsend v. Little*, 109 U. S. 504, 27 L. Ed. 1012, that special and general statutory provisions may subsist together, the former qualifying the latter." *United States v. Nix*, 189 U. S. 199, 205, 47 L. Ed. 775.

A power to tax the property of a tele-

graph company given in a city charter may be repealed by a subsequent general act taxing the same property. *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098.

The specified guarantee, that "no person for the same offense shall be twice put in jeopardy of punishment," of § 5 of the act of July 1, 1902, establishing a bill of rights for the Philippine Islands, is to be construed as prevailing over any expression to the contrary found in § 9 of the act "that the supreme court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said government to change the practice and method of procedure." *Kepner v. United States*, 195 U. S. 100, 125, 49 L. Ed. 114.

There is not a word in the charter of the Illinois Southeastern Railway Company of February 24, 1869, which expressly excludes it from the benefits of the general railroad subscription law of Illinois of November 6, 1849. Nor is there the slightest repugnancy between the provisions of the two acts. The latter, being a general law, authorized any city or county in the state to purchase or subscribe to the capital stock of any railroad company anywhere in the state; the former, being an act to incorporate a private corporation, authorized any county through which the railroad of the company or any of its branches might pass, to make a donation to the company as a bonus or inducement towards the building of the railroad or its branches. There is no ground whatever for the contention that the general law was repealed or modified, in any respect, by the act incorporating the Illinois Southeastern Railway Company. *County of Clay v. Society*, 104 U. S. 579, 587, 26 L. Ed. 856.

The charter of the Louisiana, etc., Railroad Company granted by the Missouri legislature, March 10, 1859, which superseded the laws of Louisiana, to subscribe to stock, was not repealed by the general railroad act of March 19, 1866. The subjects of the two statutes are not the same; and there is no such inconsistency between them as that both may not stand and operate. *Louisiana v. Taylor*, 105 U. S. 454, 459, 26 L. Ed. 1133.

An act of congress containing special and particular provisions relating to a judicial district in a particular state is not

other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general²² one as the general law of the land, the other as the law of the particular case.²³ The general will not be understood as repealing the special unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.²⁴ A prior special law which is merely temporary and provisional is repealed by a subsequent perpetual law intended as a complete system of government.²⁵ It is a general rule in the construction of revenue acts that specific provisions for duties on a particular article are not repealed or affected by the general words of a subsequent act, although the language is sufficiently broad to cover that article.²⁶

12. EFFECT OF PROVISIONS IN PREAMBLE AND TITLE.—No repeal or alteration of a law can arise upon an implication drawn from a mere preamble or recital to an act.²⁷ A prior act may be impliedly repealed, although the title of the later act speaks of it as being amended, approved and confirmed.²⁸

G. By Constitution.—See elsewhere.²⁹

H. By Unconstitutional Act.—A former act is not repealed by a subsequent act which is unconstitutional.³⁰

I. By Treaty.—A treaty with a foreign nation or with an Indian tribe³¹ may operate as a repeal of an act of congress,³² where it is clearly so intended.³³

repealed by a general law in regard to the jurisdiction of all federal courts, unless there be an irreconcilable conflict between the two statutes. *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 497, 50 L. Ed. 281.

22. *Rodgers v. United States*, 185 U. S. 83, 87, 46 L. Ed. 616.

"It is said that here the earlier statute was a special grant or promise to grant two particular sections in each township; the later a general statute in respect to all of a large body of lands. There is no necessary incompatibility between the two, and the earlier should be taken as an exception to the later and the later held applicable to all the lands except the specially named sections." *Minnesota v. Hitchcock*, 185 U. S. 373, 397, 46 L. Ed. 954.

23. *State v. Stoll*, 17 Wall. 425, 21 L. Ed. 650.

24. *Rodgers v. United States*, 185 U. S. 83, 90, 46 L. Ed. 616.

The act of Kentucky of April 22, 1882, exempting the Louisville Water Company from taxation, was repealed by the general revenue act of May 17, 1886, which embraced all property within the state not expressly exempted by its provisions. *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55.

The special act of March 2, 1853, establishing the territory of Washington and providing that §§ 16 and 36 in each township shall be reserved for the purpose of being applied to schools, was repealed by the general act of February 26, 1859, providing that the said sections should be subject to pre-exemption claims. *Johanson v. Washington*, 190 U. S. 179, 47 L. Ed. 1008.

A previous grant of an exemption from taxation to a railroad company is repealed by a provision in a law subjecting all rail-

roads to an ad valorem tax and containing a provision that such railroad may escape the ad valorem tax by paying a special privilege tax. *Yazoo, etc., Val. R. Co. v. Adams*, 180 U. S. 1, 45 L. Ed. 395. See the title TAXATION.

25. *Eckloff v. District of Columbia*, 135 U. S. 240, 34 L. Ed. 120; *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. Ed. 60.

26. **Revenue laws.**—*Movius v. Arthur*, 95 U. S. 144, 24 L. Ed. 420.

"An act of 1861, which exempted from duty singing-birds, land and water fowls, was held not to be repealed by an act imposing a duty of twenty per cent 'on all horses, sheep, and other live animals.'" *Movius v. Arthur*, 95 U. S. 144, 146, 24 L. Ed. 420; *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566.

27. *Yeaton v. Bank*, 5 Cranch 49, 55, 3 L. Ed. 33.

28. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

29. See the title CONSTITUTIONAL LAW, vol. 4, p. 71.

30. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 42, 44 L. Ed. 657.

31. *The Cherokee Tobacco*, 11 Wall. 616, 621, 20 L. Ed. 227.

32. *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *The Cherokee Tobacco*, 11 Wall. 616, 621, 20 L. Ed. 227; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. Ed. 905; *Ward v. Race Horse*, 163 U. S. 504, 511, 41 L. Ed. 244; *United States v. Lee Yen Tai*, 185 U. S. 213, 221, 46 L. Ed. 878.

33. *Chew Heong v. United States*, 112 U. S. 536, 549, 28 L. Ed. 770; *United States*

J. By Revision and Codification.—When a revising statute covers the whole subject matter of antecedent statutes, the revising statute virtually repeals the antecedent enactment, unless there is something in the nature of the subject matter or the revising statute to indicate a contrary intention.³⁴

K. Determination of Fact of Repeal.—Whether or not a statute has been repealed is a judicial and not a legislative question.³⁵ The determination of the question whether or not an act of a state legislature has been repealed abides in the state court, except in the case where the question of repeal involves the determination of whether or not it impaired the obligation of contract.³⁶

L. Effect of Repeal—1. UPON REPEALED ACT—*a. In General.*—Its repeal ends the life of a statute,³⁷ powers derived wholly from it are extinguished,³⁸ and, except as to transactions past and closed, it is as though it had never existed.³⁹ Where the repealing statute merely substitutes⁴⁰ or incorporates⁴¹ the repealed statute, the latter instead of being annulled remains in force, with such alterations or modifications as are placed thereon by the repealing act.⁴²

v. Lee Yen Tai, 185 U. S. 213, 221, 46 L. Ed. 878. See the title TREATIES.

"A later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty." *Johnson v. Browne*, 205 U. S. 309, 321, 51 L. Ed. 816; *United States v. Lee Yen Tai*, 185 U. S. 213, 46 L. Ed. 878.

Sections 5272, 5275, Rev. Stat., are not incompatible with the extradition treaty with Great Britain of 1899 or in any way inconsistent therewith. *Johnson v. Browne*, 205 U. S. 309, 321, 51 L. Ed. 816.

34. *Kohlsaat v. Murphy*, 96 U. S. 153, 158, 24 L. Ed. 844; *Davies v. Fairbairn*, 3 How. 636, 11 L. Ed. 760.

Where a revising statute expressly repealed all but one of a number of statutes of one purport, it was held that the omission was an oversight, and the statute not mentioned was to be deemed repealed. *Beals v. Hale*, 4 How. 37, 11 L. Ed. 865.

35. **Determination of fact of repeal.**—*District of Columbia v. Hutton*, 143 U. S. 18, 36 L. Ed. 60; *Postmaster-General v. Early*, 12 Wheat. 136, 148, 6 L. Ed. 577; *South Ottawa v. Perkins*, 94 U. S. 260, 270, 24 L. Ed. 154; *United States v. Claffin*, 97 U. S. 546, 548, 24 L. Ed. 1028; *Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276.

Even though congress supposed an act to be still law, it is immaterial if in fact it has been repealed. *District of Columbia v. Hutton*, 143 U. S. 18, 36 L. Ed. 60.

A recital in a statute, that a former statute was repealed or superseded by subsequent acts, is not conclusive as to such repeal or supersedure. *United States v. Claffin*, 97 U. S. 546, 24 L. Ed. 1028.

36. **Of act of state.**—*Commissioners v. Bancroft*, 203 U. S. 112, 51 L. Ed. 112. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 804.

Whether a former state statute is repealed by implication by a later presents no question arising under the national constitution. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 30 L. Ed. 1059.

The question whether a statute of the Cherokee nation has been repealed by another statute of that nation, is solely a matter within a jurisdiction of the courts of that nation. *In re Duncan*, 139 U. S. 449, 35 L. Ed. 219; *Talton v. Mayes*, 163 U. S. 376, 385, 41 L. Ed. 196.

37. *Greenwood v. Freight Co.*, 105 U. S. 13, 18, 26 L. Ed. 961; *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429.

38. *Flanigan v. Sierra County*, 196 U. S. 553, 560, 49 L. Ed. 597; *In re Hall*, 167 U. S. 38, 42, 42 L. Ed. 69.

39. *Ex parte McCordle*, 7 Wall. 506, 514, 19 L. Ed. 264.

40. **Where original statute merely substituted.**—*Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 12, 41 L. Ed. 327; *Steamship Co. v. Joliffe*, 2 Wall. 450, 458, 17 L. Ed. 805.

41. *Davies v. Fairbairn*, 3 How. 636, 11 L. Ed. 760.

"Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication." *In re Heath*, 144 U. S. 92, 93, 36 L. Ed. 358.

42. Upon comparing the two mechanics' lien law acts of 1888 and 1890 in force in the territory of Utah together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of the old when these similar provisions have been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 11, 41 L. Ed. 327.

"This is the same principle that is recognized and asserted in *Steamship Co. v. Joliffe*, 2 Wall. 450, 459, 17 L. Ed. 805. In that case there was a repeal in terms

b. *Where Repeal Partial.*—Where there are several sections of a statute referring to the same subject matter and a part of them are repealed, the remaining part are to be construed as intended by the legislature to stand alone.⁴³ By the repeal of a proviso the enacting clause is left without such qualification as was imposed by the proviso.⁴⁴

c. *Where Repealed Act Temporary.*—The life of a temporary statute cannot be extended beyond the date of its expiration by a provision in a repealing act.⁴⁵

2. UPON CONTRACTS—a. *Made by Repealed Act.*—When a statute is in its nature a contract and absolute rights have vested under that contract, its repeal cannot divest those rights.⁴⁶ The repeal of a statute ratifying a contract does not destroy the effect of the ratification.⁴⁷

b. *Made under Repealed Act.*—Where transactions have taken place⁴⁸ and contracts been made which give rise to vested rights,⁴⁹ the repeal of a statute has no effect upon such rights, nor upon proceedings for their enforcement,⁵⁰ but it may affect defenses thereto.⁵¹ A contract which is void under the original act is not validated by the repealing act,⁵² unless the original act merely

of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed." *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 12, 41 L. Ed. 327.

43. *Where repeal partial.*—Where congress repealed §§ 727, 729, 730, of the Revised Statutes of the District of Columbia, in regard to the capacity of married women, but did not repeal § 728 in regard to her capacity to bequeath her property, § 728 remains in force and is to be construed without any limitation which might have been found by construing it with reference to the repealed sections. *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219.

The repeal or modification of a part of a law of the District of Columbia by congress does not operate as a ratification of the other distinct and separate parts thereof. *Stoutenburgh v. Hennick*, 129 U. S. 141, 149, 32 L. Ed. 637. See the title DISTRICT OF COLUMBIA, vol. 5, p. 404.

44. *Repeal of proviso.*—*Bank v. Collector*, 3 Wall. 495, 513, 18 L. Ed. 207. See post, "Provisos and Exceptions," XVI, M, 3.

45. *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520.

46. *Fletcher v. Peck*, 6 Cranch 87, 135, 3 L. Ed. 162. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 785, 823.

47. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

48. *Upon contracts made under repealed statute.*—"If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." *Fletcher v. Peck*, 3 Cranch 87, 135, 3 L. Ed. 162.

The repeal of a law in regard to insurance policies does not affect a policy previously taken out, under the laws of Missouri. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

Where work has been done under it, the

repeal of a mechanic's lien law does not affect the rights of the lienor. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 41 L. Ed. 327.

49. *Where rights vested.*—*Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

A vested right stands independently of the statute and is not affected by its repeal. *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805.

"The express repeal of a statute does not take away rights, of property which accrued under it while it was in force." *The Confiscation Cases*, 20 Wall. 92, 113, 22 L. Ed. 320.

Rights which have accrued under a statute are not affected by its repeal as to the manner of their enforcement. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 41 L. Ed. 327.

Section 5597 of the Revised Statutes saves all rights which had accrued under any of the acts repealed by § 5596. *Bechtel v. United States*, 101 U. S. 597, 25 L. Ed. 1019.

50. *Upon right to enforce vested right.*—When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect an action for its enforcement. *Steamship Co. v. Joliffe*, 2 Wall. 450, 17 L. Ed. 805. See, also, *South Carolina v. Gaillard*, 101 U. S. 433, 25 L. Ed. 937.

The repeal of a statute does not take away a right of action for damages which has already accrued under it. *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210. See post, "Upon Pending Suits," XI, L, 6.

51. The repeal of the usury statute of Texas without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. *Ewell v. Daggs*, 108 U. S. 143, 150, 27 L. Ed. 682.

52. *Hannay v. Eve*, 3 Cranch 242, 2 L. Ed. 427.

declares void a morally good consideration.⁵³

3. UPON TENURE OF OFFICE.—The repeal of a statute terminates the tenure of an office established by the original act.⁵⁴ The power of an administrator terminates with the repeal of the statute granting it.⁵⁵

4. UPON MATTERS INDEPENDENT OF REPEALED ACT.—The repeal of a statute does not affect matters independent of it arising from the constitution,⁵⁶ prior statutes,⁵⁷ or the common law.⁵⁸

5. UPON JURISDICTION.—Where the jurisdiction of a court depends upon a statute and the statute is repealed, the court can no longer exercise jurisdiction;⁵⁹ but, where the old law is substituted by a new,⁶⁰ containing a saving clause, it can still exercise jurisdiction.⁶¹

6. UPON PENDING SUITS.—If there be no saving thereof in a general statute⁶² or in the repealing statute,⁶³ pending suits, as well as those thereafter

53. "Where the consideration of a contract declared void by statute is morally good, a repeal of the statute will validate the contract." *Little Rock v. National Bank*, 98 U. S. 308, 314, 25 L. Ed. 108.

54. Upon tenure of office.—*Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

55. For example, the power to sell realty. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

56. *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264.

57. *Ex parte Yerger*, 8 Wall. 85, 19 L. Ed. 332.

58. *Amy v. Supervisors*, 11 Wall. 136, 138, 20 L. Ed. 101.

59. Upon jurisdiction.—The *General Pinkney*, 5 Cranch 281, 3 L. Ed. 101; *The Rachel*, 6 Cranch 329, 3 L. Ed. 239; *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *Maryland v. Baltimore, etc.*, R. Co., 3 How. 534, 11 L. Ed. 714; *United States v. Boisdore*, 8 How. 113, 12 L. Ed. 1009; *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303; *Norris v. Crocker*, 13 How. 429, 438, 14 L. Ed. 210; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264; *The Assessors v. Osbornes*, 9 Wall. 567, 19 L. Ed. 743; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Railroad Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231; *Sherman v. Grinnell*, 123 U. S. 679, 31 L. Ed. 278; *Gurnee v. Patrick County*, 137 U. S. 141, 144, 34 L. Ed. 601; *National Exchange Bank v. Peters*, 144 U. S. 570, 572, 36 L. Ed. 545; *In re Hall*, 167 U. S. 38, 43, 42 L. Ed. 69; *Bird v. United States*, 187 U. S. 118, 125, 47 L. Ed. 100.

"In *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540, it was held that the jurisdiction of the circuit courts between citizens of the same state in internal revenue cases, conferred by the act of 1864, was taken away by the act of 1866, and that cases pending at the passage of the act fell with its repeal." *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741; *Ex parte McCardle*, 7 Wall. 506, 19 L. Ed. 264.

60. *Bird v. United States*, 187 U. S. 118, 47 L. Ed. 100. See the title COURTS, vol. 4, p. 1157.

61. *National Exchange Bank v. Peters*, 144 U. S. 570, 572, 36 L. Ed. 545.

The act of June 6, 1900, in regard to the jurisdiction of the United States courts of Alaska, provides that no person shall be deprived of any existing right or remedy by reason of its passage. *Bird v. United States*, 187 U. S. 118, 47 L. Ed. 100. See the title COURTS, vol. 4, p. 1157.

62. Upon pending suits.—Saving clause in general statute.—*Bechtel v. United States*, 101 U. S. 597, 25 L. Ed. 1019; *United States v. Reisinger*, 128 U. S. 398, 401, 32 L. Ed. 480.

By § 13 of the Revised Statutes it is provided that: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." The words penalty, liability or forfeiture, as used in this act, may be treated as synonymous with the word punishment, and as applying to crimes and punishments therefor. By virtue of this section the repealing act of 1884, 23 Stat. 98, 99, repealing the act of June 20, 1878, "relating to claim agents, and attorneys in pension cases," 20 Stat. 243, 367, is to be held inoperative as to all offenses committed before its passage. *United States v. Reisinger*, 128 U. S. 398, 32 L. Ed. 480.

It is provided by statute in Arizona that the repeal of a statute does not affect an existing or accrued right or any pending action or proceeding. A petition for mandamus is a proceeding within this statute. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070, citing *Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920, in which the writ of mandamus had actually issued. See the title MANDAMUS, vol. 8, p. 91.

A similar provision exists in Tennessee. *Memphis v. United States*, 97 U. S. 293, 24 L. Ed. 920.

63. Saving clause in repealing statute.—*The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *United States v. Boisdore*, 8 How. 113, 12

commenced, are terminated by the repeal,⁶⁴ except suits for the enforcement of vested rights and binding contracts.⁶⁵ All suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after.⁶⁶ Cases pending appeal are terminated,⁶⁷ and the sentence of the lower court must be reversed.⁶⁸ A decree in admiralty is not final while it is depending in the supreme court;⁶⁹ and, if the statute upon which such decree is based is repealed before the time of confirming the decree, it falls with the statute.⁷⁰ This doctrine finds its most frequent application to criminal cases,⁷¹ for the repeal of a penal statute before sentence⁷² operates as a remission of all penalties for violations of it committed before its repeal,⁷³ and a release from prosecution therefor after said repeal,⁷⁴ but it also applies

L. Ed. 1009; *The Reform*, 3 Wall. 617, 689, 13 L. Ed. 105; *Dennison v. Alexander*, 103 U. S. 522, 26 L. Ed. 313; *United States v. Reisinger*, 128 U. S. 398, 401, 32 L. Ed. 480; *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741; *Flanigan v. Sierra County*, 196 U. S. 553, 560, 49 L. Ed. 597; *Missouri Pac. R. Co. v. United States*, 189 U. S. 274, 47 L. Ed. 811.

This saving clause does not create a distinct power, but merely preserves that which existed under the original statute. *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520.

64. In absence of saving clause.—*The General Pinkney*, 5 Cranch 281, 3 L. Ed. 101; *The Rachel*, 6 Cranch 329, 3 L. Ed. 239; *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 11 L. Ed. 714; *United States v. Boisdore*, 8 How. 113, 12 L. Ed. 1009; *McNulty v. Batty*, 10 How. 72, 13 L. Ed. 303; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *United States v. 67 Packages of Dry Goods*, 17 How. 85, 96, 15 L. Ed. 54; *Moffitt v. Garr*, 1 Black 273, 283, 17 L. Ed. 207; *Steamship Co. v. Joliffe*, 2 Wall. 450, 466, 17 L. Ed. 805; *Insurance Co. v. Ritchie*, 5 Wall. 541, 18 L. Ed. 540; *Ex parte McCordle*, 7 Wall. 506, 514, 19 L. Ed. 264; *The Assessors v. Osbornes*, 9 Wall. 567, 19 L. Ed. 748; *United States v. Tynen*, 11 Wall. 88, 94, 20 L. Ed. 153; *Railroad Co. v. Grant*, 98 U. S. 398, 401, 25 L. Ed. 231; *South Carolina v. Gaillard*, 101 U. S. 433, 25 L. Ed. 937; *Gurnee v. Patrick County*, 137 U. S. 141, 34 L. Ed. 601; *In re Hall*, 167 U. S. 38, 42 L. Ed. 69; *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741; *Murphy v. Utter*, 186 U. S. 95, 109, 46 L. Ed. 1070.

After an act which creates no binding contract has been repealed, a party cannot institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated. *South Carolina v. Gaillard*, 101 U. S. 433, 25 L. Ed. 937.

65. For enforcement of vested rights.—See ante, "Made under Repealed Act," XI, L., 2, b.

66. Suits pending appeal.—*South Carolina v. Gaillard*, 101 U. S. 433, 438, 25 L. Ed. 937; *Railroad Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231.

67. Sherman v. Grinnell, 123 U. S. 679, 31 L. Ed. 278; *McNulty v. Batty*, 10 How.

72, 13 L. Ed. 303; *District of Columbia v. Eslin*, 183 U. S. 62, 64, 66, 46 L. Ed. 85.

68. "In *The General Pinkney*, 5 Cranch 281, 3 L. Ed. 101, it was held that if the law, under which a sentence of forfeiture was inflicted, expired or was absolutely repealed after an appeal and before sentence by the appellate court, the sentence must be reversed." *Gwin v. United States*, 184 U. S. 669, 675, 46 L. Ed. 741. See, also, *The Rachel*, 6 Cranch 329, 3 L. Ed. 239; *United States v. Preston*, 3 Pet. 57, 7 L. Ed. 601; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210.

69. Appeal from admiralty.—See the title ADMIRALTY, vol. 1, p. 178.

70. *United States v. Preston*, 3 Pet. 57, 7 L. Ed. 601.

71. In criminal cases.—*Flanigan v. Sierra County*, 196 U. S. 553, 560, 49 L. Ed. 597.

72. "If no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *The General Pinkney*, 5 Cranch 281, 3 L. Ed. 101.

73. Remission of penalty.—*The Peggy*, 1 Cranch 103, 104, 2 L. Ed. 49; *The General Pinkney*, 5 Cranch 231, 3 L. Ed. 101; *The Ship Helen*, 6 Cranch 203, 3 L. Ed. 199; *The Juliana*, 6 Cranch 327, 329, 3 L. Ed. 238; *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 11 L. Ed. 714; *United States v. Tynen*, 11 Wall. 88, 95, 20 L. Ed. 153; *United States v. Reisinger*, 128 U. S. 398, 401, 32 L. Ed. 480.

74. Release from prosecution.—*The Reform*, 3 Wall. 617, 629, 18 L. Ed. 105; *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210; *United States v. Reisinger*, 128 U. S. 398, 401, 32 L. Ed. 480.

The repeal of a statute operates as an absolute bar to a criminal prosecution thereon, and the defendant is entitled to a discharge. *United States v. Passmore*, 4 Dall. 372, 1 L. Ed. 871.

The repeal of a penal statute terminates the proceedings on a pending indictment under it. *United States v. Passmore*, 4 Dall. 372, 1 L. Ed. 871; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153.

to a civil action⁷⁵ for the enforcement of a penalty,⁷⁶ and it has been applied to the repeal of the power of counties to enact ordinances for revenue.⁷⁷

7. **DETERMINATION OF EFFECT.**—Unless a federal question be involved, the supreme court of the United States will follow the decisions of a state court as to the effect of the repeal of a statute.⁷⁸

8. **OF REPEAL OF REPEALING ACT**—a. *Common-Law Rule.*—By the common-law rule, the repeal of a repealing act revives the repealed act,⁷⁹ without express words to that effect,⁸⁰ unless contrary to the intention of the legislature,⁸¹ or unless the repealing statute is limited to the abrogation of the act repealed.⁸² Where an act of congress which constitutes an obstacle to the operation of an act of one of the states is repealed, the state act need not be re-enacted.⁸³ The repeal of an act which makes an exception to a prior act leaves it in full force.⁸⁴

b. *Statutory Rule.*—Congress has provided that whenever an act is repealed which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided.⁸⁵ A similar provision has been enacted in Virginia⁸⁶ and Arizona.⁸⁷

XII. Suspension.

The operation of a statute may be suspended.⁸⁸

75. **In civil cases.**—See ante, "Made under Repealed Statute," XI. L. 2, b.

76. *Dinsmore v. Southern Express Co.*, 183 U. S. 115, 46 L. Ed. 111.

77. It is clear that the decision was not based alone on the penal character of the ordinance but on the broader principle that the power to enact it having been taken away, the power to enforce it was also taken away. *Flanigan v. Sierra County*, 196 U. S. 553, 560, 561, 49 L. Ed. 597.

78. **Determination of effect.**—*Flanigan v. Sierra County*, 196 U. S. 553, 49 L. Ed. 597.

79. **Of repeal of repealing act—Common-law rule.**—*Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638; *Ex parte Yenger*, 8 Wall. 85, 106, 19 L. Ed. 332; *Kohlsaat v. Murphy*, 96 U. S. 153, 157, 24 L. Ed. 844; *In re Rahrer*, 140 U. S. 545, 546, 35 L. Ed. 572; *Butler v. Goreley*, 146 U. S. 303, 314, 36 L. Ed. 981; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 353, 43 L. Ed. 191.

80. **Necessity for express restoration.**—When an act simply removes the prohibition contained in a prior act, the effect is without formal words for that purpose, to restore the law as it was before the passage of the latter act. *United States v. Philbrick*, 120 U. S. 52, 57, 30 L. Ed. 559.

81. **Where contrary to intention.**—The contention that the act of North Carolina of 1885, ch. 308, § 4, repealed by the act of 1887, ch. 412, § 6, was revived by the act of 1891, ch. 348, is contrary to legislative intention, as the last act imposed only an inspection act, while the prior laws imposed a privilege tax on fertilizers. *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 353, 43 L. Ed. 191.

82. *United States v. Philbrick*, 120 U. S. 52, 57, 30 L. Ed. 559.

83. *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 523, 40 L. Ed. 1057.

Thus insolvency acts are revived by repeal of a general bankruptcy law. *Butler v. Goreley*, 146 U. S. 303, 314, 36 L. Ed. 981.

84. *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 409, 32 L. Ed. 180.

85. **Act of congress.**—*Kohlsaat v. Murphy*, 96 U. S. 153, 158, 24 L. Ed. 844; *Chicago, etc., R. Co. v. United States*, 127 U. S. 406, 408, 32 L. Ed. 180.

"The general rule was never modified by congress until the passage of the act of February 25, 1871, now § 12 of the Revised Statutes." *United States v. Philbrick*, 120 U. S. 52, 58, 30 L. Ed. 559.

86. **Virginia.**—The common-law rule was changed by an early act in Virginia. *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638. But this act has been held not to be applicable to the case where at a subsequent day of the term of the legislature an act was passed suspending the repealing act. The act of the legislature of Virginia of 1749 was in force on February 11, 1793, although the legislature passed a repealing act in November, 1792, but passed another act in December of same term suspending the repealing act until November, 1793. *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638.

87. **Arizona.**—The common-law rule does not prevail in the territory of Arizona. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

88. **Suspension.**—See the title *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 734. See, also, *Levey v. Stockslager*, 129 U. S. 470, 475, 32 L. Ed. 785.

XIII. Annulment.

The courts do not favor the annulment of a statute by implication.⁸⁹

XIV. Expiration.

An offense against a temporary statute cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose.⁹⁰

XV. Revival.

A. In General.—If a prior legislature declares that a statute shall expire upon a certain date, this does not prevent a subsequent legislature from reviving such statute. When an act of congress is revived by a subsequent act, it is revived precisely in that form, and with that effect, which it had at the moment when it expired. The reviving act may be made to take effect at the date of expiration, or at any future date declared by proclamation.⁹¹

B. Of Repealed Act.—See elsewhere in this title.⁹²

XVI. Construction.

A. Construction Defined.—The determination of the meaning and effect of a statute from its language,⁹³ controlled by certain well-settled rules,⁹⁴ amounts to construction.⁹⁵

B. Distinguished from Interpretation.—It seems that interpretation is the reading of a statute according to its letter, while construction is the reading of a statute according to its spirit and intent.⁹⁶

C. Distinguished from Determination of Constitutionality.—See elsewhere.⁹⁷

D. Distinguished from Construction of Other Documents.—A statute is not always construed in the same manner as other instruments.⁹⁸

E. Power to Construe—1. **IN GENERAL.**—The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.⁹⁹

2. **OF COURTS**—a. *In General.*—The judicial department of every government is the rightful expositor of its laws.¹ It is the duty of this department to declare the meaning of the law as enacted by the legislature,² and not to

89. **Annulment.**—Cope *v.* Cope, 137 U. S. 682, 686, 34 L. Ed. 832.

90. *The Ship Helen*, 6 Cranch 203, 3 L. Ed. 199; *The Irresistible*, 7 Wheat. 551, 5 L. Ed. 520; *The Reform*, 3 Wall. 617, 629, 18 L. Ed. 105.

91. *The Aurora*, 7 Cranch 382, 3 L. Ed. 378.

92. **Of repealed statutes.**—See ante, "Of Repeal of Repealing Act," XI, L. 8.

93. **Construction defined.**—See post, "Manner of Construction," XVI, G.

94. See post, "General Rules of Construction," XVI, I.

95. *Williams v. Gaylord*, 186 U. S. 157, 163, 46 L. Ed. 1102; *United States v. Farenholt*, 206 U. S. 226, 229, 51 L. Ed. 1036.

96. *United States v. Farenholt*, 206 U. S. 226, 51 L. Ed. 1036; *Felton v. United States*, 96 U. S. 699, 702, 24 L. Ed. 875.

"The very essence of construction is the extension of the meaning of a statute beyond its letter." *Williams v. Gaylord*, 186 U. S. 157, 163, 46 L. Ed. 1102.

97. See the title **APPEAL AND ERROR**, vol. 1, p. 546.

98. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 201, 47 L. Ed. 139.

99. *Smiley v. Kansas*, 196 U. S. 447, 455, 49 L. Ed. 546.

1. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

2. **To declare law as enacted.**—*United States v. Fisher*, 2 Cranch 358, 399, 2 L. Ed. 304; *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408; *Lawrence v. Allen*, 7 How. 785, 793, 12 L. Ed. 913; *The Cherokee Tobacco*, 11 Wall. 616, 620, 20 L. Ed. 227; *Reiche v. Smythe*, 13 Wall. 162, 164, 20 L. Ed. 566; *Pott v. Arthur*, 104 U. S. 735, 26 L. Ed. 909; *United States v. Temple*, 105 U. S. 97, 99, 26 L. Ed. 967; *Whitney v. Robertson*, 124 U. S. 190, 195, 31 L. Ed. 386; *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 650, 35 L. Ed. 1144; *United States v. Alger*, 152 U. S. 384, 397, 38 L. Ed. 488; *Dewey v. United States*, 178 U. S. 510, 44 L. Ed. 1170; *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *United States v. Crosley*, 196 U. S. 327, 333, 49 L. Ed. 497.

"The duty of the courts is to apply the

make,³ modify,⁴ amend,⁵ or insert exceptions in a statute,⁶ though, when so guided by the clear legislative intent, the court may disregard particular expressions and harmonize inconsistent expressions.⁷

b. *To Avoid Injustice, Inconvenience and Absurdity.*—See elsewhere in this note.⁸

c. *To Determine Constitutionality of Statute.*—In passing upon the constitutionality of a statute it is the duty of the court to construe both the constitution and the statute.⁹

d. *Of Appellate Court.*—A federal statute has more than a local application, and, until construed by the supreme court, cannot be said to have an established meaning.¹⁰

e. *Of Federal and State Courts.*—See elsewhere.¹¹

f. *Effect of Construction by Court.*—The construction by an inferior federal court prevails over a contrary construction by the officials of the patent office.¹²

3. OF LEGISLATURE.—A legislature cannot declare what the law was, but what it shall be.¹³

general rule prescribed by congress." *United States v. Alger*, 152 U. S. 384, 397, 38 L. Ed. 488.

"Our province is construction only; the policy of the law is the prerogative of the legislative department." *United States v. Jones*, 131 U. S. 1, 19, 33 L. Ed. 90.

It is the duty of the judiciary to ascertain if a doubt as to the meaning of a statute exists. *Citizens' Bank v. Parker*, 192 U. S. 73, 86, 48 L. Ed. 346.

3. *To make law.*—Keppel v. Tiffin Sav. Bank, 97 U. S. 356, 49 L. Ed. 790; *Dewey v. United States*, 178 U. S. 510, 521, 44 L. Ed. 1170.

When the language is plain, the courts have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision. *United States v. Temple*, 105 U. S. 97, 99, 26 L. Ed. 967.

"The courts have no function of legislation, and simply seek to ascertain the will of the legislator." *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394.

"It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37; *Hackfeld & Co. v. United States*, 197 U. S. 442, 450, 49 L. Ed. 826; *Burton v. United States*, 202 U. S. 344, 377, 50 L. Ed. 1057.

4. *To modify law.*—"It is our business to execute the law as we find it, and not to make or modify it." *Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866.

"It is not for the courts by mere interpretation of a statute, not justified by its language, to accomplish objects that are within the exclusive province of legislation." *Clark v. Bever*, 139 U. S. 96, 108, 35 L. Ed. 88.

The court cannot eliminate from an appropriation act the words "in full compensation," which congress, abandoning the long-used form of such acts has, ex industria, inserted. Our duty is to give them effect. When congress has said that the sum appropriated shall be "in

full compensation" of the services of the appellee, we cannot say that it shall not be in full compensation, and allow him a greater sum. *United States v. Fisher*, 109 U. S. 143, 146, 27 L. Ed. 885.

5. *To amend law.*—*Livingston v. Story*, 11 Pet. 351, 399, 9 L. Ed. 746, Baldwin, J., dissenting.

6. *Insert exceptions.*—"Where the statute contains no exception, the courts cannot create one." *Hyde v. Shine*, 199 U. S. 62, 78, 50 L. Ed. 90; *French v. Spencer*, 21 How. 228, 238, 16 L. Ed. 97.

7. *To harmonize inconsistencies.*—*Inglehart v. Inglehart*, 204 U. S. 478, 51 L. Ed. 575. See ante, "Implied Repeal," XI, F; post, "Construed as a Whole," XVI, I, 3.

8. *To avoid injustice, inconvenience and absurdity.*—See the title CONSTITUTIONAL LAW, vol. 4, pp. 255, 298. And see post, "Injustice, Inconvenience and Absurdity," XVI, K, 11.

9. *Bank v. Dudley*, 2 Pet. 492, 7 L. Ed. 496.

10. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 182 U. S. 499, 505, 45 L. Ed. 1200.

11. *Of federal and state courts.*—See the titles APPEAL AND ERROR, vol. 1, p. 548; COURTS, vol. 4, p. 1066.

12. *Steinmetz v. Allen*, 192 U. S. 545, 560, 48 L. Ed. 553.

13. *Power of legislature to construe.*—*Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276. See ante, "Determination of Fact of Repeal," XI, K.

Where a statute has received a judicial construction, a remedial act will always be construed to extend only to future cases. *Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276.

A declaratory statute cannot have the legal effect of taking away a vested right, or of changing the rule of construction as to a pre-existing law. *Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276. See post, "Legislative Construction," XVI, J, 3, a.

4. OF EXECUTIVE AND ADMINISTRATIVE OFFICERS.—Where congress confers a power upon the secretary of the interior in ambiguous language to regulate the exercise of a license, the secretary cannot construe such statute in a manner which amounts to legislation.¹⁴

5. OF PARTIES.—See elsewhere.¹⁵

F. Necessity for Construction—1. IN GENERAL.—There never will be a time in which judicial interpretation of laws will not be invoked.¹⁶

2. WHERE INTENT CLEAR.—Where a statute is expressed in plain and unambiguous terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.¹⁷ Where the intent is plain, nothing is left for construction.¹⁸ The province of construction lies wholly within the domain of ambiguity.¹⁹

3. WHERE INTENT NOT CLEAR.—Where neither the words of a statute nor the circumstances and conditions of its enactment make clear the intent of congress, the court will turn to the rules of statutory construction.²⁰

4. OF PARTICULAR STATUTES.—A statute authorizing an action to establish a right is very different from one which creates a right to be established. An action brought under the one may involve no controversy as to the scope and effect of the statute, while in the other case it necessarily involves such a con-

14. Of executive and administrative officers.—United States *v.* United Verde Copper Co., 196 U. S. 207, 49 L. Ed. 449. See post, "Contemporaneous and Practical Construction," XVI, J, 3, c.

15. Of parties.—See post, "Mining Laws," XVI, L, 26.

16. Citizens' Bank *v.* Parker, 192 U. S. 73, 86, 48 L. Ed. 346.

17. Where intent clear.—United States *v.* Fisher, 2 Cranch 358, 386, 399, 2 L. Ed. 304; United States *v.* Wiltberger, 5 Wheat. 76, 95, 5 L. Ed. 37; Washington *v.* Pratt, 8 Wheat. 681, 683, 5 L. Ed. 714; United States *v.* Freeman, 3 How. 556, 11 L. Ed. 724; Forsyth *v.* United States, 9 How. 570, 571, 577, 13 L. Ed. 262; United States *v.* Hartwell, 6 Wall. 385, 396, 18 L. Ed. 830; Doe *v.* Considine, 6 Wall. 458, 18 L. Ed. 869; The Cherokee Tobacco, 11 Wall. 616, 620, 621, 20 L. Ed. 227; Texas *v.* Chiles, 21 Wall. 488, 491, 22 L. Ed. 650; Smythe *v.* Fiske, 23 Wall. 374, 23 L. Ed. 47; United States *v.* Reese, 92 U. S. 214, 221, 23 L. Ed. 563; Lewis *v.* United States, 92 U. S. 618, 621, 23 L. Ed. 513; Morgan *v.* Railroad Co., 96 U. S. 716, 722, 24 L. Ed. 743; Platt *v.* Union Pac. R. Co., 99 U. S. 48, 25 L. Ed. 424; Doggett *v.* Railroad Co., 99 U. S. 72, 78, 25 L. Ed. 301; United States *v.* Temple, 105 U. S. 97, 26 L. Ed. 967; Ruggles *v.* Illinois, 108 U. S. 526, 531, 27 L. Ed. 812; United States *v.* Fisher, 109 U. S. 143, 146, 27 L. Ed. 885; Thornley *v.* United States, 113 U. S. 310, 313, 28 L. Ed. 999; Viterbo *v.* Friedlander, 120 U. S. 707, 724, 30 L. Ed. 776; Lake County *v.* Rollins, 130 U. S. 662, 670, 32 L. Ed. 1060; United States *v.* Lynch, 137 U. S. 280, 285, 34 L. Ed. 700; United States *v.* Burr, 159 U. S. 78, 82, 40 L. Ed. 82; United States *v.* Goldenberg, 168 U. S. 95, 42 L. Ed. 394; Calderon *v.* Atlas Steamship Co., 170 U. S. 272, 280, 42 L. Ed. 1033; Yerke *v.* United States, 173 U. S. 439, 442, 43 L. Ed. 760;

Hamilton *v.* Rathbone, 175 U. S. 414, 419, 44 L. Ed. 219; Hawaii *v.* Mankichi, 190 U. S. 197, 223, 247, 47 L. Ed. 1016; White *v.* United States, 191 U. S. 545, 48 L. Ed. 295; Northern Securities Co. *v.* United States, 193 U. S. 197, 358, 48 L. Ed. 679; Crawford *v.* Burke, 195 U. S. 176, 189, 49 L. Ed. 147; United States *v.* Thomas, 195 U. S. 418, 49 L. Ed. 259; Franklin Sugar Ref. Co. *v.* United States, 202 U. S. 580, 50 L. Ed. 1153. See post, "According to Letter," XVI, G, 1.

Where the language of an act is plain and unequivocal, there is no need of the aid of an extrinsic rule of construction to get at the intent and meaning of congress. St. Paul, etc., R. Co. *v.* Phelps, 137 U. S. 528, 536, 34 L. Ed. 767.

"When terms are unambiguous we may not speculate on probabilities of intention." Insurance Co. *v.* Ritchie, 5 Wall. 541, 545, 18 L. Ed. 540.

"Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning." State Tonnage Tax Cases, 12 Wall. 204, 217, 20 L. Ed. 370.

The language of the act of March 3, 1835, providing for payment of traveling expenses of any United States officer, is too clear to require interpretation. United States *v.* Graham, 110 U. S. 219, 220, 28 L. Ed. 126.

18. United States *v.* Fisher, 2 Cranch 358, 386, 2 L. Ed. 304.

19. Hamilton *v.* Rathbone, 175 U. S. 414, 421, 44 L. Ed. 219.

20. Rodgers *v.* United States, 185 U. S. 83, 86, 46 L. Ed. 616; White *v.* United States, 191 U. S. 545, 550, 48 L. Ed. 295.

A statute will not be deemed equivocal to the degree that it may be extended by construction beyond its spirit. Faw *v.* Marsteller, 2 Cranch 10, 24, 2 L. Ed. 191.

troversy, for the thing to be decided is the extent of the right given by the statute.²¹

G. Manner of Construction—1. ACCORDING TO LETTER.—A statute is its own best expositor.²² Expression is to be given to its language,²³ and consequences in direct violation of its provisions are to be avoided.²⁴ As the law as passed is the will of the majority of the legislature and the only mode in which that will is spoken is in the act itself,²⁵ the legislative meaning is first to be sought in the words they have used,²⁶ and if clear the letter of the law controls,²⁷ unless in exceptional cases where there are cogent reasons for believing

21. *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 510, 44 L. Ed. 864.

22. **Construed according to letter.**—*Pennington v. Coxe*, 2 Cranch 33, 52, 2 L. Ed. 199; *United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724; *Henderson's Distilled Spirits*, 14 Wall. 44, 68, 20 L. Ed. 815; *United States v. Saunders*, 22 Wall. 492, 496, 22 L. Ed. 736.

23. **Expression given to language.**—*Harford v. United States*, 8 Cranch 109, 110, 3 L. Ed. 504; *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *The Cherokee Tobacco*, 11 Wall. 616, 620, 20 L. Ed. 227; *The Strathairly*, 124 U. S. 558, 31 L. Ed. 580; *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394; *The Japanese Immigration Case*, 189 U. S. 86, 101, 47 L. Ed. 721; *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575.

Effect must be given to the express words of the legislature. *United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304.

"The act itself speaks the will of congress, and this is to be ascertained from the language used." *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79, 23 L. Ed. 224.

"It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of congress, but it is the imperative duty of the court to do so." *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 39 L. Ed. 601.

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *United States v. Goldenberg*, 168 U. S. 95, 102, 42 L. Ed. 394.

"Words which have a meaning are not to be entirely disregarded in construing a statute." *Postmaster-General v. Early*, 12 Wheat. 136, 148, 6 L. Ed. 577.

24. *Huidekoper v. Douglass*, 3 Cranch 1, 72, 2 L. Ed. 347.

Where the language of an act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature." *Scott v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519.

25. *Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469.

26. **Meaning first sought in language.**—*Brewer v. Bloucher*, 14 Pet. 178, 10 L. Ed. 408; *Aldridge v. Williams*, 3 How. 9, 11 L. Ed. 469; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Market Co. v. Hoffman*, 101 U. S. 112, 116, 25 L. Ed. 782; *Railroad Companies v. Schutte*, 103 U. S. 118, 140, 26 L. Ed. 327; *Merritt v. Welsh*, 104 U. S. 697, 702, 26 L. Ed. 896; *Tennessee Bond Cases*, 114 U. S. 663, 688, 29 L. Ed. 281; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 313, 41 L. Ed. 1007; *Maxwell v. Dow*, 176 U. S. 581, 601, 44 L. Ed. 597.

"We must take the law as we find it upon examination of its language. The words of the statute should be pursued." *United States v. Gooding*, 12 Wheat. 460, 478, 6 L. Ed. 693.

To get at the thought or meaning expressed in a statute the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060; *Scott v. Reid*, 10 Pet. 524, 9 L. Ed. 519.

27. **Where language clear.**—*Hamilton v. Russell*, 1 Cranch 309, 2 L. Ed. 118; *United States v. Fisher*, 2 Cranch 358, 400, 2 L. Ed. 304; *Pierce v. Turner*, 5 Cranch 154, 169, 3 L. Ed. 64; *Martin v. Hunter*, 1 Wheat. 304, 358, 4 L. Ed. 97; *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529; *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37; *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408; *Market Co. v. Hoffman*, 101 U. S. 112, 116, 25 L. Ed. 782; *Merritt v. Welsh*, 104 U. S. 694, 702, 26 L. Ed. 896; *Chew Heong v. United States*, 112 U. S. 536, 28 L. Ed. 770; *In re Wilson*, 140 U. S. 575, 35 L. Ed. 513; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. Ed. 340; *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571, 587, 37 L. Ed. 284; *In re Horst*, 150 U. S. 653, 37 L. Ed. 1211; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 38, 39 L. Ed. 601; *Quackenbush v.*

that the letter does not fully and accurately disclose the intent²⁸ or unless to avoid absurd, unjust or inconvenient consequences.²⁹ The words of a statute are presumed to be comprehensively,³⁰ intentionally, meaningly,³¹ and in-

United States, 177 U. S. 20, 26, 44 L. Ed. 654; *Treat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853; *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438; 450, 45 L. Ed. 1171; *McLaughry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049; *United States v. Michigan*, 190 U. S. 379, 47 L. Ed. 1103; *James v. Appel*, 92 U. S. 129, 48 L. Ed. 377; *United States v. Smith*, 187 U. S. 386, 49 L. Ed. 801. See the title ACKNOWLEDGMENTS, vol. 1, p. 91.

The positive language of a statute controls every other rule of interpretation. *Cary v. Curtis*, 3 How. 236, 239, 11 L. Ed. 576.

Where the meaning is clear the court cannot "travel outside" the wording of a statute. *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 450, 45 L. Ed. 1171.

If the terms of a law be explicit, they must control the subject. *Wilson v. Mason*, 1 Cranch 45, 101, 2 L. Ed. 29.

Where the language of a statute is too plain to be misunderstood, it must be followed. *Knights Templars', etc., Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139.

"If the language used is free from ambiguity it is the best evidence of the thing intended, and it is the duty of the courts to find, if possible, within the four corners of the act, and from the language used, the scope and meaning of the law." *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *Lake County v. Rollins*, 130 U. S. 662, 671, 32 L. Ed. 1060.

"It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." *Scott v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519.

"Where the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature intended any thing different from what their language imports." *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 663, 23 L. Ed. 336.

"The legislature having made a distinction between the cases, whether it was intentional or not, reasonable or unreasonable, the court are bound by the clearly-expressed language of the act." *Scott v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519.

28. *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394.

It is the duty of the court to restrain the operation of a statute within narrower limits than its words import, if satisfied that the literal meaning of its language

would extend to cases which the legislature never designed to include in it. *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408.

There is no ground which would justify a departure from the plain words employed, where the court is not able to see that the letter of the statute did not fully disclose the intent. *Dunlap v. United States*, 173 U. S. 65, 73, 43 L. Ed. 616.

29. *Pierce v. Turner*, 5 Cranch 154, 169, 3 L. Ed. 64, *Johnson, J.*, dissenting. See post, "Injustice, Inconvenience and Absurdity," XVI, K, 11.

30. *United States v. Staats*, 8 How. 41, 47, 12 L. Ed. 979; *Telegraph Co. v. Eyser*, 19 Wall. 419, 432, 22 L. Ed. 42.

"The courts cannot extend it beyond its terms and hold the statute to include things not named therein." *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 249, 46 L. Ed. 1144.

Where the words of a statute are explicit, they must be construed to comprehend every case not completely excepted from their operation. *Young v. Bank*, 4 Cranch 384, 397, 2 L. Ed. 655. See post, "Construed by Implication," XVI, G, 5.

31. *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *Adams v. Woods*, 2 Cranch 336, 2 L. Ed. 297; *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 48 L. Ed. 491.

Congress is not to be presumed to have used words for no purpose. *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 58, 25 L. Ed. 424.

Every word used in a statute is presumed to have a separate and independent meaning of its own. *Murphy v. Uter*, 186 U. S. 95, 111, 46 L. Ed. 1070.

"We must assume that the members, by whose vote the act became a law, fully weighed its meaning and intended what it expressed." *Slidell v. Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321.

The legislature is presumed to use language to express their meaning. *O'Neale v. Thornton*, 6 Cranch 53, 3 L. Ed. 150.

A word in the statute which appears to have been intentionally used cannot be treated as an intruder and eliminated from it. *United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

It is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 245, 46 L. Ed. 1144. See *Field v. Clark*, 143 U. S. 649, 672, 36 L. Ed. 294.

telligently used,³² unless incongruous.³³ The rule that a statute is to be construed according to a just interpretation of the language used, prevails over the rule that statutes in *pari materia* are to be construed together;³⁴ but a statute is to be construed according to the clear intention of the legislature³⁵ and according to its universally accepted construction rather than according to its language.³⁶

2. ACCORDING TO INTENTION—*a. In General.*—A statute is not always to be read according to the written word. Construction sometimes is to be exercised as well as interpretation.³⁷ Wherever the words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to in order to find its meaning;³⁸ for a thing which is within the intention of the makers of a stat-

32. *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925; *Montclair v. Ramsdell*, 107 U. S. 147, 152, 27 L. Ed. 431.

The presumption is that congress appreciated the effect of its action when it took upon itself anew, and in derogation of the local authorities, the duty of fixing the subjects of taxation; and that it knew that the result of declaring all the property, with certain exceptions, to be liable to the payment of taxes for the year ending June, 1875, was to make that act stand in the place of all others upon the subject. *Welch v. Cook*, 97 U. S. 541, 543, 24 L. Ed. 1112.

The act of June 30, 1864, regulating prize proceedings and the distribution of prize money, provided a bounty upon the sinking of an enemy's vessel of "\$100 if the enemy's vessel is of inferior force, and \$200 if of equal or superior force." In construing the statute it was held that the court could not suppose that congress overlooked the fact that an enemy's vessel might be supported by land batteries, mines and torpedoes, and that "the enemy's vessel" did not mean the enemy's vessel and the land batteries, mines and torpedoes by which it was supported; and that Dewey's fleet in the battle of Manila was superior to the Spanish fleet excluding the land batteries, mines and torpedoes. *Dewey v. United States*, 178 U. S. 510, 44 L. Ed. 1170.

33. *Telegraph Co. v. Eyser*, 19 Wall. 419, 432, 22 L. Ed. 42, Clifford, J., dissenting.

34. *Prevails over other rules.*—*Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199.

35. See post, "According to Intention," XVI, G, 2.

36. *McKeen v. Delaney*, 5 Cranch 22, 3 L. Ed. 25. See post, "Contemporaneous and Practical Construction," XVI, J, 3, c.

37. *Construed according to intention.*—It was so held in construing the naval personnel act of March 3, 1898. The words "assistant surgeons" were construed to mean the whole class of assistant surgeons, passed as well as those not passed. *United States v. Farenholt*, 206 U. S. 226, 51 L. Ed. 1036.

"The spirit and purpose of the act are not to be lost sight of in a strict ad-

herence to its letter." *Felton v. United States*, 96 U. S. 699, 702, 24 L. Ed. 875.

38. *Where meaning doubtful.*—*Nathan v. Virginia*, 1 Dall. 77, 1 L. Ed. 44; *Respublica v. Weidle*, 2 Dall. 88, 1 L. Ed. 301; *The Mary Ann*, 8 Wheat. 380, 387, 5 L. Ed. 641; *Minor v. Mechanics' Bank*, 1 Pet. 46, 64, 7 L. Ed. 47; *Ex parte Crane*, 5 Pet. 190, 205, 8 L. Ed. 92; *Shaw v. Cooper*, 7 Pet. 292, 8 L. Ed. 689; *United States v. Clarke*, 8 Pet. 436, 8 L. Ed. 1001; *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *Griffith v. Bogert*, 18 How. 158, 163, 15 L. Ed. 307; *United States v. Fisk*, 3 Wall. 445, 447, 18 L. Ed. 243; *Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 377; *Farmers', etc., Bank v. Dearington*, 91 U. S. 29, 23 L. Ed. 196; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 662, 23 L. Ed. 336; *Ryan v. Carter*, 93 U. S. 78, 84, 23 L. Ed. 807; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 62, 25 L. Ed. 424; *Merritt v. Welsh*, 104 U. S. 694, 702, 26 L. Ed. 896; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080; *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. Ed. 340; *Rhodes v. Iowa*, 170 U. S. 412, 422, 42 L. Ed. 1088; *Stephens v. Cherokee Nation*, 174 U. S. 445, 479, 43 L. Ed. 1041; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679; *Olsen v. Smith*, 195 U. S. 332, 49 L. Ed. 224; *Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256; *Johnson v. Browne*, 205 U. S. 309, 51 L. Ed. 816; *United States v. Fisher*, 109 U. S. 143, 145, 27 L. Ed. 885; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Wilson v. Rousseau*, 4 How. 646, 677, 11 L. Ed. 1141; *Beley v. Naphtaly*, 169 U. S. 353, 360, 42 L. Ed. 775.

"The intention of the legislature may be taken into view by the court, in the construction of a statute, where the language is so obscure and doubtful as to admit of different interpretations." *Levy Court v. Ringgold*, 5 Pet. 451, 455, 8 L. Ed. 188.

"The cardinal rule of construction is, that where any doubt exists, the intent of the legislature, if it can be plainly perceived, ought to be pursued." *Postmaster-General v. Early*, 12 Wheat. 136, 152, 6 L. Ed. 577.

ute, is as much within the statute, as if within the letter,³⁹ and a thing which is within the letter of a statute is not within the statute, unless within the intention of the makers.⁴⁰

b. Intention Collected from Letter.—The intention of the legislature is to be collected from the words they employ.⁴¹ And the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would yet pretty plainly be beyond the limitation contained in the statute.⁴² A thing may be within the reason of the statute, and yet so far outside of its language that to

39. Within intent but not letter.—*United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724; *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510; *United States v. Babbitt*, 1 Black 55, 61, 17 L. Ed. 94; *Hill v. American Surety Co.*, 200 U. S. 197, 203, 50 L. Ed. 436; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016.

"If a case be within the intention, it must be considered as if within the letter of the statute. So, if it be within the reason of the statute." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37.

"It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37.

In providing in the safety appliance act of March 2, 1893, that the railroad should use automatic couplers, the intention of congress to promote the safety of railroad employees requires that the couplers should be of the same kind so that the cars may be coupled by impact "without the necessity of men going between the ends of the cars." *Johnson v. Southern Pac. R. Co.*, 196 U. S. 1, 16, 49 L. Ed. 363.

The intention of congress in the revenue act of July, 1883, is to be followed although not strictly within the letter of the act. *Hartranft v. Oliver*, 125 U. S. 525, 31 L. Ed. 813.

40. Within letter but not intent.—*Wilson v. Rousseau*, 4 How. 646, 694, 11 L. Ed. 1141; *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 301, 21 L. Ed. 841; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 742, 23 L. Ed. 634; *Holy Trinity Church v. United States*, 143 U. S. 457, 459, 36 L. Ed. 226; *Treat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853.

"A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter." *United States v. Babbitt*, 1 Black 55, 61, 17 L. Ed. 94; *Stewart v. Kahn*, 11 Wall. 493, 504, 20 L. Ed. 176; *Smythe v. Fiske*, 23 Wall. 374, 380, 22 L. Ed. 47; *Raymond v. Thomas*, 91 U. S. 712, 715, 23 L. Ed. 434; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898;

United States v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 626, 25 L. Ed. 1030; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016.

"Matters embraced in the general words of statutes, nevertheless, were not within the statutes, because it could not have been the intention of the lawmakers that they should be included." *Beley v. Naphtaly*, 169 U. S. 353, 360, 42 L. Ed. 775.

If the general purpose of a statute have plain reference to one class of persons, it will not include a single individual in a distinct class, though the mere words might include him. *United States v. Saunders*, 22 Wall. 492, 22 L. Ed. 736.

The act excluding aliens under a contract to perform labor expressly excepted actors, artists, lecturers, etc., but did not except ministers. Nevertheless the court held ministers not to be excluded by the statute. *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226. See the title *CONTRACT LABOR LAW*, vol. 4, p. 550.

41. Intention collected from letter.—*The Paulina's Cargo*, 7 Cranch 52, 60, 3 L. Ed. 266; *United States v. Palmer*, 3 Wheat. 610, 632, 4 L. Ed. 471; *Sturges v. Crowninshield*, 4 Wheat. 122, 202, 4 L. Ed. 529; *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37; *The Margaret*, 9 Wheat. 421, 424, 6 L. Ed. 125; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Ham v. Missouri*, 18 How. 126, 132, 15 L. Ed. 334; *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830; *Telegraph Co. v. Eyser*, 19 Wall. 419, 432, 22 L. Ed. 43; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 662, 23 L. Ed. 336; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 564, 36 L. Ed. 537; *McBroom v. Scottish, etc., Ins. Co.*, 153 U. S. 318, 323, 38 L. Ed. 729; *Jacobson v. Massachusetts*, 197 U. S. 11, 22, 49 L. Ed. 643; *Huidekoper v. Douglass*, 3 Cranch 1, 67, 2 L. Ed. 347.

The intention is to be found "in the language actually used, interpreted according to its fair and obvious meaning." *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 19, 49 L. Ed. 363; *United States v. Harris*, 177 U. S. 305, 309, 44 L. Ed. 780.

42. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 533, 48 L. Ed. 548.

include it within the statute would be to legislate and not to construe legislation.⁴³

c. *Intention Prevails*.—When the intention of the legislature is discovered it must prevail,⁴⁴ for the intent of the lawmakers is the law,⁴⁵ and prevails over the letter,⁴⁶ and every other technical rule of construction must yield to the clear expression of the paramount will of the legislature.⁴⁷ But when the intent is a debatable question, and there is nothing on the face of the statute which clearly indicates such intent, there are certain minor and subsidiary rules by which courts are guided in determining the true construction.⁴⁸ In some cases the letter of a legislative act is restrained by an equitable construction;⁴⁹ in others it is enlarged;⁵⁰ others the construction is contrary to the letter.⁵¹

3. CONSTRUED LIBERALLY.—See elsewhere.⁵²

4. CONSTRUED STRICTLY.—By strict construction is meant only that cases which are not clearly embraced in a statute are not to be brought within its provisions by an extended construction, nor are cases that are obviously within

43. *France v. United States*, 164 U. S. 676, 683, 41 L. Ed. 595.

44. *When discovered intent prevails*.—*Inglehart v. Inglehart*, 204 U. S. 478, 51 L. Ed. 575; *Pollard v. Bailey*, 20 Wall. 520, 525, 22 L. Ed. 376.

The general intention must be followed. *United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479, Johnson, J.

A statute will not be construed so as to defeat its obvious meaning. *Vance v. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100. See post, "Construed to Effectuate Legislative Intent," XVI, I, 2.

45. *Intent is law*.—*United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724; *United States v. Babbit*, 1 Black 55, 17 L. Ed. 94; *United States v. Hartwell*, 6 Wall. 385, 395, 18 L. Ed. 830; *Stewart v. Kahn*, 11 Wall. 493, 504, 506, 20 L. Ed. 176; *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 301, 21 L. Ed. 841; *Telegraph Co. v. Eyser*, 19 Wall. 419, 427, 22 L. Ed. 43; *Smythe v. Fiske*, 23 Wall. 374, 380, 22 L. Ed. 47; *Raymond v. Thomas*, 91 U. S. 712, 715, 23 L. Ed. 434; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 300, 23 L. Ed. 898; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Insurance Co. v. Gridley*, 100 U. S. 614, 616, 25 L. Ed. 746; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 626, 25 L. Ed. 1030; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016.

46. *Prevails over letter*.—*United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Rodgers v. United States*, 185 U. S. 83, 86, 46 L. Ed. 616; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016.

"It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice." *Lionberger v. Rouse*, 9 Wall. 468, 475, 19 L. Ed. 721.

47. *Prevails over other rules of construction*.—*Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Brown v. Barry*, 3 Dall.

365, 367, 1 L. Ed. 638; *Kohlsaat v. Murphy*, 96 U. S. 153, 160, 24 L. Ed. 844; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016; *Cherokee Intermarriage Cases*, 203 U. S. 76, 94, 51 L. Ed. 96.

In *Copper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721, "the intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." *United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724.

48. *When other rules resorted to*.—*Rodgers v. United States*, 185 U. S. 83, 86, 46 L. Ed. 616. See post, "General Rules of Construction," XVI, I.

49. *Letter restrained by intent*.—"The operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it." *United States v. American Bell Tel. Co.*, 159 U. S. 548, 549, 40 L. Ed. 255, citing *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408; *Reiche v. Smythe*, 13 Wall. 162, 164, 20 L. Ed. 566; *Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 650, 35 L. Ed. 1144.

50. *Letter enlarged by intent*.—The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which a lawmaker proceeded, and not a like reason. *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724.

51. *Letter contradicted by intent*.—*Beley v. Naphitaly*, 169 U. S. 353, 360, 42 L. Ed. 775.

52. *Construed liberally*.—See post, "Remedial Statutes," XVI, L, 12; "Construed Liberally," XVI, L, 24, c.

the statute to be excluded from its provisions by a narrow, technical or forced construction.⁵³ The rule of strict construction is a stringent one and is liable at times to work a practical injustice.⁵⁴

5. CONSTRUED BY IMPLICATION—*a. In General.*—A thing which arises by plain and necessary implication from the language used in an act is as much a part of the act as if it had been embodied in so many words;⁵⁵ but nothing can be implied which is by the terms of the statute excluded or is contrary to the manifest legislative intent.⁵⁶ It is not usual for a legislative act to involve

53. *Construed strictly.*—*Northern Security Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679.

54. *Hill v. American Surety Co.*, 200 U. S. 197, 50 L. Ed. 436.

55. *Construed by implication.*—*Wilson v. Mason*, 1 Cranch 45, 101, 2 L. Ed. 29; *Durousseau v. United States*, 6 Cranch 307, 314, 3 L. Ed. 232; *Campbell v. City of Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *McHenry v. Alford*, 168 U. S. 651, 672, 42 L. Ed. 614; *Bird v. United States*, 187 U. S. 118, 124, 47 L. Ed. 100; *O'Neale v. Thornton*, 6 Cranch 53, 67, 3 L. Ed. 150; *Chorpenning v. United States*, 94 U. S. 397, 24 L. Ed. 126.

What is implied in a statute is as much a part of it as what is expressed. *Durousseau v. United States*, 6 Cranch 307, 314, 3 L. Ed. 232; *Aldridge v. Williams*, 3 How. 9, 25, 11 L. Ed. 469; *Union Ins. Co. v. Hoge*, 21 How. 35, 66, 16 L. Ed. 61; *United States v. Babbitt*, 1 Black 55, 57, 61, 17 L. Ed. 94; *Gelpcke v. Dubuque*, 1 Wall. 175, 220, 221, 17 L. Ed. 520; *Meyer v. Muscatine*, 1 Wall. 384, 393, 17 L. Ed. 564; *Butz v. Muscatine*, 8 Wall. 575, 581, 19 L. Ed. 490; *United States v. Hodson*, 10 Wall. 395, 406, 19 L. Ed. 937; *Stewart v. Kahn*, 11 Wall. 493, 506, 20 L. Ed. 176; *Davis v. Gray*, 16 Wall. 203, 223, 21 L. Ed. 447; *Bulkley v. United States*, 19 Wall. 37, 40, 22 L. Ed. 62; *Telegraph Co. v. Eysler*, 19 Wall. 419, 427, 22 L. Ed. 42; *Pine Grove Tp. v. Talcott*, 19 Wall. 666, 676, 22 L. Ed. 227; *Cornett v. Williams*, 20 Wall. 226, 250, 22 L. Ed. 254; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 493, 22 L. Ed. 395; *Board of Supervisors v. Lackawana Iron, etc., Co.*, 93 U. S. 619, 23 L. Ed. 989; *United States v. Babbitt*, 95 U. S. 334, 336, 24 L. Ed. 480; *Pompton v. Cooper Union*, 101 U. S. 196, 202, 25 L. Ed. 803; *County of Wilson v. National Bank*, 103 U. S. 770, 778, 26 L. Ed. 488; *Hill v. American Surety Co.*, 200 U. S. 197, 203, 50 L. Ed. 436; *United States v. Hodson*, 10 Wall. 395, 19 L. Ed. 937, affirmed in *United States v. Hodson*, 154 U. S., appx., 580, 19 L. Ed. 937.

"In construing a law, implications are not to be drawn from careless expressions, which would produce unreasonable results, and subvert the usual course of legal proceedings." *Williams v. Norris*, 12 Wheat. 117, 119, 6 L. Ed. 571.

Where the implication of a prior act is exactly the same as the affirmation of a subsequent act, the latter act is unneces-

sary. *Burnhisel v. Firman*, 22 Wall. 170, 176, 22 L. Ed. 766; *United States v. Babbitt*, 1 Black 55, 61, 17 L. Ed. 94.

The language of the act of the territory of March 7, 1889, providing for the payment of all taxes in arrear under the act of March 9, 1883, of the territory of North Dakota, entitled "An act to provide for the levy and collection of taxes upon railroad property of railroad companies in this territory," as a condition for the acceptance of the act of 1889, implied that such payment should also be in full of all other claims for taxes assessed for the same years. *McHenry v. Alford*, 168 U. S. 651, 672, 42 L. Ed. 614.

A statute which enacts that whenever any railroad company "shall have received or may hereafter receive the bonds of any city or county upon subscriptions of stock by such city or county, such bonds may bear an interest" at a rate specified, and "may be sold by the company," in a way mentioned, implies that a city (whose charter gave it power to borrow money for public purposes), had power to subscribe to the stock and to issue its bonds in payment, and makes the subscription and bonds as valid as if authorized by the statute directly. *Gelpcke v. Dubuque*, 1 Wall. 175, 220, 17 L. Ed. 520.

"It is upon this principle that the court implies a legislative exception from its constitutional appellate power, in the legislative affirmative description of those powers. Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of \$2,000. There is no express declaration that it will not lie, where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits, where the matter in controversy is of less value, and implies negative words. This restriction, however, being implied by the court, and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made, for the purpose of defeating the intent of the legislature." *Durousseau v. United States*, 6 Cranch 307, 314, 3 L. Ed. 232.

56. *Intent prevails over implication.*—*Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 317, 38 L. Ed. 992; *Bullard v.*

consequences which are not expressed;⁵⁷ but the legislature is presumed to have expressed all that was intended,⁵⁸ and an implication must be clear, necessary and irresistible to override the express words of a statute.⁵⁹ A grant of a power implies the means to make it effective.⁶⁰ A thing may be implied to prevent an unjust operation of a statute which was evidently not intended by the legislature;⁶¹ but no mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, will justify any judicial addition to the language of the statute.⁶²

b. *Where Matters Omitted.*—The general rule is that where a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.⁶³ But a statute will be construed according to the expressed intent, regardless of mistakes and omissions of the legislature.⁶⁴

H. Object of Construction.—The object of construction and interpretation of a statute is to ascertain the legislative intent and meaning.⁶⁵ This is

Bank, 18 Wall. 589, 596, 21 L. Ed. 923.

"It would be repugnant to every principle of sound construction to imply an exception against the intent." *Durousseau v. United States*, 6 Cranch 307, 318, 3 L. Ed. 232.

The act of congress annexing the Hawaiian Islands providing that their laws, not in conflict with the United States constitution, should remain in force until altered by congress, was construed not to extend impliedly every clause of the United States constitution to the islands. The Newlands act of July 7, 1898, annexing the Hawaiian Islands and providing for a temporary law for their government, did not extend the bill of rights of the United States constitution to the islands. *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016.

The negative words of the statute annexing the Hawaiian Islands and providing that such of the existing laws as are not contrary to the constitution of the United States should remain in force, was construed as not imposing every provision of the United States constitution upon the islands. *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016.

57. It is no unusual thing for an act of congress to imply, without expressing, exemption from state control. *Osborn v. United States Bank*, 9 Wheat. 738, 865, 6 L. Ed. 204.

58. *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 503, 24 L. Ed. 188.

The legislature cannot be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law. *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420, 551, 9 L. Ed. 773. See ante, "According to Letters," XVI, G, 1.

59. *Faw v. Marsteller*, 2 Cranch 10, 24, 2 L. Ed. 191.

60. **Grant implies means of making it effective.**—A statute which authorizes towns to contract debts or other obligations payable in money implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided. *Loan*

Ass'n v. Topeka, 20 Wall. 635, 22 L. Ed. 455.

The acts of congress for the establishment of federal courts will be construed by implication to vest in such courts power to carry out that expressed. *United States v. Hudson*, 7 Cranch 32, 3 L. Ed. 259. See the title COURTS, vol. 4, p. 888.

61. **Implication to prevent injustice.**—*Kirk v. Smith*, 9 Wheat. 241, 288, 6 L. Ed. 81.

62. *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394.

A mere oversight cannot be supplied by implication. *Folsom v. United States*, 160 U. S. 121, 127, 40 L. Ed. 363.

63. **Where matters omitted.**—*Hobbs v. McLean*, 117 U. S. 567, 579, 29 L. Ed. 940; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 751, 23 L. Ed. 634; *Kennedy v. Gibson*, 8 Wall. 498, 506, 19 L. Ed. 476; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 85, 23 L. Ed. 224.

64. It was so held in construing the statute of descents and distributions of Maryland of 1786, which failed to declare how an estate from a half-brother, of the whole blood, son, daughter, or wife should descend. *Barnitz v. Casey*, 7 Cranch 456, 3 L. Ed. 403.

Words may be supplied as having been omitted by way of ellipsis. *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080.

The words "judicial circuit" in the act of September 19, 1890, providing that no lottery, circular, ticket, etc., shall be carried through the mails, were probably printed by a clerical error for "judicial district," as in the act of March 2, from which it is taken, the words are "judicial district." *Horne v. United States*, No. 1, 143 U. S. 207, 36 L. Ed. 126.

65. **Object of construction.**—The *Paulina's Cargo*, 7 Cranch 52, 61, 3 L. Ed. 266; *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 201, 212, 8 L. Ed. 917; *Cary v. Curtis*, 3 How. 236, 239, 11 L. Ed. 576; *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *Interstate Commerce*

the case in construing penal, as well as other statutes.⁶⁶ Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment,⁶⁷ to solve, not to create ambiguities.⁶⁸

I. General Rules of Construction—1. IN GENERAL.—In construing statutes the courts are to be guided by certain rules which wisdom and experience have sanctioned.⁶⁹ These rules are well defined⁷⁰ and uniform.⁷¹ Although such courts have no common-law jurisdiction,⁷² the rules of interpretation furnished by the common law are to be followed in the federal courts.⁷³

2. CONSTRUED TO EFFECTUATE LEGISLATIVE INTENT.—That construction is to be given a statute which will carry into effect the intention, purpose and object of the legislature.⁷⁴ The provisions of a law ought not to be so construed

Comm. v. Baird, 194 U. S. 25, 38, 46 L. Ed. 830; *United States v. Crosley*, 196 U. S. 327, 333, 49 L. Ed. 497; *In re Ross*, 140 U. S. 453, 475, 35 L. Ed. 581. See ante, "According to Intention," XVI, G, 2.

66. *United States v. Hartwell*, 6 Wall. 385, 395, 18 L. Ed. 830. See post, "Penal Statutes," XVI, L, 11.

67. *Kohlsaat v. Murphy*, 96 U. S. 153, 160, 24 L. Ed. 844.

68. *Citizens' Bank v. Parker*, 192 U. S. 73, 86, 48 L. Ed. 346.

69. General rules of construction.—The *Paulina's Cargo*, 7 Cranch 52, 60, 3 L. Ed. 266; *Cary v. Curtis*, 3 How. 236, 239, 11 L. Ed. 576; *The Mary Ann*, 8 Wheat. 380, 387, 5 L. Ed. 641.

70. "On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself." *United States v. Fisher*, 2 Cranch 358, 386, 2 L. Ed. 304.

71. Uniformity.—*Davis v. Packard*, 8 Pet. 312, 8 L. Ed. 957. See the title APPEAL AND ERROR, vol. 1, pp. 431, 457, 503, 548.

72. Adopted from common law.—See the title COURTS, vol. 4, p. 890.

73. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 545, 9 L. Ed. 773; *The Corsair*, 145 U. S. 335, 347, 36 L. Ed. 727; *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

74. Construed to effectuate legislative intent.—*Wilson v. Mason*, 1 Cranch 45, 101, 2 L. Ed. 29; *Hamilton v. Russell*, 1 Cranch 309, 2 L. Ed. 118; *Pennington v. Cox*, 2 Cranch 33, 35, 2 L. Ed. 199; *Wayman v. Southard*, 10 Wheat. 1, 6, 6 L. Ed. 253; *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *Griffith v. Bogert*, 18 How. 158, 163, 15 L. Ed. 307; *United States v. Kirby*, 7 Wall. 482, 486, 19 L. Ed. 278; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 740, 23 L. Ed. 634; *Unity v. Burrage*, 103 U. S. 447, 457, 26 L. Ed. 405; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 625, 28 L. Ed. 1109; *Holy Trinity Church v. United States*, 143 U. S. 457, 461, 36 L. Ed. 226; *Lau Ow Bow v. United States*, 144 U. S. 47, 59, 36 L. Ed. 340; *Bate Refrigerating Co. v. Sulzberger*, 157

U. S. 1, 34, 39 L. Ed. 601; *United States v. Oregon, etc., R. Co.*, 164 U. S. 526, 539, 41 L. Ed. 541; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, 42 L. Ed. 1033; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. Ed. 1041; *Dewey v. United States*, 178 U. S. 510, 524, 44 L. Ed. 1170; *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528; *Missouri Pac. R. Co. v. United States*, 189 U. S. 274, 47 L. Ed. 811; *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679; *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 38, 46 L. Ed. 860; *Rogers v. Peck*, 199 U. S. 425, 436, 50 L. Ed. 256; *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515; *Blair v. Chicago*, 201 U. S. 400, 469, 50 L. Ed. 801.

A statute should be construed so as to render it effectual to prevent the evils which it was designed to remedy. *United States v. Jonas*, 19 Wall. 598, 604, 22 L. Ed. 177.

If a statute admits of more than one construction, that one should be adopted which best seems to carry out the purpose of the act. *Hutchinson Investment Co. v. Caldwell*, 152 U. S. 65, 69, 38 L. Ed. 356; *Bernier v. Bernier*, 147 U. S. 242, 37 L. Ed. 152.

Cases may be found where courts have construed a statute most liberally to effectuate the remedy. *Scott v. Reid*, 10 Pet. 524, 537, 9 L. Ed. 519.

"The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes." *Wetmore v. Markoe*, 196 U. S. 68, 77, 49 L. Ed. 390.

Especially should the main purpose of an enactment be rendered effective. *Studebaker v. Perry*, 184 U. S. 258, 268, 46 L. Ed. 528.

In construing an act for the purpose of obtaining revenue, it is proper to give it that construction which will render it productive of revenue. *Pennington v. Cox*, 2 Cranch 33, 55, 2 L. Ed. 199.

The act of congress of March 3, 1803, in regard to donation claims to land on the Mexican frontier, reads "that the persons, who on the day of the year 1797, when the Mississippi Territory was finally evacuated by the Spanish troops." The actual evacuation by the Spanish troops took place March 30, 1798. It was held

as to defeat its object, unless the language be such as absolutely to require this construction.⁷⁵

3. CONSTRUED AS A WHOLE.—The legislative meaning is to be extracted from a statute as a whole.⁷⁶ Its clauses are not to be segregated;⁷⁷ but every part of a statute is to be construed with reference to every other part⁷⁸ and every

that in construing the act to avoid defeating the manifest general intent of congress, the words "of the year of 1797" should be rejected as inconsistent with the main scope of the general intent of the law. *Ross v. Barland*, 1 Pet. 656, 7 L. Ed. 302.

75. Construed to avoid defeating intent.—*Platt v. Union Pac. R. Co.*, 99 U. S. 48, 62, 25 L. Ed. 424; *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *Hill v. American Surety Co.*, 200 U. S. 197, 203, 50 L. Ed. 436; *Scott v. Ben*, 6 Cranch 3, 7, 3 L. Ed. 135.

76. Construed as a whole.—*Pennington v. Cox*, 2 Cranch 33, 52, 2 L. Ed. 199; *United States v. Fisher*, 2 Cranch 358, 386, 389, 2 L. Ed. 304; *Keene v. United States*, 5 Cranch 304, 3 L. Ed. 108; *Aldridge v. Williams*, 3 How. 9, 31, 11 L. Ed. 469; *United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724; *Gayler v. Wilder*, 10 How. 477, 496, 13 L. Ed. 504; *Harris v. Runnels*, 12 How. 79, 86, 13 L. Ed. 901; *Brown v. Duchesne*, 19 How. 183, 194, 15 L. Ed. 595; *Henderson's Distilled Spirits*, 14 Wall. 44, 68, 20 L. Ed. 815; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *The Collector v. Richards*, 23 Wall. 246, 257, 22 L. Ed. 95; *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 25 L. Ed. 424; *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *The Great Western*, 118 U. S. 520, 533, 30 L. Ed. 156; *United States v. Saunders*, 120 U. S. 126, 30 L. Ed. 594; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 409, 30 L. Ed. 1230; *In re Ross*, 140 U. S. 453, 475, 35 L. Ed. 581; *In re Hohorst*, 150 U. S. 653, 660, 37 L. Ed. 1211; *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 323, 38 L. Ed. 729; *United States v. Burr*, 159 U. S. 78, 84, 40 L. Ed. 82; *McKee v. United States*, 164 U. S. 287, 293, 41 L. Ed. 437; *New York Indians v. United States*, 170 U. S. 1, 19, 42 L. Ed. 927; *North American Commercial Co. v. United States*, 171 U. S. 110, 128, 43 L. Ed. 98; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *United States v. Michigan*, 190 U. S. 379, 399, 401, 47 L. Ed. 1103; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Blair v. Chicago*, 201 U. S. 400, 463, 50 L. Ed. 801.

"The whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together." *Pollard v. Bailey*, 20 Wall. 520, 525, 22 L. Ed. 376. See also, *United States*

v. Boisdore, 8 How. 113, 12 L. Ed. 1009.

"We are not to look at any single phrase in it, but to its whole scope." *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 634, 638, 23 L. Ed. 995.

"In the exposition of statutes, the established rule is that the intention of the lawmaker is to be deduced from a view of the whole statute, and every material part of the same." *Kohlsaat v. Murphy*, 96 U. S. 153, 159, 24 L. Ed. 844.

The provisions of the internal revenue laws must be considered as a whole in order that the purpose of congress in enacting them may be understood. *Mansfield v. Excelsior Ref. Co.*, 135 U. S. 326, 34 L. Ed. 162; *United States v. Burr*, 159 U. S. 78, 84, 40 L. Ed. 82; *Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199.

77. Clauses not to be segregated.—*Blair v. Chicago*, 201 U. S. 400, 463, 50 L. Ed. 801; *Gayler v. Wilder*, 10 How. 477, 496, 13 L. Ed. 504.

78. With reference to every other part.—*Beaty v. Knowler*, 4 Pet. 152, 171, 7 L. Ed. 813; *United States v. Coombs*, 12 Pet. 72, 80, 81, 9 L. Ed. 1004; *Peck v. Jenness*, 7 How. 612, 623, 12 L. Ed. 841; *Wisconsin Cent. R. Co. v. Forsyth*, 159 U. S. 46, 40 L. Ed. 71; *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. Ed. 890; *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175; *Easton v. Iowa*, 188 U. S. 220, 228, 47 L. Ed. 452; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. Ed. 925; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89, 51 L. Ed. 96.

In the construction of a certain provision of a statute another provision may be resorted to. *Knowlton v. Moore*, 178 U. 41, 44 L. Ed. 969.

"Every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Market Co. v. Hoffman*, 101 U. S. 112, 115, 25 L. Ed. 782.

"The words describing the power and duty of the postmaster general may be expounded by other parts of the act showing the legislative opinion as to their extent; and if this be true, the sections which have been cited cannot be misunderstood." *Postmaster-General v. Early*, 12 Wheat. 136, 152, 6 L. Ed. 577; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 58, 25 L. Ed. 424; *Alexander v. Alexandria*, 5 Cranch 1, 7, 3 L. Ed. 19.

The first and second branches of § 4 of the act of March 3, 1887, as corrected August 13, 1888, in regard to the federal jurisdiction of the national banking association, should be construed together.

word and phrase in connection with its context,⁷⁹ and that construction sought which gives effect to the whole of the statute⁸⁰—its every word,⁸¹ even

Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. Ed. 1144.

The first and second sections of the act of July 23, 1866, granting lands to the agricultural college of California, are to be construed together. *McNee v. Donahue*, 142 U. S. 587, 35 L. Ed. 1122.

79. Words and phrases with reference to context.—*Preston v. Browder*, 1 Wheat. 115, 122, 4 L. Ed. 50; *Mutual Assur. Society v. Watts*, 1 Wheat. 279, 288, 4 L. Ed. 91; *The Mary Ann*, 8 Wheat. 380, 387, 5 L. Ed. 641; *Binney v. Chesapeake, etc., Canal Co.*, 8 Pet. 201, 212, 8 L. Ed. 917; *United States v. Freeman*, 3 How. 556, 565, 11 L. Ed. 724; *Wilson v. Rousseau*, 4 How. 646, 677, 11 L. Ed. 1141; *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830; *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 301, 21 L. Ed. 841; *Telegraph Co. v. Eyser*, 19 Wall. 419, 432, 22 L. Ed. 43; *Neal v. Clark*, 95 U. S. 704, 708, 24 L. Ed. 586; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247; *Columbia Water Power Co. v. Columbia, etc., Power Co.*, 172 U. S. 475, 43 L. Ed. 521; *McCray v. United States*, 195 U. S. 27, 50, 49 L. Ed. 78; *United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449; *Cherokee Inter-marriage Cases*, 203 U. S. 76, 89, 51 L. Ed. 96; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

"There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected." *Wheaton v. Peters*, 8 Pet. 591, 661, 8 L. Ed. 1055.

Noscitur a sociis is a rule of construction of statutes. *Virginia v. Tennessee*, 148 U. S. 503, 519, 37 L. Ed. 537; *United States v. Rodgers*, 150 U. S. 249, 278, 37 U. S. 1071; *Stoutenburgh v. Hennick*, 129 U. S. 141, 147, 32 L. Ed. 637.

Meaning when standing alone changed by context.—Words which, standing alone in an act of congress, may properly be understood to pass a beneficial interest in land, will not be regarded as having that effect, if the context shows that they were not intended to be so used. *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

The expressions "all the goods of the said traders," in the second section of the act of May 6, 1822, to prevent or restrain the vending of spirituous liquors among all or any of the Indian tribes, although general enough, if they stood alone, unexplained by the context, to embrace all the goods belonging to the trader wherever they might be found; are clearly restrained by the provision which imme-

diately precedes them, so as to mean those goods only which might be found in company, though not in contact with, the interdicted article. *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. Ed. 450.

Words in series.—Where a word susceptible of two different meanings is used in a series of words, it will be given that meaning which is suggested by its use in connection with the other terms; but where such word is preceded by the word "other" it will be given a different meaning. The word "domestic" in the act of June 3, 1878, may be used in relation to a household or in relation to locality. In the provision "that all citizens of the United States * * * shall be and are hereby authorized and permitted to fell and remove for buildings, agricultural, mining, or other domestic purposes," etc., the word "domestic" applies to locality. *United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

In construction of revenue laws.—This rule is applied to revenue acts. *The Conqueror*, 166 U. S. 110, 115, 41 L. Ed. 937; *Patton v. United States*, 159 U. S. 500, 509, 40 L. Ed. 233.

It was held in *Hollender v. Magone*, 149 U. S. 586, 37 L. Ed. 860, applying the rule *noscitur a sociis*, that beer was not embraced within schedule H of the act of March 3, 1883, 22 Stat. 505, c. 121, which says there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, and distilled spirits.

80. Effect given to whole.—*Adams v. Woods*, 2 Cranch 336, 2 L. Ed. 297; *Lawrence v. Allen*, 7 How. 785, 793, 12 L. Ed. 913; *Bend v. Hoyt*, 13 Pet. 263, 273, 10 L. Ed. 154; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. Ed. 318; *Montclair v. Ramsdell*, 107 U. S. 147, 152, 27 L. Ed. 431; *United States v. Fisher*, 109 U. S. 143, 145, 27 L. Ed. 885; *United States v. Landram*, 118 U. S. 81, 85, 30 L. Ed. 58; *Blair v. Chicago*, 201 U. S. 400, 464, 468, 469, 50 L. Ed. 801; *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 446, 51 L. Ed. 553. See ante, "Implied Repeal," XI, F.

"It is a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting." *Bernier v. Bernier*, 147 U. S. 242, 246, 37 L. Ed. 152.

81. Effect to be given to every word.—*United States v. Gooding*, 12 Wheat. 460, 476, 477, 6 L. Ed. 693; *Bend v. Hoyt*, 13 Pet. 263, 272, 10 L. Ed. 154; *Hardy v. Hoyt*, 13 Pet. 292, 293, 10 L. Ed. 167;

though ambiguous,⁸² unless so clearly repugnant to the rest of the act that the whole cannot stand together.⁸³ That construction which makes its different parts inconsistent with and antagonistic to each other is to be avoided.⁸⁴ In order to harmonize all the different parts of a statute one or all may be qualified,⁸⁵ or one may be restrained and another enlarged,⁸⁶ or a different meaning given to the same word in different parts of a statute,⁸⁷ but a word in a statute used in different parts of a section is to be construed as having the same meaning in both cases.⁸⁸ A subordinate part of a statute may be restrained or enlarged to give effect to an important part.⁸⁹ If general words are used, which import more than seems to have been within the purview of the other parts of the law, and those expressions can be restrained by others used in the same law, they ought to be restrained.⁹⁰ If a section be introduced, which is a stranger to, and unconnected with the other parts of an act, it must nevertheless take effect according to its obvious meaning, independent of all influence from other parts of the law.⁹¹ Although penal statutes are to be strictly con-

Early *v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 24 L. Ed. 188; *Wil-mot v. Mudge*, 103 U. S. 217, 221, 26 L. Ed. 536; *East Tenn., etc., R. Co. v. Inter-state Commerce Comm.*, 181 U. S. 1, 45 L. Ed. 719; *Murphy v. Utter*, 186 U. S. 95, 111, 46 L. Ed. 1079; *Market Co. v. Hoffman*, 101 U. S. 112, 115, 25 L. Ed. 782.

Words cannot be construed as redundant and rejected as surplusage where they can be given full effect. *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. Ed. 1041.

A statute will not be so construed as to virtually expunge a distinct member of a sentence. *Adams v. Woods*, 2 Cranch 336, 2 L. Ed. 297.

Where an act of congress making a grant of public lands to a territory to aid the construction of a railroad declares that no title shall vest in the territory, nor to patent issue for any part of the lands until twenty miles of the railroad be finished, these words cannot be rejected or disregarded, or shorn of their ordinary signification. *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

Effect is to be given every word of a penal statute. *United States v. Gooding*, 12 Wheat. 460, 477, 6 L. Ed. 693.

82. Effect to be given to ambiguous words.—*Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

83. *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

84. All parts to be harmonized.—*Huide-koper v. Douglass*, 3 Cranch 1, 66, 2 L. Ed. 347; *Postmaster-General v. Early*, 12 Wheat. 136, 148, 6 L. Ed. 577; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 187, 13 L. Ed. 92; *Merritt v. Cameron*, 137 U. S. 542, 551, 34 L. Ed. 772; *Rodgers v. United States*, 185 U. S. 83, 46 L. Ed. 616; *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. Ed. 563.

85. Harmonized by qualifying words.—*Provident, etc., Trust Co. v. Mercer County*, 170 U. S. 593, 42 L. Ed. 1156; *Peck v. Jenness*, 7 How. 612, 623, 12 L. Ed. 841.

86. "Words and phrases are often found

in different provisions of the same statute, which, if taken literally, without any qualification, would be inconsistent, and sometimes repugnant, when, by a reasonable interpretation—as by qualifying both, or by restricting one and giving to the other a liberal construction—all become harmonious, and the whole difficulty disappears; and in such a case the rule is that repugnancy should, if practicable, be avoided, and that, if the natural import of the words contained in the respective provisions tends to establish such a result, the case is one where a resort may be had to construction for the purpose of reconciling the inconsistency, unless it appears that the difficulty cannot be overcome without doing violence to the language of the lawmaker." *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 663, 23 L. Ed. 336.

87. Harmonized by changing meaning of words.—*Cherokee Nation v. Georgia*, 5 Pet. 1, 19, 8 L. Ed. 25.

88. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548.

89. Restraining subordinate part.—*Caha v. United States*, 152 U. S. 211, 214, 38 L. Ed. 415; *United States v. Burr*, 159 U. S. 78, 84, 40 L. Ed. 82. See post, "Primary Intent Prevails Over Secondary," XVI, I, 11.

90. Restraining general language.—"The general language found in one place may be restricted in its effect to the particular expressions employed in another, if such, upon a careful examination of the subject, appears to have been the intent of the enactment." *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 302, 21 L. Ed. 841; *Brewer v. Blougher*, 14 Pet. 178, 198, 199, 10 L. Ed. 408. See post, "General Terms," XVI, M, 2.

91. Independent provisions.—*New Orleans Pac. R. Co. v. United States*, 124 U. S. 124, 128, 31 L. Ed. 383; *United States v. Fisher*, 2 Cranch 358, 400, 2 L. Ed. 304; *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394.

Different sections of the statute relating to the same subject are to be con-

strued yet their words are to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context.⁹²

4. CONSTRUED WITH REFERENCE TO STATUTES IN PARI MATERIA.—Where there are several statutes relating to the same subject, they are all to be considered together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and to pertain to the same system.⁹³ If the language will reasonably admit of it the acts are to be so construed as to permit both to stand together and remain in full force.⁹⁴

strued together; but where two sections of a statute are separate and distinct they are to be construed separately. The fifth section of the act of March 3, 1797, is totally unconnected with those which precede it. The other sections refer to a mode of proceeding in bankruptcy, while the latter refers to a granting of preference to certain creditors. The court held this section was to be construed without reference to the others. *United States v. Fisher*, 2 Cranch 358, 389, 2 L. Ed. 304.

In the revenue act of June 10, 1890, there are two separate clauses, each prescribing a condition. One is, "shall within ten days after 'but not before' * * * give notice," etc., and the other, "shall pay the full amount of the duties," etc. In the latter no time is mentioned, and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other. *United States v. Goldenberg*, 168 U. S. 95, 102, 42 L. Ed. 394.

92. Penal statutes.—*United States v. Hartwell*, 6 Wall. 385, 386, 18 L. Ed. 830. See post, "Penal Statutes," XVI, L, 11.

93. Construed with reference to statutes in pari materia.—*Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199; *The Paulina's Cargo*, 7 Cranch 52, 3 L. Ed. 266; *Polk v. Wendal*, 9 Cranch 87, 96, 3 L. Ed. 665; *The Star*, 3 Wheat. 78, 92, 4 L. Ed. 338; *Doddridge v. Thompson*, 9 Wheat. 469, 479, 6 L. Ed. 137; *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154; *Brewer v. Blougher*, 14 Pet. 178, 199, 10 L. Ed. 408; *Cary v. Curtis*, 3 How. 236, 239, 11 L. Ed. 576; *United States v. Freeman*, 3 How. 556, 564, 11 L. Ed. 724; *Phalen v. Virginia*, 8 How. 163, 164, 12 L. Ed. 1030; *Brown v. Duchesne*, 19 How. 183, 194, 15 L. Ed. 595; *United States v. Babbit*, 1 Black 55, 60, 17 L. Ed. 94; *Furman v. Nichol*, 8 Wall. 44, 61, 19 L. Ed. 370; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *The Distilled Spirits*, 11 Wall. 356, 365, 20 L. Ed. 167; *Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. Ed. 566; *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 301, 21 L. Ed. 841; *Stockdale v. Insurance Companies*, 20 Wall. 323, 22 L. Ed. 348; *The Collector v. Richards*, 23 Wall. 246, 257, 22 L. Ed. 95; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 662, 23 L. Ed. 336; *Ryan v. Carter*, 93 U. S.

78, 23 L. Ed. 807; *Arthur v. Lahey*, 96 U. S. 112, 24 L. Ed. 766; *Kohlsaat v. Murphy*, 96 U. S. 153, 160, 24 L. Ed. 844; *United States v. Watkins*, 97 U. S. 219, 24 L. Ed. 952; *Greenleaf v. Goodrich*, 101 U. S. 278, 281, 25 L. Ed. 845; *Wolsey v. Chapman*, 101 U. S. 755, 771, 25 L. Ed. 915; *Five Per Cent. Cases*, 110 U. S. 471, 484, 28 L. Ed. 198; *United States v. Central Pac. R. Co.*, 118 U. S. 235, 239, 30 L. Ed. 173; *Viterbo v. Friedlander*, 120 U. S. 707, 724, 30 L. Ed. 776; *Tompkins v. Little Rock, etc., Railway*, 125 U. S. 109, 117, 31 L. Ed. 615; *Vane v. Newcomber*, 132 U. S. 220, 235, 33 L. Ed. 310; *Crenshaw v. United States*, 134 U. S. 99, 108, 33 L. Ed. 825; *United States v. Lacher*, 134 U. S. 624, 626, 33 L. Ed. 1080; *Cope v. Cope*, 137 U. S. 682, 688, 34 L. Ed. 832; *United States v. Des Moines, etc., R. Co.*, 142 U. S. 510, 534, 35 L. Ed. 1099; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537; *Sessions v. Romadka*, 145 U. S. 29, 41, 36 L. Ed. 609; *United States v. Pitman*, 147 U. S. 669, 37 L. Ed. 324; *Barratt v. United States*, 169 U. S. 218, 227, 42 L. Ed. 723; *North American Commercial Co. v. United States*, 171 U. S. 110, 128, 43 L. Ed. 98; *Cleveland, etc., R. Co. v. Illinois*, 177 U. S. 514, 44 L. Ed. 868; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 614, 45 L. Ed. 679; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 497, 46 L. Ed. 289; *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *Blair v. Chicago*, 201 U. S. 400, 453, 50 L. Ed. 801.

Two statutes which are in substance the same must be construed together. *Sinclair v. District of Columbia*, 192 U. S. 16, 48 L. Ed. 322.

The provisions in one of several acts forming a general system may be explanatory of other parts of the same system. *The Amelia*, 1 Cranch 1, 35, 2 L. Ed. 15.

94. Construed to give effect to both.—*Pollard v. Kibbe*, 14 Pet. 353, 366, 10 L. Ed. 490; *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *The Strathairly*, 124 U. S. 558, 579, 31 L. Ed. 580; *Henrietta, etc., Min. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637; *Cherokee Inter-marriage Cases*, 203 U. S. 76, 51 L. Ed. 96; *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429; *Tracey v. Tuffly*, 134 U. S. 206, 33 L. Ed. 879; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079; *District of*

This rule of construction applies to appropriation acts,⁹⁵ acts to issue bonds to aid construction of railroads,⁹⁶ acts in regard to land titles under Spanish grants,⁹⁷ acts relating to mineral lands,⁹⁸ acts constituting a part of the scheme of government of Alaska,⁹⁹ bankruptcy laws,¹ revenue laws,² patent laws,³ land laws of a state,⁴ laws of descent and distribution,⁵ laws empowering municipal corporation to levy tax,⁶ and the different sections of a code;⁷ original and supplemental,⁸ explanatory,⁹ amendatory¹⁰ and repealing acts,¹¹ repealing act and act suspending its operation,¹² the ratification of a treaty by the senate and a subsequent amendment thereto;¹³ constitutional and statutory provisions¹⁴ and acts of congress and of territories.¹⁵ The rule applies although some of the acts have been repealed and revived.¹⁶ It does not apply where the particular statute is dissimilar from the other statutes,¹⁷ where the two statutes concern different objects,¹⁸ where the particular act contains a substantive and independent provision having no connection with the other acts,¹⁹ where one statute is remedial and the other penal,²⁰ nor does

Columbia v. Hutton, 143 U. S. 18, 36 L. Ed. 60; *Marks v. United States*, 161 U. S. 297, 305, 40 L. Ed. 706; *Wilmot v. Mudge*, 103 U. S. 217, 221, 26 L. Ed. 536; *Nobles v. Georgia*, 168 U. S. 398, 404, 42 L. Ed. 515.

95. *Converse v. United States*, 21 How. 463, 16 L. Ed. 192.

96. *Kansas City, etc., R. Co. v. Attorney-General*, 118 U. S. 682, 30 L. Ed. 281.

97. *Pollard v. Kibbe*, 14 Pet. 353, 366, 10 L. Ed. 490; *United States v. Arredondo*, 6 Pet. 691, 719, 8 L. Ed. 547. See, generally, the title PUBLIC LANDS, vol. 10, p. 1.

98. Revised Statutes, § 2326, construed to qualify §§ 2319, 2324 in regard to mineral lands. *Lavagnino v. Uhlig*, 198 U. S. 443, 49 L. Ed. 1119.

99. *Bird v. United States*, 187 U. S. 118, 47 L. Ed. 100.

1. *United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304; *Wilmot v. Mudge*, 103 U. S. 217, 220, 26 L. Ed. 536; *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 450, 45 L. Ed. 1171; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 662, 23 L. Ed. 336.

2. *Merritt v. Cameron*, 137 U. S. 542, 34 L. Ed. 772.

"The several laws on the subject of internal revenue constitute one system, all in *pari materia*." *Steamboat Co. v. Collector*, 18 Wall. 478, 492, 21 L. Ed. 769. See, also, *Stuart v. Maxwell*, 16 How. 150, 160, 14 L. Ed. 883; *Pennington v. Cox*, 2 Cranch 33, 60, 2 L. Ed. 199.

Where two revenue laws are in *pari materia*, it will be presumed that if the same word be used in both, and a special meaning was given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention. In other words, if congress has defined a word in one act, so as to limit its application, it cannot successfully be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used

indicating an intention to produce such a result. *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566.

3. "They are statutes in *pari materia*; and all relate to the same subject, and must be construed together." *Bloomer v. McQuewan*, 14 How. 539, 548, 14 L. Ed. 532; *Brown v. Duchesne*, 19 How. 183, 15 L. Ed. 595.

4. *Doe v. Winn*, 11 Wheat. 380, 385, 6 L. Ed. 500.

5. *Brewer v. Blougher*, 14 Pet. 178, 199, 10 L. Ed. 408.

6. *Alexander v. Alexandria*, 5 Cranch 1, 3 L. Ed. 19; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 627, 628, 45 L. Ed. 702; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 596, 45 L. Ed. 679.

7. *Nobles v. Georgia*, 168 U. S. 398, 404, 42 L. Ed. 515; *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575.

8. *United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 47, 40 L. Ed. 71.

9. *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696.

10. See post, "Amended and Amendatory Statutes," XVI, L, 4.

11. See post, "Repealed and Repealing Statutes," XVI, L, 5.

12. A repealing act and an act suspending its operation are to be construed as one statute. *Brown v. Barry*, 3 Dall. 365, 367, 1 L. Ed. 638.

13. *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 50 L. Ed. 1149.

14. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. Ed. 1137.

15. *Murphy v. Utter*, 186 U. S. 95, 103, 46 L. Ed. 1070.

16. *Fussell v. Cregg*, 113 U. S. 550, 560, 28 L. Ed. 993.

17. *Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199.

18. *Priestman v. United States*, 4 Dall. 28, 1 L. Ed. 727.

19. *United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304.

20. *United States v. Anderson*, 9 Wall. 56, 67, 19 L. Ed. 615.

it apply to acts admitting separate states to the union.²¹ This rule of construction does not prevent the operation of particular provisions in accordance with the legislative intent,²² clearly expressed.²³ Where there are different acts concerning the same subject matter, they are to be construed with reference to the order in which they were passed.²⁴

5. CONSTRUED WITH REFERENCE TO PRIMARY MEANING OF WORDS.—A statute should be construed by the obvious and natural import of its words,²⁵

21. "We do not regard these acts as in pari materia in any proper sense. They provided for the admission of three separate states, and the subject of each was not only not identical with, but not even similar to, that of the others." *Louisiana v. Mississippi*, 202 U. S. 1, 41, 50 L. Ed. 913.

22. *Pennington v. Coxe*, 2 Cranch 33, 58, 2 L. Ed. 199.

23. *Barnes v. The Railroads*, 17 Wall. 294, 302, 21 L. Ed. 544.

24. Rule that later prevails over prior applies.—*The Paulina's Cargo*, 7 Cranch 52, 3 L. Ed. 266.

25. Primary meaning of words.—*Faw v. Marsteller*, 2 Cranch 10, 24, 2 L. Ed. 191; *United States v. Fisher*, 2 Cranch 358, 399, 2 L. Ed. 304; *Huidekoper v. Douglass*, 3 Cranch 1, 60, 67, 2 L. Ed. 347; *Kirk v. Smith*, 9 Wheat. 241, 272, 6 L. Ed. 81; *Postmaster-General v. Early*, 12 Wheat. 136, 152, 6 L. Ed. 577; *United States v. Gooding*, 12 Wheat. 460, 476, 6 L. Ed. 693; *Minor v. Mechanics' Bank*, 1 Pet. 46, 64, 7 L. Ed. 47; *Gardner v. Collins*, 2 Pet. 58, 90, 91, 7 L. Ed. 347; *Scott v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *United States v. Coombs*, 12 Pet. 72, 78, 9 L. Ed. 1004; *Bend v. Hoyt*, 13 Pet. 263, 273, 10 L. Ed. 154; *Lawrence v. Allen*, 7 How. 785, 793, 12 L. Ed. 913; *Maillard v. Lawrence*, 16 How. 251, 253, 14 L. Ed. 925; *Griffith v. Bogert*, 18 How. 158, 163, 15 L. Ed. 307; *Williams v. Baker*, 17 Wall. 144, 152, 21 L. Ed. 561; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 347, 23 L. Ed. 428; *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 634, 638, 23 L. Ed. 995; *County of Cass v. Shores*, 95 U. S. 375, 379, 24 L. Ed. 219; *Arthur v. Morrison*, 96 U. S. 108, 111, 24 L. Ed. 764; *Pott v. Arthur*, 104 U. S. 735, 26 L. Ed. 909; *United States v. Temple*, 105 U. S. 97, 99, 26 L. Ed. 967; *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 92, 28 L. Ed. 76; *Chew Heong v. United States*, 112 U. S. 536, 559, 28 L. Ed. 770; *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 271, 31 L. Ed. 731; *Lake County v. Rollins*, 130 U. S. 662, 670, 32 L. Ed. 1060; *United States v. Chase*, 135 U. S. 255, 258, 34 L. Ed. 117; *Worthington v. Robbins*, 139 U. S. 337, 35 L. Ed. 181; *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226; *Magone v. Heller*, 150 U. S. 70, 37 L. Ed. 1001; *Sarlls v. United States*, 152 U. S. 570, 574, 38 L. Ed. 556; *Presson v. Russell*, 152 U. S. 577, 38 L. Ed. 559; *McBroom v. Scottish, etc., Inv. Co.*, 153 U.

S. 318, 323, 38 L. Ed. 729; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 36, 39 L. Ed. 601; *Sonn v. Magone*, 159 U. S. 417, 421, 40 L. Ed. 203; *Glover v. United States*, 164 U. S. 294, 297, 41 L. Ed. 440; *United States v. Oregon, etc., R. Co.*, 164 U. S. 526, 540, 41 L. Ed. 541; *Provident, etc., Trust Co. v. Mercer County*, 170 U. S. 593, 602, 42 L. Ed. 1156; *Dunlap v. United States*, 173 U. S. 65, 73, 43 L. Ed. 616; *Dewey v. United States*, 178 U. S. 510, 520, 521, 44 L. Ed. 1170; *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 201, 47 L. Ed. 139; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790; *Blair v. Chicago*, 201 U. S. 400, 466, 50 L. Ed. 801. For many illustrations of this rule, see the words and phrases defined by the court in this work in their alphabetical order, such as AMITY, vol. 1, p. 312; FOR, vol. 6, p. 302; etc.

"It cannot be pretended, that the natural sense of words is to be disregarded, because that which they import might have been better, or more directly, expressed." *United States v. Fisher*, 2 Cranch 358, 387, 2 L. Ed. 304.

Where the language used is plain and unambiguous, a refusal to recognize its natural, obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of congress. *Bate v. Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 36, 39 L. Ed. 601.

"The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and whenever the legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be that they have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925.

The court is bound to take judicial notice of the ordinary meaning of words as used in the tariff laws just as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court. *Nix v. Hedden*, 149 U. S. 304, 37 L. Ed. 745, citing *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *Jones v. United*

giving to it the ordinary grammatical construction,²⁶ unless that sense be repelled by the intention²⁷ or would lead to absurd consequences.²⁸ Ordinary words are to be taken in their popular sense,²⁹ technical words in their technical sense,³⁰

States, 137 U. S. 202, 34 L. Ed. 691. See the title JUDICIAL NOTICE, vol. 7, p. 680.

In instances in which words or phrases are novel, or obscure, as in terms of art, where they are peculiar or exclusive, in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habit and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. *Maillard v. Lawrence*, 16 How. 251, 261, 14 L. Ed. 925.

26. Ordinary grammatical construction.—*United States v. Goldenberg*, 168 U. S. 95, 102, 42 L. Ed. 394.

27. Controlled by intention.—*O'Neale v. Thornton*, 6 Cranch 53, 68, 3 L. Ed. 150; *Minor v. Mechanics' Bank*, 1 Pet. 46, 64, 7 L. Ed. 47; *Levy v. McCartee*, 6 Pet. 102, 110, 8 L. Ed. 334; *Hepburn v. Griswold*, 8 Wall. 603, 607, 19 L. Ed. 513; *Marks v. United States*, 161 U. S. 297, 301, 40 L. Ed. 706.

28. Avoiding absurdities.—*Treat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853. See post, "Injustice, Inconvenience and Absurdity," XVI, K, 11.

29. United States v. Isham, 17 Wall. 496, 504, 21 L. Ed. 728; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 347, 23 L. Ed. 428; *United States v. Gooding*, 12 Wheat. 460, 476, 6 L. Ed. 693; *Houghton v. Payne*, 194 U. S. 88, 99, 48 L. Ed. 888, followed in *Smith v. Payne*, 194 U. S. 104, 48 L. Ed. 893; *Bates v. Payne*, 194 U. S. 106, 48 L. Ed. 893; *Marks v. United States*, 161 U. S. 297, 301, 40 L. Ed. 706; *Gardner v. Collins*, 2 Pet. 58, 87, 7 L. Ed. 347; *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *Columbia Water Power Co. v. Columbia, etc., Power Co.*, 172 U. S. 475, 491, 43 L. Ed. 521; *Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. Ed. 566; *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139; *United States v. Oregon, etc., R. Co.*, 164 U. S. 526, 540, 41 L. Ed. 541; *Magone v. Heller*, 150 U. S. 70, 74, 37 L. Ed. 1001. And see the many words and phrases whose judicial construction is given in this work, such as, AMITY, vol. 1, p. 312; FOR, vol. 6, p. 302; etc.

30. Technical words in technical sense.—*United States v. Isham*, 17 Wall. 496, 504, 21 L. Ed. 728; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247; *United States v. Freight Ass'n*, 166 U. S. 290, 353, 41 L. Ed. 1007; *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. Ed. 563. And see the words and phrases judicially defined in this work.

Where the legislature makes use of a word having a well-defined, technical meaning, it is presumed to use the word technically in the absence of an indication to the contrary in the statute. *Hawley v. Diller*, 178 U. S. 476, 488, 44 L. Ed. 1157.

A technical word is not construed technically where otherwise defined in the statute itself. *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

"Words and phrases of accepted meaning in legal phraseology must not, because they may be popularly used in a broader sense, be given, when found in a statute, that popular significance so as to enlarge the matters in respect to which compensation has been authorized and may be awarded. There is nothing in the case of *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. Ed. 1110, which militates against the views herein expressed." *United States v. Patterson*, 150 U. S. 65, 69, 37 L. Ed. 999.

The word "interest" as found in the law books refers to pecuniary profit and loss, and that congress used the word "interested" in its common legal acceptance in § 1782, Rev. Stat., is as clear and certain as anything can be. *Burton v. United States*, 202 U. S. 344, 391, 50 L. Ed. 1057.

Fines, penalties and forfeitures as used in the judiciary act of the District of Columbia have reference to those recoverable by the state only. *United States v. Simms*, 1 Cranch 252, 2 L. Ed. 98.

The words "legal representatives" as used in the act of the state of Pennsylvania of December 21, 1784, were construed to mean the heirs and not the administrator. *Respublica v. Weidle*, 2 Dall. 88, 1 L. Ed. 301. See legal REPRESENTATIVES, vol. 7, p. 852.

The terms "bona fide purchasers" as used in the act of March 3, 1887, adjusting land grants to railroad companies and providing for securing the rights of bona fide purchasers, are not to be used in their technical sense. *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 480, 41 L. Ed. 789; *Gertgens v. O'Connor*, 191 U. S. 237, 48 L. Ed. 163.

The term "bona fide purchaser" as used in the act of congress of June 3, 1878 known as the Timber and Stone act, had a well defined meaning long before the enactment of the statute, and the statute contained nothing to indicate that congress used the term other than in its technical sense. The term was construed technically as meaning purchaser of the legal title or estate and not a purchaser of a mere equity. *Hawley v. Diller*, 178

and commercial words in their commercial sense.³¹ Where the language used in a statute has a settled and well-known meaning, sanctioned by judicial decision, it is presumed to be used in that sense by the legislature.³²

6. **CONSTRUED AS PROSPECTIVE OR RETROSPECTIVE.**—While, in the absence of a constitutional inhibition, the legislature may give retrospective operation to a statute,³³ the presumption is that prospective operation only is intended,³⁴ and

U. S. 476, 44 L. Ed. 1157. See *BONA FIDE PURCHASER*, vol. 3, p. 381.

"Legal owner."—"Whilst it is hence clear that a strict and technical construction of the words 'legal owner' would be conclusive against the claim which the mortgage creditors here assert, the language of the act of 1891 should not be measured and interpreted by this narrow rule. The context of that act makes it manifest that the word 'legal,' prefixed to the word 'owner,' was not intended to give it a purely artificial meaning." *Glover v. United States*, 164 U. S. 294, 297, 41 L. Ed. 440.

The word "suicide" as used in the statute in regard to life insurance is not used in its technical sense. Section 5855 of the Revised Statutes of Missouri of 1855, providing that it shall be no defense to the recovery of life insurance that the insured "committed suicide," does not use the term suicide in its technical sense of self-destruction by a sane person, but according to its popular meaning of death by one's own hand, irrespective of the mental condition of the person committing the act. *Knights Templars' Indemnity Co. v. Jarman*, 187 U. S. 197, 47 L. Ed. 139. See the title *INSURANCE*, vol. 7, p. 143.

"Plaintiff and defendant."—"In condemnation proceedings the words 'plaintiff and defendant' can be used only in an uncommon and liberal sense." *Mason City R. Co. v. Boynton*, 204 U. S. 570, 579, 51 L. Ed. 629.

"Claimant."—In the act of July 31, 1789, c. 5, § 36 to regulate the collection of duties upon the tonnage of ships, and upon goods, wares and merchandise imported, the word "claimant" is obviously used in its technical sense, to stand for the owner of the property seized for a penalty or forfeiture, under previous sections of the act. *The Conqueror*, 166 U. S. 110, 123, 41 L. Ed. 937.

"The significance of the word 'willful' in criminal statutes has been considered by this court. In *Felton v. United States*, 96 U. S. 699, 702, 24 L. Ed. 875, it was said: 'Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it.'" *Spurr v. United States*, 174 U. S. 728, 734, 43 L. Ed. 1150. See, also, *Potter v. United States*, 155 U. S. 438, 445, 39 L. Ed. 214; *Evans v. United States*, 153 U. S. 584, 38 L. Ed. 830.

31. Commercial terms.—Two Hundred Chests of Tea, 9 Wheat. 430, 438, 6 L. Ed.

128; *Barlow v. United States*, 7 Pet. 404, 8 L. Ed. 728; *United States v. One Hundred and Twelve Casks of Sugar*, 8 Pet. 277, 8 L. Ed. 944; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *Curtis v. Martin*, 3 How. 106, 11 L. Ed. 516; *Tyng v. Grinnell*, 92 U. S. 467, 23 L. Ed. 733; *Arthur v. Morrison*, 96 U. S. 108, 24 L. Ed. 764; *Arthur v. Lahey*, 96 U. S. 112, 24 L. Ed. 766; *Arthur v. Rheims*, 96 U. S. 143, 24 L. Ed. 813; *Swan v. Arthur*, 103 U. S. 597, 26 L. Ed. 525; *Newman v. Arthur*, 109 U. S. 132, 27 L. Ed. 883; *Schmieder v. Barney*, 113 U. S. 645, 28 L. Ed. 1130; *Marvel v. Merritt*, 116 U. S. 11, 12, 29 L. Ed. 550; *Worthington v. Abbott*, 124 U. S. 434, 31 L. Ed. 494; *Arthur v. Butterfield*, 125 U. S. 70, 31 L. Ed. 643; *Robertson v. Salomon*, 130 U. S. 412, 415, 32 L. Ed. 995; *Seeberger v. Cahn*, 137 U. S. 95, 97, 34 L. Ed. 599; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 35 L. Ed. 821; *Toplitz v. Hedden*, 146 U. S. 252, 36 L. Ed. 961; *Arnold v. United States*, 147 U. S. 494, 37 L. Ed. 253; *Nix v. Hedden*, 149 U. S. 304, 37 L. Ed. 745; *Hedden v. Richards*, 149 U. S. 346, 37 L. Ed. 763; *Cadwalader v. Zeh*, 151 U. S. 171, 176, 38 L. Ed. 115; *Bogle v. Magone*, 152 U. S. 623, 38 L. Ed. 574; *Chew Hing Lung v. Wise*, 176 U. S. 156, 161, 44 L. Ed. 412.

It must appear that the commercial designation is the result of established usage in commerce and trade, and that at the time of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal. *Sonn v. Magone*, 159 U. S. 417, 420, 40 L. Ed. 203.

"The phrase 'of similar description' is not a commercial term, and if it were, there is no evidence in the record to show what it is understood to mean among merchants and importers." *Greenleaf v. Goodrich*, 101 U. S. 278, 284, 25 L. Ed. 845.

32. Terms judicially defined.—See post, "Judicial Construction," XVI, J, 3, b.

33. Construed as prospective or retrospective.—See the title *CONSTITUTIONAL LAW*, vol. 4, p. 432.

34. Presumed to operate prospectively only.—*United States v. Union Pac. R. Co.*, 98 U. S. 569, 606, 25 L. Ed. 143; *Shreveport v. Cole*, 129 U. S. 36, 39, 32 L. Ed. 589; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 565, 41 L. Ed. 1114; *White v. United States*, 191 U. S. 545, 552, 48 L. Ed. 295; *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 50 L. Ed. 1149; *Franklin Sugar Ref. Co. v. United States*, 202 U. S. 580, 50 L. Ed. 1153.

it is a rule of construction that a statute is not to be construed to act retrospectively or to affect rights vested prior to its passage, unless no other meaning can be given it, or unless the express or necessarily implied intention of the legislature cannot be otherwise satisfied.³⁵ Pursuant to this rule courts apply the

35. Construed as prospective.—The *Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276; *United States v. Heth*, 3 Cranch 399, 413, 414, 2 L. Ed. 479; *Reynolds v. McArthur*, 2 Pet. 417, 434, 7 L. Ed. 470; *Beard v. Rowan*, 9 Pet. 301, 317, 9 L. Ed. 135; *Ladiga v. Roland*, 2 How. 581, 589, 11 L. Ed. 387; *Lewis v. Lewis*, 7 How. 776, 784, 12 L. Ed. 909; *Surgett v. Lapice*, 8 How. 48, 68, 12 L. Ed. 982; *Snead v. M'Coull*, 12 How. 407, 13 L. Ed. 1043; *Murray v. Gibson*, 15 How. 421, 423, 14 L. Ed. 755; *United States v. Dawson*, 15 How. 467, 14 L. Ed. 775; *Carroll v. Carroll*, 16 How. 275, 284, 14 L. Ed. 936; *McEwen v. Den*, 24 How. 242, 244, 16 L. Ed. 672; *Harvey v. Tyler*, 2 Wall. 328, 347, 17 L. Ed. 871; *United States v. Alexander*, 12 Wall. 177, 179, 20 L. Ed. 381; *Sohn v. Waterson*, 17 Wall. 596, 599, 21 L. Ed. 737; *Robertson v. Carson*, 19 Wall. 94, 22 L. Ed. 178; *Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339; *United States v. Moore*, 95 U. S. 760, 762, 24 L. Ed. 588; *Chew Heong v. United States*, 112 U. S. 536, 555, 559, 28 L. Ed. 770; *Shreveport v. Cole*, 129 U. S. 36, 43, 32 L. Ed. 589; *Cook v. United States*, 138 U. S. 157, 181, 34 L. Ed. 906; *Caha v. United States*, 152 U. S. 211, 214, 38 L. Ed. 415; *United States v. Burr*, 159 U. S. 78, 82, 40 L. Ed. 82; *United States v. Healey*, 160 U. S. 136, 149, 40 L. Ed. 369; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 565, 41 L. Ed. 1114; *Stephens v. Cherokee Nation*, 174 U. S. 445, 478, 43 L. Ed. 1041; *DeLima v. Bidwell*, 182 U. S. 1, 197, 45 L. Ed. 1041; *Southwestern Coal Co. v. McBride*, 185 U. S. 499, 503, 46 L. Ed. 1010; *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505, 509, 46 L. Ed. 1012; *White v. United States*, 191 U. S. 545, 555, 48 L. Ed. 295; *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 577, 579, 50 L. Ed. 1149; *Franklin Sugar Ref. Co. v. United States*, 202 U. S. 580, 50 L. Ed. 1153.

"This rule ought especially to be adhered to, when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, services and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *United States v. Heth*, 3 Cranch 399, 413, 2 L. Ed. 479.

"Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet

be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms." *Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339.

Act in regard to foreign judgments in evidence.—*Murray v. Gibson*, 15 How. 421, 14 L. Ed. 755.

Act giving right of redemption.—*Barnitz v. Beverly*, 163 U. S. 118, 129, 41 L. Ed. 93.

Act authorizing municipal corporation to contract.—*City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 565, 41 L. Ed. 1114.

Acts of limitation.—*Sohn v. Waterson*, 17 Wall. 596, 599, 21 L. Ed. 737. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 910.

Curative acts.—See the title CHATTEL MORTGAGES, vol. 3, p. 741.

Navy personnel act.—See the title ARMY AND NAVY, vol. 2, p. 508.

Act giving states power over imported intoxicating liquors.—See the title INTER-STATE AND FOREIGN COMMERCE, vol. 7, p. 383.

Revenue laws.—A tariff law ought not to be construed to operate retrospectively. *United States v. Burr*, 159 U. S. 78, 40 L. Ed. 82.

Accordingly it is held that merchandise entered for consumption and delivered to the importer before a subsequent tariff becomes a law, is subject to the rates of duty imposed by the law in force at that time. *United States v. Burr*, 159 U. S. 78, 82, 40 L. Ed. 82.

But where an act levies duties on goods imported from and after its passage, goods which come into a collection district on the very day the act is passed are dutiable under it. *Arnold v. United States*, 9 Cranch 104, 3 L. Ed. 671.

Goods are deemed to be imported on the day they arrive at the port and are entered at the custom house, so as to subject them to the duties laid by a new act. *Hartranft v. Oliver*, 125 U. S. 525, 31 L. Ed. 813. See the title REVENUE LAWS, vol. 10, p. 838.

Act affecting land entries.—See the title PUBLIC LANDS, vol. 10, p. 1.

Act empowering aliens to hold land.—See the title ALIENS, vol. 1, p. 228.

Chinese exclusion acts.—See the title CHINESE EXCLUSION ACTS, vol. 3, p. 778.

Legal tender acts.—See the title PAYMENT, vol. 9, p. 325.

Act establishing land boundaries.—See the title PUBLIC LANDS, vol. 10, p. 1.

Act in regard to suits by and against national banks.—*First Nat. Bank v. Morgan*, 132 U. S. 141, 145, 33 L. Ed. 282. See

provisions of a statute to future cases only, unless there is something in the nature of the case or in the language used which shows the legislature intended them to have a retroactive operation.³⁶ Where the language is in the future tense,³⁷ designates a future date as time of taking effect,³⁸ refers to facts to arise in the future,³⁹ or excepts existing rights,⁴⁰ the statute is to be construed as prospective; but where reference is made to a past state of facts it is to be construed as retrospective.⁴¹ The rule applies to an amendatory statute,⁴² but not to one passed to construe an existing act.⁴³

7. **CONSTRUED REASONABLY.**—Statutes are to receive a reasonable construction with a view to carrying out their purpose and intent.⁴⁴

the title **COURTS**, vol. 4, p. 925.

Act in regard to wills.—See the title **WILLS**.

Act giving United States priority over other creditors.—*United States v. Bryan*, 9 Cranch 374, 3 L. Ed. 764. See, generally, the title **UNITED STATES**.

Act making ca. sa. lien on realty.—*Snead v. McCoull*, 12 How. 407, 13 L. Ed. 1043.

36. **Application of rule of prospective operation.**—*Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339; *White v. United States*, 191 U. S. 545, 552, 48 L. Ed. 295.

37. **Where language in future tense.**—*United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479.

Weight should be given the fact that a statute is expressed in terms in the future tense. Such a statute is to be construed as not having a retrospective effect. *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 577, 50 L. Ed. 1149.

It has been held that the word "shall" in a tariff law providing that on and after a certain day there shall be levied, collected, and paid, etc., speaks for the future, and is not intended to apply to transactions completed, when the act became a law. *United States v. Burr*, 159 U. S. 78, 40 L. Ed. 82. See **SHALL**, vol. 10, p. 1130.

38. **Where statute takes effect at future date.**—The designation of the time of its taking effect affords a demonstration that congress never intended that a statute should retroact to any other or greater extent. *Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339; *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 579, 50 L. Ed. 1149.

39. **Where language refers to future acts.**—The words "unless otherwise provided by law" are to be construed with reference to future provisions, and not as referring to prior existing laws. It was so held in construing the circuit court of appeals act of March 3, 1891, § 6. *Lau Ow Bew v. United States*, 144 U. S. 47, 56, 36 L. Ed. 340.

The phrase "as provided by law" under the circuit court of appeals act of March 3, 1891, should not be construed as if it read "as is, or has been, or may be provided by law." In *re Heath*, 144 U. S. 92, 93, 36 L. Ed. 358.

An act of legislature authorizing a municipal corporation to lend its credit to a

specified railroad company, and to "any other railroad company duly incorporated and organized for the purpose of constructing railroads," leading in a direction named, "and which in the opinion of common council are entitled to such aid from the city," authorizes the lending of the city credit to a railroad company thereafter duly incorporated and organized, as well as the lending of such credit to those in existence when the act was passed. *James v. Milwaukee*, 16 Wall. 159, 21 L. Ed. 267.

The 21st and 22d sections of the Virginia statute of April 1st, 1831, "concerning lands returned delinquent for the nonpayment of taxes," were not confined to delinquencies prior to the passing of that statute. Under the said sections, land is rightly exonerated by the county court of the county in which alone it was always taxed; even though a part of the land lay of later times in another county, a new one, made out of such former county. *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871.

40. *Marsh v. Nichols, etc., Co.*, 128 U. S. 605, 616, 32 L. Ed. 538; *Wayman v. Southard*, 10 Wheat. 1, 30, 6 L. Ed. 253.

41. **Where past facts referred to.**—*Concord v. Robinson*, 121 U. S. 165, 167, 30 L. Ed. 885; *United States v. Hooe*, 3 Cranch 73, 79, 2 L. Ed. 370.

The act of Illinois of February 14, 1859, incorporating the Chicago city railway company and declaring that all contracts, stipulations, etc., "as made or amended" binding between the railway and the city, refer to past and not future engagements. *Blair v. Chicago*, 201 U. S. 400, 464, 50 L. Ed. 801.

Act validating defective chattel mortgages.—See the title **CHATTEL MORTGAGES**, vol. 3, p. 741.

42. *Auffmordt v. Rasin*, 102 U. S. 620, 622, 26 L. Ed. 262; *McEwen v. Den*, 24 How. 242, 16 L. Ed. 672.

43. **In construction of declaratory statute.**—Had it been intended in an act passed to remove a doubt existing as to the construction of an existing statute to apply only to cases subsequently arising, it would undoubtedly have so provided in terms. *Bailey v. Clark*, 21 Wall. 284, 288, 22 L. Ed. 651.

44. **Construed reasonably.**—*Huidekoper v. Douglass*, 3 Cranch 1, 66, 67, 72, 2 L. Ed. 347; *Murray v. Baker*, 3 Wheat. 541,

8. CONSTRUED WITH REFERENCE TO CONSTITUTION.—A statute is to be construed with reference to the constitution which is binding upon the legislative body by which it is enacted.⁴⁵

9. CONSTRUED CONTRA PROFERENTEM.—The doctrine that an instrument is to be construed against the person who caused it to be prepared is applicable to statutes.⁴⁶ It has especial application to legislative grants of franchises and privileges.⁴⁷

10. CONSTRUED IN FAVOR OF PUBLIC WELFARE, MORALS, ETC.—A statute is presumed to be intended to operate in favor of the public welfare,⁴⁸ and is to be so construed.⁴⁹

11. PRIMARY INTENT PREVAILS OVER SECONDARY.—Although a statute should if possible be construed to give full effect to both a special and a general intent of the legislature,⁵⁰ yet where the two are irreconcilable the special will be construed to prevail over the general intent.⁵¹ Where one section of a stat-

4 L. Ed. 454; *Mobile v. Esclava*, 16 Pet. 234, 247, 10 L. Ed. 948; *Moore v. American Transp. Co.*, 24 How. 1, 36, 16 L. Ed. 674; *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *United States v. Saunders*, 22 Wall. 492, 22 L. Ed. 736; *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226; *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 59, 36 L. Ed. 340; *Sioux City, etc., R. Co. v. United States*, 159 U. S. 349, 360, 40 L. Ed. 177; *Plessy v. Ferguson*, 163 U. S. 537, 558, 41 L. Ed. 256; *In re Chapman*, 166 U. S. 661, 667, 41 L. Ed. 1154; *The Japanese Immigrant Case*, 189 U. S. 86, 101, 47 L. Ed. 721; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016; *Scottish, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 629, 49 L. Ed. 614; *Jacobson v. Massachusetts*, 197 U. S. 11, 39, 49 L. Ed. 643; *Hackfeld & Co. v. United States*, 197 U. S. 442, 452, 49 L. Ed. 826; *Rogers v. Peck*, 199 U. S. 425, 50 L. Ed. 256.

45. Construed with reference to constitution.—*Cooper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 51 L. Ed. 1143; *Kepner v. United States*, 195 U. S. 100, 124, 49 L. Ed. 114; *Durousseau v. United States*, 6 Cranch 307, 318, 3 L. Ed. 232. See post, "Unconstitutionality," XVI, K, 3.

This rule, however, does not apply to the territory of Arizona, which has no constitution. *Cooper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 51 L. Ed. 1143.

46. Construed contra proferentem.—*Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 42 L. Ed. 1033; *United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479. See the title INTERPRETATION AND CONSTRUCTION, vol. 7, p. 264.

"Legislative contracts are to be construed most favorably to the state." *Home of the Friendless v. Rouse*, 8 Wall. 430, 437, 19 L. Ed. 495.

47. Grants of powers and privileges.—"It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and

submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give." *Blair v. Chicago*, 201 U. S. 400, 471, 50 L. Ed. 801. See, also, *Cleveland Electric R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399; *Ruggles v. Illinois*, 108 U. S. 526, 534, 27 L. Ed. 812; *Slidell v. Grandjean*, 111 U. S. 412, 438, 28 L. Ed. 321. See post, "Grant of Powers and Privileges," XVI, L, 22.

48. *Millard v. Roberts*, 202 U. S. 429, 437, 50 L. Ed. 1090.

49. *Harris v. Runnels*, 12 How. 79, 86, 13 L. Ed. 901; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. 66, 88, 16 L. Ed. 500; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 740, 23 L. Ed. 634; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 562, 36 L. Ed. 537; *Atlantic, etc., R. Co. v. Mingus*, 165 U. S. 413, 429, 41 L. Ed. 770; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548.

In regard to railroads.—Statutes referring to the conduct of railroads are to be construed favorable to the general public. *United States v. Freight Ass'n*, 166 U. S. 290, 322, 41 L. Ed. 1007.

Providing form of insurance contract.—The statutes of the different states providing standard forms of insurance contracts are enacted for the public welfare and are to be construed with reference to that object. *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 398, 44 L. Ed. 1116. See the title INSURANCE, vol. 7, p. 94.

50. *Platt v. Union Pac. R. Co.*, 99 U. S. 51, 65, 25 L. Ed. 424.

51. *Beaty v. Knowler*, 4 Pet. 152, 170, 7 L. Ed. 813; *Twin City Bank v. Nebeker*, 167 U. S. 196, 42 L. Ed. 134; *Lumberman's Bank v. Huston*, 167 U. S. 203, 42 L. Ed. 136; *United States v. Harris*, 177 U. S. 305, 44 L. Ed. 780; *Studebaker v. Perry*, 184 U. S. 258, 268, 46 L. Ed. 528.

The specific intention of the legislature is to be found in the leading provisions of a statute. *The Paquete Habana*, 175 U. S. 677, 44 L. Ed. 320.

The chief purpose of the act of August 18, 1856, § 4966 of the Revised Statutes,

ute treats specially and solely of a matter it prevails in reference to that matter over other sections in which only incidental reference is made thereto.⁵²

12. **LATER PROVISION PREVAILS OVER PRIOR.**—Upon the theory that the last expression is the expression of the last will of the legislature, one of the canons of construction is that the provisions of a later statute are to be construed as prevailing over those of a prior statute,⁵³ that subsequent provisions prevail over prior provisions of the same statute,⁵⁴ and that in case of a conflict between an act of congress and a treaty—each being equally the supreme law of the land—the one last in date prevails over the one prior.⁵⁵ This rule seems to be seldom applicable; and, when applicable, gives way to other rules.⁵⁶ The rule is not applicable where the prior section is specific in its terms and the later section only general,⁵⁷ nor where the later act is merely affirmative and declaratory of the prior act and intended simply to construe and apply it.⁵⁸ It is not applicable to the construction of the different provisions of a code.⁵⁹

13. **RULE OF EXPRESSIO UNIUS.**—It is a well-settled principle of statutory construction that the expression of one thing excludes others not expressed, or, as usually expressed, *expressio unius est exclusio alterius*.⁶⁰ An exception

providing for the recovery of damages for performing or representing a dramatic composition without the consent of the proprietor of the copyright, had for the chief object the recovery by the proprietor of compensation for the wrong done him, and not for the punishment of the wrongdoer. Therefore the statute was construed not to be penal. *Brady v. Daly*, 175 U. S. 148, 44 L. Ed. 169.

Too much stress should not be laid upon a subordinate part of a sentence. *Caha v. United States*, 152 U. S. 211, 214, 38 L. Ed. 415. See post, "General Terms," XVI, M, 2.

52. *Lowndes v. Huntington*, 153 U. S. 1, 22, 38 L. Ed. 615.

53. **Later prevails over prior statute.**—*The Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *Alexander v. Alexandria*, 5 Cranch 1, 8, 3 L. Ed. 19; *The Paulina's Cargo*, 7 Cranch 52, 3 L. Ed. 266; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 419; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *McKee v. United States*, 8 Wall. 163, 167, 19 L. Ed. 329; *United States v. Tynen*, 11 Wall. 88, 93, 20 L. Ed. 153; *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. Ed. 235; *Telegraph Co. v. Eyser*, 19 Wall. 419, 427, 22 L. Ed. 43; *Bailey v. Clark*, 21 Wall. 284, 22 L. Ed. 651; *The Collector v. Richards*, 23 Wall. 246, 257, 22 L. Ed. 95; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 195, 31 L. Ed. 386; *Cope v. Cope*, 137 U. S. 682, 34 L. Ed. 832; *Henrietta, etc., Mill. Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637; *DeLima v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390; *United States v. Whitridge*, 197 U. S. 135, 143, 49 L. Ed. 696; *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575. See ante, "Construed with Reference to Statutes and Pari Materia," XVI, I, 4.

"The last expression of the will of the lawmaker prevails over an earlier one." *Schick v. United States*, 195 U. S. 65, 68, 49 L. Ed. 99.

54. **Later provision in same act.**—"If, in a subsequent clause of the same act, provisions are introduced, which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases." *Alexander v. Alexandria*, 5 Cranch 1, 7, 3 L. Ed. 19.

The enacting clause of a statute is construed to prevail over the preamble, on the ground that it is the last expression of the legislative will. *Ware v. Hylton*, 3 Dall. 199, 233, 1 L. Ed. 568.

55. **Provisions in treaty and statute.**—*The Cherokee Tobacco*, 11 Wall. 616, 621, 20 L. Ed. 227; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386; *DeLima v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041; *United States v. Lee Yen Tai*, 185 U. S. 213, 221, 46 L. Ed. 878; *Hijo v. United States*, 194 U. S. 315, 324, 48 L. Ed. 994. See ante, "Later Provision Prevails over Prior," XVI, I, 12.

56. *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575.

57. *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575.

58. **Where later act declaratory.**—The amendatory act of March 2, 1903, of the safety appliance act of March 2, 1893, is merely declaratory of the prior act, and the fact that the later act is more ample than the prior does not show that it was the intention of the legislature not to give the prior act a liberal construction. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

59. *Iglehart v. Iglehart*, 204 U. S. 478, 51 L. Ed. 575.

60. **Rule of expressio unius.**—*The Paulina's Cargo*, 7 Cranch 52, 61, 3 L. Ed. 266; *Mutual Assur. Society v. Watts*, 1 Wheat. 279, 289, 4 L. Ed. 91; *Minor v. Mechanics' Bank*, 1 Pet. 46, 64, 7 L. Ed.

in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted.⁶¹ The doctrine is based upon a presumed intent of the legislature and where the intent requires to the contrary the rule does not prevail.⁶²

14. APPLICATION OF RULES.—It would be unprofitable to attempt to lay down any rules applicable to all cases. Every case must depend on its own circumstances.⁶³

15. FORCE OF RULES.—It is by the light which each rule of construction contributes that the judgment of the court is to be made up.⁶⁴

J. Aids to Construction—1. IN GENERAL.—In seeking to discover the design of the legislature, the judicial mind seizes upon everything from which aid can be derived.⁶⁵

2. INTRINSIC AIDS—*a. Title*.—While the title is no part of a statute⁶⁶ and cannot control the plain provisions of the enacting clause,⁶⁷ it may be referred to in aid of construction in cases of ambiguity.⁶⁸ The ambiguity must exist in

47; *Beatty v. Knowler*, 4 Pet. 152, 170, 7 L. Ed. 813; *Ex Parte Crane*, 5 Pet. 190, 204, 8 L. Ed. 92; *United States v. Coombs*, 12 Pet. 72, 79, 9 L. Ed. 1004; *Wood v. United States*, 16 Pet. 342, 363, 10 L. Ed. 987; *Telegraph Co. v. Eyser*, 19 Wall. 419, 432, 22 L. Ed. 43; *United States v. Hirsch*, 100 U. S. 33, 25 L. Ed. 539; *United States v. Arredondo*, 6 Pet. 691, 725, 8 L. Ed. 547; *Durousseau v. United States*, 6 Cranch 307, 313, 317, 3 L. Ed. 232.

"When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 270, 20 L. Ed. 570.

The doctrine *expressio unius est exclusio alterius* is applicable to the construction of a special act otherwise furthering the same subject matter as a prior general act. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 22, 43 L. Ed. 341.

A statute granting pieces of lands to Indians, and prescribing a specific mode in which they may sell, forbids by implication a sale independently of the mode. *Smith v. Stevens*, 10 Wall. 321, 19 L. Ed. 933.

The affirmative description of the cases in which the jurisdiction may be exercised under the circuit court of appeals act of March 3, 1891, implies a negative on the exercise of such power in other cases. *In re Heath*, 144 U. S. 92, 93, 36 L. Ed. 358.

Act granting longevity pay.—*United States v. Sweeny*, 157 U. S. 281, 286, 39 L. Ed. 702; *Thornley v. United States*, 113 U. S. 310, 315, 28 L. Ed. 999.

61. *Bend v. Hoyt*, 13 Pet. 263, 271, 10 L. Ed. 154.

An express exception of executors, administrators, and guardians from a law leaves all other suitors under its operation. *Green v. United States*, 9 Wall. 655, 658, 19 L. Ed. 806.

The express exceptions to the act of February 24, 1855, amended March 3, 1863, establishing the court of claims and declaring that claims shall be barred after

six years, preclude the court from making other exceptions. *Kendall v. United States*, 107 U. S. 123, 27 L. Ed. 437.

62. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 15, 49 L. Ed. 363. See ante, "Constructed by Implication," XVI, G, 5.

63. *Griffith v. Bogert*, 18 How. 158, 163, 15 L. Ed. 307.

64. *United States v. Hartwell*, 6 Wall. 385, 395, 18 L. Ed. 830.

65. **Aids to construction**.—*United States v. Fisher*, 2 Cranch 358, 386, 2 L. Ed. 304; *White v. United States*, 191 U. S. 545, 550, 48 L. Ed. 295; *Gardner v. Collector*, 6 Wall. 499, 511, 18 L. Ed. 890; *United States v. Ballin*, 144 U. S. 1, 3, 36 L. Ed. 321.

66. *United States v. Fisher*, 2 Cranch 358, 386, 2 L. Ed. 304; *Cornell v. Coyne*, 192 U. S. 418, 430, 48 L. Ed. 504; *Patterson v. Bark Eudora*, 190 U. S. 169, 172, 47 L. Ed. 1002.

67. *Postmaster-General v. Early*, 12 Wheat. 136, 148, 6 L. Ed. 577; *United States v. Fisher*, 2 Cranch 358, 386, 2 L. Ed. 304; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 408, 30 L. Ed. 1230.

The title of an act cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight. *Hadden v. The Collector*, 5 Wall. 107, 18 L. Ed. 518.

Thus an act relating to "American Seamen" may extend to foreigners. *Patterson v. Bark Eudora*, 190 U. S. 169, 172, 173, 47 L. Ed. 1002.

68. **As aid to construction**.—*United States v. Fisher*, 2 Cranch 358, 386, 400, 2 L. Ed. 304; *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471; *Scott v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519; *United States v. Briggs*, 9 How. 351, 13 L. Ed. 170; *Davidson v. Lanier*, 4 Wall. 447, 454, 18 L. Ed. 377; *Hadden v. The Collector*, 5 Wall. 107, 18 L. Ed. 518; *The Clinton Bridge*, 10 Wall. 454, 19 L. Ed. 969; *Smythe v. Fiske*, 23 Wall. 374, 380, 22 L. Ed. 47; *United States v. Union Pac. R.*

the enacting clause.⁶⁹ The title of an act may be referred to to determine the meaning of general words used in its body.⁷⁰ The title of an act of congress affords but little assistance,⁷¹ but, in states whose constitutions require the expression of the subject matter of a statute in its title, the title is an important aid to construction.⁷² No presumption of legislative construction is to be drawn from the title under which a section of the Revised Statutes appears.⁷³

b. *Preamble*.—While express provisions in the body of an act cannot be controlled or restrained by the preamble,⁷⁴ the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions.⁷⁵

Co., 91 U. S. 72, 82, 23 L. Ed. 224; Yazoo, etc., R. Co. v. Thomas, 132 U. S. 174, 188, 33 L. Ed. 302; Holy Trinity Church v. United States, 143 U. S. 457, 462, 465, 36 L. Ed. 226; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562, 563, 36 L. Ed. 537; The Delaware, 161 U. S. 459, 471, 40 L. Ed. 771; United States v. Laws, 163 U. S. 258, 41 L. Ed. 151; United States v. Oregon, etc., R. Co., 164 U. S. 526, 541, 41 L. Ed. 541; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 352, 41 L. Ed. 1007; Price v. Forrest, 173 U. S. 410, 427, 43 L. Ed. 749; Knowlton v. Moore, 178 U. S. 41, 65, 44 L. Ed. 969; Patterson v. Bark Eudora, 190 U. S. 169, 172, 173, 47 L. Ed. 1002; White v. United States, 191 U. S. 545, 550, 48 L. Ed. 295; Cornell v. Coyne, 192 U. S. 418, 430, 48 L. Ed. 504.

The title of an act is the best summary of its purpose. Millard v. Roberts, 202 U. S. 429, 437, 50 L. Ed. 1090.

69. "The ambiguity must be in the context and not in the title to render the latter of any avail." Cornell v. Coyne, 192 U. S. 418, 430, 48 L. Ed. 504.

70. *Construction of general words*.—Holy Trinity Church v. United States, 143 U. S. 457, 36 L. Ed. 226.

71. United States v. Union Pac. R. Co., 91 U. S. 72, 82, 23 L. Ed. 224; Hadden v. The Collector, 5 Wall. 107, 110, 18 L. Ed. 518.

72. Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 563, 36 L. Ed. 537; Myer v. Car Co., 102 U. S. 1, 11, 26 L. Ed. 59.

73. Doyle v. Wisconsin, 94 U. S. 50, 51, 24 L. Ed. 64.

74. Price v. Forrest, 173 U. S. 410, 427, 43 L. Ed. 749; Ware v. Hylton, 3 Dall. 199, 233, 1 L. Ed. 568; Alexander v. Alexandria, 5 Cranch 1, 9, 3 L. Ed. 19.

A preamble sets forth merely the motives or inducements of the legislator, and, whether founded in error or truth, serves no other purpose than to assist in developing the meaning of doubtful enacting words. Yeaton v. Bank, 5 Cranch 49, 55, 3 L. Ed. 33.

Although the preamble of a later act speaks of amending and confirming a prior act, where the body of the act is a substitute for the prior, the act will operate as a repealing act. Murphy v. Uter, 186 U. S. 95, 105, 46 L. Ed. 1070.

There can be no doubt that strong

words in the enacting part of a law may extend beyond the preamble. If the preamble is contradicted by the enacting clause, as to the intention of the legislature, it must prevail, on the principle, that the legislature changed their intention. Ware v. Hylton, 3 Dall. 199, 1 L. Ed. 568.

75. *As aid to construction*.—Ware v. Hylton, 3 Dall. 199, 233, 1 L. Ed. 568; United States v. Fisher, 2 Cranch 358, 386, 400, 2 L. Ed. 304; Yeaton v. Bank, 5 Cranch 49, 55, 3 L. Ed. 33; Preston v. Browder, 1 Wheat. 115, 122, 4 L. Ed. 50; United States v. Palmer, 3 Wheat. 610, 631, 4 L. Ed. 471; Beard v. Rowan, 9 Pet. 301, 317, 9 L. Ed. 135; Beatty v. Knowler, 4 Pet. 152, 169, 7 L. Ed. 813; Richmond, etc., R. Co. v. Louisa R. Co., 13 How. 71, 81, 14 L. Ed. 55; Yazoo, etc., R. Co. v. Thomas, 132 U. S. 174, 188, 33 L. Ed. 302; Holy Trinity Church v. United States, 143 U. S. 457, 462, 36 L. Ed. 226; Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 563, 36 L. Ed. 537; Kinkead v. United States, 150 U. S. 483, 497, 37 L. Ed. 1152; Price v. Forrest, 173 U. S. 410, 413, 43 L. Ed. 749; Knowlton v. Moore, 178 U. S. 41, 65, 44 L. Ed. 969; Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643.

The preamble has been said to be a key to open the understanding of a statute. Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 562, 36 L. Ed. 537.

"If the words, or effect and operation, of the enacting clause are ambiguous or doubtful, such construction should be made as not to extend the provisions in the enacting clause beyond the intention of the legislature, so clearly expressed in the preamble: but if the words in the enacting clause, in their nature, import a common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction." Ware v. Hylton, 3 Dall. 199, 233, 1 L. Ed. 568.

Thus the preamble to the safety appliance act was taken into consideration to show the purpose of the congressional legislation. Johnson v. Southern Pac. Co., 196 U. S. 1, 14, 49 L. Ed. 363.

"The recital, in the preamble of a public act of parliament, of a public fact, is evidence to prove the existence of that fact." Watkins v. Holman, 16 Pet. 25, 55, 10 L. Ed. 873.

c. *Provisos and Exceptions*.—A proviso may be referred to to aid the construction of the enacting clause.⁷⁶ Reference may be had to a proviso which has been repealed.⁷⁷ The exception of a particular thing from general words marks their extent⁷⁸ and proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made.⁷⁹ If possible, the enacting clause and the proviso are to be construed so as to give effect to both.⁸⁰

d. *Marginal References*.—The marginal references in the Revised Statutes made by the commissioners of revision may be referred to in aid of construction.⁸¹

e. *Grammar, Punctuation and Collocation*.—(1) *Grammar*.—The rules of grammar are presumed to be known to the legislature⁸² and are to be followed in the construction of its statutes,⁸³ unless the legislative intent would be violated,⁸⁴ or inconvenience or absurdity would result.⁸⁵

(2) *Punctuation*.—While punctuation may aid construction,⁸⁶ it is no part of a statute⁸⁷ and not controlling upon the courts.⁸⁸ Marks of punctuation may

76. Provisos and exceptions.—*Alexander v. Alexandria*, 5 Cranch 1, 8, 3 L. Ed. 19; *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408; *Thaw v. Ritchie*, 136 U. S. 519, 542, 34 L. Ed. 531; *Arnold v. United States*, 147 U. S. 494, 499, 37 L. Ed. 253; *Austin v. United States*, 155 U. S. 417, 431, 39 L. Ed. 206. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1000. And see post, "Provisos and Exceptions," XVI, M, 3.

The enacting clause of the act of Virginia of December 16, 1796, empowering the city of Alexandria to recover taxes by motion "of and from all and every person and persons holding land within the limits of said town," was declared by a proviso thereto not to extend to persons residing out of the limits of the corporation under certain conditions. It was held that this proviso showed that it was the intention of the legislature in the enacting clause to tax the land of non-residents. *Alexander v. Alexandria*, 5 Cranch 1, 8, 3 L. Ed. 19.

77. *Bank v. Collector*, 3 Wall. 495, 18 L. Ed. 207.

78. Extent of general terms limited by.—"It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend." *Gibbons v. Ogden*, 9 Wheat. 1, 191, 6 L. Ed. 23.

79. *Arnold v. United States*, 147 U. S. 494, 499, 37 L. Ed. 253; *Brown v. Maryland*, 12 Wheat. 419, 438, 6 L. Ed. 678.

As a general proposition a thing that is excepted from a clause in the tariff law must necessarily belong to the class of things from which it is excepted. *Pott v. Arthur*, 104 U. S. 735, 26 L. Ed. 909.

80. See ante, "Construed as a Whole," XVI, I, 3.

81. *Barrett v. United States*, 169 U. S. 218, 227, 228, 42 L. Ed. 723; *United States*

v. Averill, 130 U. S. 335, 338, 32 L. Ed. 977.

82. *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394.

83. Followed by court.—*Scott v. Reid*, 10 Pet. 524, 9 L. Ed. 519; *Minis v. United States*, 15 Pet. 423, 446, 10 L. Ed. 791; *Insurance Co. v. Dunn*, 19 Wall. 214, 224, 22 L. Ed. 68; *Farmers', etc., Bank v. Dear- ing*, 91 U. S. 29, 23 L. Ed. 196.

The court may be aided by a grammatical construction, but is not bound thereby. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554.

There must be some satisfactory reason for departing from this rule of construction. *Treat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853.

84. Intent prevails over grammatical construction.—*Beard v. Rowan*, 9 Pet. 301, 317, 9 L. Ed. 135; *Caha v. United States*, 152 U. S. 211, 214, 38 L. Ed. 415.

85. To avoid inconvenience and absurdity.—*Treat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853.

86. Punctuation.—*Ewing v. Burnett*, 11 Pet. 41, 54, 9 L. Ed. 624; *Joy v. St. Louis*, 138 U. S. 1, 32, 34 L. Ed. 843; *Lees v. United States*, 150 U. S. 476, 37 L. Ed. 1150; *Crawford v. Burke*, 195 U. S. 176, 192, 49 L. Ed. 147.

87. *Hammock v. Loan, etc., Co.*, 105 U. S. 77, 84, 26 L. Ed. 1111.

In the enumeration of persons or things in acts of congress it has been the custom for many years to insert a comma before the final "and" or "or" which precedes the last thing enumerated, apparently for greater precision, but without special significance. *Crawford v. Burke*, 195 U. S. 176, 192, 49 L. Ed. 147.

88. Not absolutely controlling.—"It is well settled that punctuation is not decisive." *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 674, 41 L. Ed. 590.

"Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by

be changed,⁸⁹ inserted⁹⁰ or expunged.⁹¹ Brackets are frequently used in an amendatory act to include terms not found in the old act.⁹²

(3) *Collocation*.—It seems that the words of a statute are to be construed with reference to their nature and meaning rather than their place in the statute;⁹³ but where the words of a statute read in the order in which passed, present no ambiguity, they will not be transposed to further what may be argued to be the general legislative intention.⁹⁴ The general rule is that while a relative term refers to its immediate antecedent⁹⁵ in the same act,⁹⁶ it is to be construed

its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it." *Ewing v. Burnet*, 11 Pet. 41, 54, 9 L. Ed. 624.

89. A comma may be read as a semi-colon. *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080.

90. *Inserting punctuation*.—*United States v. Isham*, 17 Wall. 496, 502, 21 L. Ed. 728; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Hammock v. Loan*, etc., Co., 105 U. S. 77, 84, 26 L. Ed. 1111; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080; *United States v. Oregon*, etc., R. Co., 164 U. S. 526, 541, 41 L. Ed. 541; *Stephens v. Cherokee Nation*, 174 U. S. 445, 480, 43 L. Ed. 1041; *Crawford v. Burke*, 195 U. S. 176, 192, 49 L. Ed. 147.

"For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required." *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080. In the following cases omitted points were supplied by courts: *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363; *Stephens v. Cherokee Nation*, 174 U. S. 445, 479, 43 L. Ed. 1041; *United States v. Oregon*, etc., R. Co., 164 U. S. 526, 541, 41 L. Ed. 541; *Schmidt v. Badger*, 107 U. S. 85, 27 L. Ed. 328.

91. *Stephens v. Cherokee Nation*, 174 U. S. 445, 479, 43 L. Ed. 1041; *Respublica v. Weidle*, 2 Dall. 88, 1 L. Ed. 301.

92. *Murphy v. Utter*, 186 U. S. 95, 46 L. Ed. 1070.

93. *Schick v. United States*, 195 U. S. 65, 49 L. Ed. 99.

94. *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

In the act of April 30, 1790, the description of places, contained in the eighth section, within which the offenses therein enumerated must be committed, in order to give the courts of the Union jurisdiction over them, cannot be transferred to the twelfth section, so as to give those courts jurisdiction over a manslaughter committed in the river of a foreign country, and not on the high seas. *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

95. *Relative refers to immediate antecedent*.—By strictly grammatical construction a descriptive modifying phrase refers to the last antecedent. This grammatical construction is not without its influence involved. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554

The words "during the life thereof" in an act extending the franchises of a corporation of twenty-five to ninety-nine years, refer to the life of the corporation and not to contractual rights made between such corporation and a city by which it was authorized to exercise its franchises for twenty-five years. *Blair v. Chicago*, 201 U. S. 400, 468, 50 L. Ed. 801.

The word "thereof" in § 18 of the Bankruptcy Act of May 2, 1792, was construed to refer to the preceding word "property," and "a voluntary assignment thereof" was held to mean all of his property. *United States v. Hooe*, 3 Cranch 73, 91, 2 L. Ed. 370.

"Affecting citizenship."—In the act of July 1, 1898, providing that "Appeals shall be allowed from the United States courts in the Indian Territory direct to the supreme court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said courts in other cases," the words "affecting citizenship" are not restricted in their qualification to the last-named case alone, and the appeal or intent to extend only to the constitutionality or validity of the legislature affecting citizenship or allotment of lands. *Stephens v. Cherokee Nation*, 174 U. S. 445, 479, 43 L. Ed. 1041. See the title APPEAL AND ERROR, vol. 1, p. 526.

The word "therein" in the 10th section of the act of March 12, 1808, conferring appellate jurisdiction in the supreme court over the court of the territory of Orleans refers to the prior section conferring jurisdiction over the district courts of Kentucky, Ohio and Tennessee, and the supreme court has the same appellate jurisdiction over the courts of the territory as it has over the courts of the states. *Durousseau v. United States*, 6 Cranch 307, 3 L. Ed. 232.

The words "as aforesaid" refer only to a previous part of the sentence or statute. *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

96. *In same act*.—In an act which is meant to be exhaustive on the subject of its enactment, the expression "not otherwise provided for" was intended to apply to a preceding enumeration in the same

with reference to the whole act,⁹⁷ its context,⁹⁸ and to the particular facts coming within the statute.⁹⁹ An adverbial modifier following an auxiliary verb common to the different members of a compound predicate of a single subject, is to be construed as modifying all of the different predicates.¹ The different members of a compound predicate enumerating prohibited acts having a common adverbial modifier specifying when those acts are unlawful are embraced in a relative word introducing a dependent clause which states the penalty incurred.²

3. **EXTRINSIC AIDS**—a. *Legislative Construction*—(1) *In General*.—A statute is to be construed with reference to its legislative construction,³ found in the same,⁴ prior⁵ or subsequent acts.⁶ Legislative construction may be resorted to, to solve, but not to create an ambiguity.⁷ A statutory definition prevails over the ordinary definition of a word used in a statute, and all technicality and narrowness of meaning is precluded where the word is defined in a comprehensive sense.⁸

(2) *In Prior Acts*.—The provisions of a statute are to be construed with reference to the legislative intention as evidenced by prior enactments relating to the same subject,⁹ although there is no reference made to such prior enact-

and not previous enactment. *Smythe v. Fiske*, 23 Wall. 374, 381, 22 L. Ed. 47. See the title **REVENUE LAWS**, vol. 10, p. 838.

97. Construed with reference to whole act.—The word "aforesaid" may be construed with reference to the whole act. *Pennington v. Coxe*, 2 Cranch 33, 57, 2 L. Ed. 199.

The phrase "which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law," in the fourteenth section of the judiciary act of 1789, providing "that all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law," is not restricted to its immediate antecedent, "all other writs not specially provided for by statute," but has reference to the writs of scire facias and habeas corpus. *Ex parte Bollman*, 4 Cranch 75, 94, 2 L. Ed. 554.

98. United States v. St. Anthony R. Co., 192 U. S. 524, 48 L. Ed. 548.

99. Construed with reference and subject matter.—A statute should be so construed as to apply descriptive terms to persons to whom they are adapted. *Huidekoper v. Douglass*, 3 Cranch 1, 67, 2 L. Ed. 347. See, also, *United States v. St. Anthony R. Co.*, 192 U. S. 524, 530, 48 L. Ed. 548.

1. Adverbial modifier of compound predicate.—The *Paulina's Cargo*, 7 Cranch 52, 3 L. Ed. 266.

2. The Paulina's Cargo, 7 Cranch 52, 3 L. Ed. 266.

3. Legislative construction.—*Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115; *Ogden v. Blackledge*, 2 Cranch 272, 277, 2 L. Ed. 276; *Terrett v. Taylor* 9 Cranch 43, 51, 3 L. Ed. 650; *Postmaster-General v. Early*,

12 Wheat. 136, 148, 6 L. Ed. 577; *Bank v. Collector*, 3 Wall. 495, 18 L. Ed. 207; *Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 332, 22 L. Ed. 348; *United States v. Clafin*, 97 U. S. 546, 24 L. Ed. 1028; *Koshkonong v. Burton*, 104 U. S. 668, 678, 679, 26 L. Ed. 886; *United States v. Chase*, 135 U. S. 255, 34 L. Ed. 117.

4. United States v. Pitman, 147 U. S. 669, 671, 37 L. Ed. 324; *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199.

5. See post, "In Prior Acts," XVI, J, 3, a, (2).

6. See post, "In Subsequent Acts," XVI, J, 3, a, (3).

7. In cases of ambiguity.—*Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. Ed. 219; *Yerke v. United States*, 173 U. S. 439, 442, 43 L. Ed. 760.

8. Legislative definition of terms.—*Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

9. Legislative construction in prior acts.—*American Fur Co. v. United States*, 2 Pet. 358, 7 L. Ed. 450; *United States v. Morris*, 14 Pet. 464, 10 L. Ed. 543; *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058; *Bank v. Collector*, 3 Wall. 495, 18 L. Ed. 207; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. Ed. 566; *Wolsey v. Chapman*, 101 U. S. 755, 25 L. Ed. 915; *Ex parte Crow Dog*, 109 U. S. 556, 561, 27 L. Ed. 1030; *McDonald v. Hovey*, 110 U. S. 619, 620, 28 L. Ed. 269; *Viterbo v. Friedlander*, 120 U. S. 707, 725, 726, 30 L. Ed. 776; *Pennoyer v. McConaughy*, 140 U. S. 1, 21, 35 L. Ed. 363; *Dwight v. Merritt*, 140 U. S. 213, 217, 35 L. Ed. 450; *United States v. Des Moines, etc., R. Co.*, 142 U. S. 510, 524, 35 L. Ed. 1099; *In re Hohorst*, 150 U. S. 653, 660, 37 L. Ed. 1211; *Hedden v. Robertson*, 151 U. S. 520, 526, 38 L. Ed. 257; *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556; *Marks v. United States*, 161 U. S. 297, 302, 40 L. Ed. 706; *Beley v. Naphtaly*, 169 U.

ments,¹⁰ and although the prior acts have been repealed.¹¹ That construction should be given a statute which will not impair the operation of a prior law not intended to be repealed by the legislature.¹² A word in a statute used in different parts of a section or in different statutes relating to the same subject is to be construed as having the same meaning in both cases.¹³ And a word in a statute different from those of prior law must be construed as having been providently inserted and cannot be rejected as inefficacious.¹⁴ A change of expression in the later of two statutes in *pari materia* may be regarded as purely accidental.¹⁵

S. 353, 42 L. Ed. 775; *Vance v. Vandercook Co.*, 170 U. S. 438, 453, 42 L. Ed. 1100; *Keck v. United States*, 172 U. S. 434, 448, 43 L. Ed. 505; *Yerke v. United States*, 173 U. S. 439, 442, 43 L. Ed. 760; *Stephens v. Cherokee Nation*, 174 U. S. 445, 481, 43 L. Ed. 1041; *Hamilton v. Rathbone*, 175 U. S. 414, 419, 44 L. Ed. 219; *Benziger v. United States*, 192 U. S. 38, 48 L. Ed. 331; *United States v. Thomas*, 195 U. S. 418, 420, 49 L. Ed. 259; *Blair v. Chicago*, 201 U. S. 400, 453, 469, 50 L. Ed. 801.

If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724.

In determining whether or not the judiciary act of March 3, 1887, is to be construed as to repeal the special provisions of the act of March 2, 1887, in regard to the judicial districts of Illinois, the acts of congress prior to and after the passage of the principle act show that congress did not intend the general act to repeal the special. *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 50 L. Ed. 231.

Prior acts of congress may be referred to to determine the meaning of the phrase "in amity with the United States" as used in the Indian depredation act of March 3, 1891. *Marks v. United States*, 161 U. S. 297, 302, 40 L. Ed. 706.

Where a later statute substantially re-enacts a prior statute with the exception of one section, and the later act is upon "the same terms and conditions" as contained in the prior act, the later statute is not to be construed as to express the full intention of congress, but the reference to the prior statute is to be given effect to. *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 41 L. Ed. 399.

In construing the acts of Virginia of October 4, 1779, and December 13, 1796, empowering the city of Alexandria to levy taxes, the court adopted the construction of those acts as found in the act of December 16, 1796, and the term "lot" as found in the prior acts was construed to mean lands within the meaning of the later act empowering the city to levy taxes against any person "holding land within the limits of the city." *Alexander v. Alexandria*, 5 Cranch 1, 10, 3 L. Ed. 19.

10. *United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304.

11. **Where prior act has been repealed.**—*Bank v. Collector*, 3 Wall. 495, 513, 18 L.

Ed. 207; *Ex parte Crow Dog*, 109 U. S. 556, 561, 27 L. Ed. 1030; *In re Hohorst*, 150 U. S. 653, 660, 37 L. Ed. 1211. See ante, "Provisos and Exceptions," XVI, J, 2, c.

The act of June 13, 1898, imposing a tax on legacies and distributive shares, was construed in the light of the English legacy act and the act of congress of 1864, which had been repealed in 1870. *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

12. *Mills v. Scott*, 99 U. S. 25, 28, 25 L. Ed. 294. See ante, "Implied Repeal," XI, F.

13. **Where word has been used in prior acts.**—*Reiche v. Smythe*, 13 Wall. 162, 165, 20 L. Ed. 566; *Maddock v. Magone*, 152 U. S. 368, 371, 38 L. Ed. 482; *Marks v. United States*, 161 U. S. 297, 302, 40 L. Ed. 706; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548.

If a word be defined in one act, so as to limit its application, it cannot be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result. And it is fair to presume in case a special meaning were attached to certain words in a prior tariff act, that congress intended they should have the same signification when used in a subsequent act in relation to the same subject matter. *Reiche v. Smythe*, 13 Wall. 162, 164, 20 L. Ed. 566.

"And it may be admitted that when, in a later act, congress uses expressions that had a recognized meaning in a former act relating to the same subject, they intended to use them in the same sense in which they were first used, that is, with their recognized meaning." *Greenleaf v. Goodrich*, 101 U. S. 278, 281, 25 L. Ed. 845.

14. *Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 48 L. Ed. 491.

Where the legislature in the course of the act employed a change of language, this strongly implies a change of intent. *United States v. Fisher*, 2 Cranch 358, 387, 2 L. Ed. 304; *Crawford v. Burke*, 195 U. S. 176, 190, 49 L. Ed. 147.

It is not to be doubted that congress acted deliberately in using a change of phraseology in the removal of cause act of March 3, 1887, as amended August 3, 1888, from that used in the act of March 3, 1875. *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079.

15. *United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479, *Washington, J.*

(3) *In Subsequent Acts*—(a) *In General*.—Where its language is ambiguous,¹⁶ a statute may be construed with reference to subsequent acts relating to the same subject matter.¹⁷ This legislative construction of previous statutes is binding upon the courts in reference to all transactions occurring thereafter,¹⁸ and in many cases furnishes the rule to govern the courts as to previous transactions,¹⁹ provided no constitutional rights are violated.²⁰

(b) *In Amendatory Acts*.—A statute is to be construed with reference to an amendment thereto,²¹ although the amendment does not affect the particular part of the original act being construed.²²

b. *Judicial Construction*.—Where the same or like terms, the meaning of which in a prior statute had been ascertained by judicial interpretation, are used in a subsequent statute they are to be understood in the same sense, unless the intention to use them in a different sense clearly appears.²³ Such a construction

16. "A later statute, not declaratory in its character, cannot be relied upon for the purpose of giving a construction to a former act plain in its terms." *United States v. Gillis*, 95 U. S. 407, 415, 24 L. Ed. 503.

17. *Doddridge v. Thompson*, 9 Wheat. 469, 479, 6 L. Ed. 137; *United States v. Arredondo*, 6 Pet. 691, 713, 8 L. Ed. 547; *Minis v. United States*, 15 Pet. 423, 447, 10 L. Ed. 791; *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724; *Bailey v. Clark*, 21 Wall. 284, 288, 22 L. Ed. 651; *Cope v. Cope*, 137 U. S. 682, 688, 34 L. Ed. 832; *The United States Petitioner*, 194 U. S. 194, 200, 48 L. Ed. 931; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *United States v. Scott*, 3 Wall. 642, 18 L. Ed. 218; *Alexander v. Alexandria*, 5 Cranch 1, 8, 3 L. Ed. 19.

Several acts of congress, dealing with the same subject matter, should be construed not only as expressing the intention of congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones. *Cope v. Cope*, 137 U. S. 682, 688, 34 L. Ed. 832; *United States v. Freeman*, 3 How. 556, 564, 11 L. Ed. 724; *Stockdale v. Insurance Companies*, 20 Wall. 323, 22 L. Ed. 348.

A legislative declaration for the first time in legislature on a subject of an exception is a declaration of the belief of the legislators that no exception had previously existed. *Smythe v. Fiske*, 23 Wall. 374, 382, 22 L. Ed. 47.

The legislative construction placed upon § 828 of Revised Statutes, providing for a per diem compensation for attendance upon court by congress by the civil appropriation act of March 3, 1887, is to be followed. *United States v. Pitman*, 147 U. S. 669, 671, 37 L. Ed. 324.

18. *As to past transactions*.—*Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 22 L. Ed. 348.

A declaratory statute cannot have the legal effect of changing the rule of construction as to a pre-existing law. *Ogden v. Blackledge*, 2 Cranch 272, 2 L. Ed. 276.

The utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of prior statutes

which had been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions. *Koshkonong v. Burton*, 104 U. S. 668, 679, 26 L. Ed. 886.

19. *Stockdale v. Insurance Companies*, 20 Wall. 323, 331, 22 L. Ed. 348.

"Congress might fix a reasonable time, within which titles should be asserted, and might annex conditions to the extension of this time. But to look back to titles already acquired, to declare by a law what was the meaning of the compact under which those titles were acquired, is to construe that compact and to adjudicate in the form of legislation. It would be the exercise of a judicial, not of a legislative power. This construction can never be admitted by the court, unless it be rendered indispensable by the language of the act. We do not think that the language of this act does require it." *Reynolds v. McArthur*, 2 Pet. 417, 435, 7 L. Ed. 470.

20. Congress cannot, under cover of giving a construction to an existing or an expired statute, invade private rights, with which it could not interfere by a new or affirmative statute. *Stockdale v. Insurance Companies*, 20 Wall. 323, 332, 22 L. Ed. 348. See the title CONSTITUTIONAL LAW, vol. 4, p. 225.

21. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553.

22. *Hill v. American Surety Co.*, 200 U. S. 197, 50 L. Ed. 436.

23. *Judicial construction*.—*Cary v. Curtis*, 3 How. 236, 239, 11 L. Ed. 576; *Mason v. Fearson*, 9 How. 248, 258, 13 L. Ed. 125; *Ward v. Chamberlain*, 2 Black 430, 442, 17 L. Ed. 319; *The Abbotsford*, 98 U. S. 440, 444, 25 L. Ed. 168; *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 93, 28 L. Ed. 76; *Marvel v. Merritt*, 116 U. S. 11, 29 L. Ed. 550; *United States v. Mooney*, 116 U. S. 104, 29 L. Ed. 550; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 654, 29 L. Ed. 755; *In re Louisville Underwriters*, 134 U. S. 488, 33 L. Ed. 991; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079; *Logan v. United States*, 144 U. S. 263, 301, 36 L. Ed. 429; *McDonnell v. Jordan*, 178 U. S. 229, 44 L. Ed. 1048; *Lawder v. Stone*, 187 U. S. 281,

becomes a part of the law, as it is presumed that the legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment.²⁴ Where a statute has been repealed in part and then re-enacted, the re-enactment does not restore the constructions placed upon the original act with sufficient force to overcome the clear meaning of a statute derived from its language and reason.²⁵ Where the supreme court has previously expressed a doubt as to the power of congress to legislate in regard to a certain matter, the ambiguous terms of a statute will not be so literally construed as to encounter the limitations previously expressed.²⁶

c. Contemporaneous and Practical Construction—(1) *In General*.—The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect is entitled to great respect in the court.²⁷ Though not

293, 47 L. Ed. 178; *Kepner v. United States*, 195 U. S. 100, 121, 49 L. Ed. 114.

The act of July 1, 1898, conferring jurisdiction upon the supreme court from United States courts over Indian territory must be construed with reference to the fact that congress is presumed to have had in mind decisions of the supreme court under the act of June 10, 1896. *Stephens v. Cherokee Nation*, 174 U. S. 445, 480, 43 L. Ed. 1041.

Bankruptcy act.—*Bardes v. Hawarden Bank*, 178 U. S. 524, 529, 44 L. Ed. 1175.

Removal of causes act.—*McDonnell v. Jordan*, 178 U. S. 229, 44 L. Ed. 1048; *Fisk v. Henarie*, 142 U. S. 459, 35 L. Ed. 1079.

Revenue law.—*Hedden v. Robertson*, 151 U. S. 520, 38 L. Ed. 257, citing *McDonald v. Hovey*, 110 U. S. 619, 620, 28 L. Ed. 269; *Lawder v. Stone*, 187 U. S. 281, 293, 47 L. Ed. 178; *United States v. Klingenberg*, 153 U. S. 93, 38 L. Ed. 647.

Presumed acquiescence of legislature.—Notwithstanding the interpretation placed by the decision in *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, upon § 34 of the judiciary act of 1789, congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. *Baltimore, etc., R. Co. v. Baugh*, 149 U. S. 368, 372, 37 L. Ed. 772.

Adopted statutes.—See post, "Adopted Statutes," XVI, L. 1.

Re-enacted statutes.—See post, "Re-Enacted Statutes," XVI, L. 2.

24. Case of the Sewing Machine Companies, 18 Wall. 553, 584, 21 L. Ed. 914.

25. The Strathairly, 124 U. S. 558, 577, 31 L. Ed. 580.

26. *Lincoln v. United States*, 202 U. S. 484, 498, 50 L. Ed. 1117.

27. **Contemporaneous and practical construction.**—*Stuart v. Laird*, 1 Cranch 299, 2 L. Ed. 115; *McKeen v. Delancy*, 5 Cranch 22, 3 L. Ed. 25; *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97; *Cohens v. Virginia*, 6 Wheat. 264, 418, 5 L. Ed. 257; *United States Bank v. Halstead*, 10 Wheat. 51, 62, 6 L. Ed. 264; *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603; *Taylor v. Thomson*, 5 Pet. 358, 8 L. Ed. 154; *United States v. North Carolina*, 6 Pet. 29, 39, 8 L. Ed. 308;

Grant v. Raymond, 6 Pet. 218, 8 L. Ed. 376; *United States v. Macdaniel*, 7 Pet. 1, 8 L. Ed. 587; *United States v. Dickson*, 15 Pet. 141, 145, 10 L. Ed. 689; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *Surgett v. Lapice*, 8 How. 48, 12 L. Ed. 982; *Bissell v. Penrose*, 8 How. 317, 12 L. Ed. 1095; *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396; *United States v. Alexander*, 12 Wall. 177, 20 L. Ed. 381; *James v. Milwaukee*, 16 Wall. 159, 162, 21 L. Ed. 267; *Peabody v. Stark*, 16 Wall. 240, 21 L. Ed. 311; *Atkins v. The Disintegrating Co.*, 13 Wall. 272, 301, 21 L. Ed. 841; *Smythe v. Fiske*, 23 Wall. 374, 382, 22 L. Ed. 47; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *United States v. Burlington, etc., R. Co.*, 98 U. S. 334, 341, 25 L. Ed. 198; *United States v. Pugh*, 99 U. S. 265, 269, 25 L. Ed. 322; *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. Ed. 1108; *Hahn v. United States*, 107 U. S. 402, 406, 27 L. Ed. 527; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *United States v. Graham*, 110 U. S. 219, 221, 28 L. Ed. 126; *Five Per Cent. Cases*, 110 U. S. 471, 485, 28 L. Ed. 198; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 28 L. Ed. 349; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 418, 28 L. Ed. 794; *Brown v. United States*, 113 U. S. 568, 571, 28 L. Ed. 1079; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. Ed. 1137; *The Laura*, 114 U. S. 411, 29 L. Ed. 147; *Boyd v. United States*, 116 U. S. 616, 622, 29 L. Ed. 746; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 30 L. Ed. 627; *United States v. Johnston*, 124 U. S. 236, 31 L. Ed. 389; *Andrews v. Hovey*, 124 U. S. 694, 717, 31 L. Ed. 557; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 269; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. Ed. 363; *Mcritt v. Cameron*, 137 U. S. 542, 552, 34 L. Ed. 772; *Schell v. Fauche*, 138 U. S. 562, 572, 34 L. Ed. 1040; *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 621, 35 L. Ed. 1134; *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. Ed. 321; *United States v. Alger*, 152 U. S. 384, 397,

absolutely controlling;²⁸ it is not to be disregarded without the most cogent and persuasive reasons;²⁹ for the reasons that it is usually construed by able men, masters of the subject and frequently the draftsmen of the statute,³⁰ that such construction goes a long way to prove that there is some plausible ground or reason for it in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage,³¹ and that such construction has received the implied sanction of the legislature in its not passing an act abrogating it.³²

38 L. Ed. 488; *Sparf v. United States*, 156 U. S. 51, 169, 39 L. Ed. 343; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34, 39 L. Ed. 601; *United States v. Healey*, 160 U. S. 136, 141, 40 L. Ed. 369; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179; *United States v. Freight Ass'n*, 166 U. S. 290, 370, 41 L. Ed. 1007; *Barrett v. United States*, 169 U. S. 218, 42 L. Ed. 723; *Hewitt v. Schultz*, 180 U. S. 139, 157, 45 L. Ed. 463; *Fairbank v. United States*, 181 U. S. 283, 308, 45 L. Ed. 862; *United States v. Finnell*, 185 U. S. 236, 46 L. Ed. 890; *United States v. Sweet*, 189 U. S. 471, 47 L. Ed. 907; *The United States Petitioner*, 194 U. S. 194, 48 L. Ed. 931; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 49 L. Ed. 312; *Martin v. District of Columbia*, 205 U. S. 135, 51 L. Ed. 743; *Cooper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 51 L. Ed. 1143.

The doctrine of contemporaneous and practical construction is a useful one. *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528.

The principle of contemporaneous and practical construction of statutes is firmly imbedded in our jurisprudence. *Pennoyer v. McConaughy*, 140 U. S. 1, 23, 35 L. Ed. 363.

28. Force of rule.—*Houghton v. Payne*, 194 U. S. 88, 99, 48 L. Ed. 888; *Smythe v. Fiske*, 23 Wall. 374, 382, 22 L. Ed. 47; *East Tenn., etc., R. Co. v. Interstate Commerce Comm.*, 181 U. S. 1, 45 L. Ed. 719.

This is a government of laws, and not of men; and the judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it. *United States v. Dickson*, 15 Pet. 141, 162, 10 L. Ed. 689.

"When the language of the statutes under consideration was dubious and open to different interpretations, the established construction of them by the department charged with their execution would have very great force and generally a controlling one in the formation of the judgment of this court." *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528, 536, 34 L. Ed. 767.

The practical construction of an act by the land department cannot control the action or opinion of the supreme court. *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 294.

29. Contemporaneous construction should be followed.—*Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603; *United States v. North Carolina*, 6 Pet. 29, 8 L. Ed. 308; *United States v. Macdaniel*, 7 Pet. 1, 8 L. Ed. 587; *United States v. Dickson*, 15 Pet. 141, 10 L. Ed. 689; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396; *Smythe v. Fiske*, 23 Wall. 374, 382, 22 L. Ed. 47; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Hahn v. United States*, 107 U. S. 402, 27 L. Ed. 527; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. Ed. 389; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. Ed. 363; *Merritt v. Cameron*, 137 U. S. 542, 552, 34 L. Ed. 772; *Schell v. Fauche*, 138 U. S. 562, 34 L. Ed. 1040; *Heath v. Wallace*, 138 U. S. 573, 582, 34 L. Ed. 1063.

Where a statute has been in practical operation for a long time and the public welfare has not been injured by it, the court will not upon considerations of expediency depart from the obvious and necessary intent of a statute. It was so held in construing the interstate commerce act in abolishing a common-law action for excessive freight rates. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 447, 51 L. Ed. 553.

Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it had been the long-established practice before the year 1775 to acknowledge deeds before a justice of the supreme court of the province of Pennsylvania; and although the act of 1715 does not authorize such a practice, yet as it has prevailed, it is to be considered as a correct exposition of the statute. *McKeen v. Delancy*, 5 Cranch 22, 3 L. Ed. 25. See the title *DEEDS*, vol. 5, p. 245.

30. Basis of rule.—*United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Heath v. Wallace*, 138 U. S. 573, 582, 34 L. Ed. 1063; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. Ed. 363.

31. *Boyd v. United States*, 116 U. S. 616, 622, 29 L. Ed. 746.

32. That construction of an act by the treasury department which has been followed for many years, without any attempt of congress to change it, should be followed in the federal supreme court. *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 269.

(2) *When Applicable.*—The construction must have been actual,³³ consistent³⁴ and continuous.³⁵ It will not be followed where clearly erroneous.³⁶ It is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that the doctrine of contemporaneous and practical construction is applicable.³⁷ It can have no influence to change the clear lan-

33. When applicable—Actual construction.—The rule that the settled construction of a statute by an officer or board charged with its enforcement is to be followed in construing a statute, is applicable only to such provisions of the act as have been actually passed upon. The construction of the interstate commerce act by the interstate commerce commission has no binding force unless upon a point directly involved. *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515.

To justify the application of the doctrine of contemporaneous construction to a particular case, such contemporaneous construction must be shown to have been as broad as the exigencies of the case require. *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 690, 40 L. Ed. 849.

34. Consistent construction.—*United States v. Southern Pac. R. Co.*, 184 U. S. 49, 56, 46 L. Ed. 425; *Merritt v. Cameron*, 137 U. S. 542, 552, 34 L. Ed. 772; *Taylor v. Thomson*, 5 Pet. 358, 8 L. Ed. 154.

The administrative construction of the act of 1864 was contradictory, and, therefore, not followed in the construction of the act of June 13, 1898, imposing a tax on legacies and distributive shares. *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

35. Continuous construction.—*Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. Ed. 399; *Bates v. Payne*, 194 U. S. 106, 111, 48 L. Ed. 893; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396.

36. Erroneous construction.—*Surgett v. Lapice*, 8 How. 48, 68, 12 L. Ed. 982; *Swift Co. v. United States*, 105 U. S. 691, 26 L. Ed. 1108; *United States v. Graham*, 110 U. S. 219, 28 L. Ed. 126; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Johnson*, 124 U. S. 236, 253, 31 L. Ed. 389; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. Ed. 321; *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 41 L. Ed. 399; *Providence, etc., Trust Co. v. Mercer County*, 170 U. S. 593, 603, 42 L. Ed. 1156; *Hewitt v. Schultz*, 180 U. S. 139, 156, 45 L. Ed. 463; *United States v. Southern Pac. R. Co.*, 184 U. S. 49, 56, 46 L. Ed. 425; *United States v. Finnell*, 185 U. S. 236, 244, 46 L. Ed. 890; *Houghton v. Payne*, 194 U. S. 88, 100, 48 L. Ed. 888; *Bates v. Payne*, 194 U. S. 106, 111, 48 L. Ed. 893; *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 269, 51 L. Ed. 476.

While the uniform construction of an act by the treasury is certainly entitled to great respect, still, however, if it is not in conformity to the true intent and provisions of the law, it cannot be permitted

to conclude the judgment of a court of justice. *United States v. Dickson*, 15 Pet. 141, 161, 10 L. Ed. 689.

The construction placed upon the Northern Pacific Act of July 2, 1864, by the land department in 1888, is not so plainly and probably wrong as to justify the court in adjudging that the act has been misconstrued. *Hewitt v. Schultz*, 180 U. S. 139, 45 L. Ed. 463.

The construction placed upon a statute of a state by the governor thereof in his message accompanying his veto was not followed in this case, where his construction was assumed rather than demonstrated, and the stress of his argument was upon its impropriety. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

If there simply be doubt as to the soundness of that construction, the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. *United States v. Finnell*, 185 U. S. 236, 244, 46 L. Ed. 890.

37. Where statute ambiguous.—*United States Bank v. Halstead*, 10 Wheat. 51, 62, 6 L. Ed. 264; *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. Ed. 603; *Peabody v. Stark*, 16 Wall. 240, 243, 21 L. Ed. 311; *Blake v. National Banks*, 23 Wall. 307, 321, 23 L. Ed. 119; *Smythe v. Fiske*, 23 Wall. 374, 22 L. Ed. 47; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *United States v. Pugh*, 99 U. S. 265, 25 L. Ed. 322; *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. Ed. 1108; *United States v. Graham*, 110 U. S. 219, 221, 28 L. Ed. 126; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 269; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. Ed. 321; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179; *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. Ed. 399; *Yerke v. United States*, 173 U. S. 439, 442, 43 L. Ed. 760; *Hewitt v. Schultz*, 180 U. S. 139, 156, 45 L. Ed. 463; *Fairbank v. United States*, 181 U. S. 283, 311, 45 L. Ed. 862; *United States v. Southern Pac. R. Co.*, 184 U. S. 49, 56, 46 L. Ed. 425; *United States v. Finnell*, 185 U. S. 236, 46 L. Ed. 890; *Houghton v. Payne*, 194 U. S. 88, 99, 48 L. Ed. 888.

"We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning

guage of the law.³⁸ The rule has especial application where such construction has been acted upon and those relying upon it would be prejudiced by a change³⁹ and rights be divested,⁴⁰ but not where a mere license would be terminated.⁴¹ The application of the rule may be prohibited by legislative enactment.⁴²

(3) *By Whom Construed.*—The rule applies where the construction is placed upon a statute by the president of the United States,⁴³ the heads⁴⁴ and subordi-

is doubtful." *Fairbank v. United States*, 181 U. S. 283, 311, 45 L. Ed. 862.

If the meaning of the longevity pay act of March 3, 1883, c. 97, were doubtful, its practical construction by the navy department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to the federal supreme court to be perfectly clear, no practice inconsistent with that meaning can have any effect. *United States v. Alger*, 152 U. S. 384, 397, 38 L. Ed. 488.

38. Where statute clear.—*United States v. Kirkpatrick*, 9 Wheat. 720, 725, 6 L. Ed. 199; *United States v. Graham*, 110 U. S. 219, 221, 28 L. Ed. 126; *United States v. Healey*, 160 U. S. 136, 141, 40 L. Ed. 369; *United States v. Johnson*, 173 U. S. 363, 378, 43 L. Ed. 731; *McClaughry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049; *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528, 536, 34 L. Ed. 767.

"A custom of a department, however long continued by successive officers, must yield to the positive language of the statute." *Houghton v. Payne*, 194 U. S. 88, 100, 48 L. Ed. 888.

Whether or not § 5234 of the Revised Statutes in regard to the assessment of the stockholders by the controller of the treasury permits only one assessment or successive assessments, is not a sufficiently doubtful question to admit of resort to the doctrine of contemporaneous construction. The statute too clearly empowers the comptroller to make successive assessments. *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528.

39. Where construction been acted upon.—*Tayloe v. Thomson*, 5 Pet. 358, 8 L. Ed. 154; *Pennoyer v. McConaughy*, 140 U. S. 1, 23, 35 L. Ed. 363; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34, 39 L. Ed. 601; *United States v. Healey*, 160 U. S. 136, 141, 40 L. Ed. 369; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179; *Studebaker v. Perry*, 184 U. S. 258, 269, 46 L. Ed. 528; *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 621, 35 L. Ed. 1134.

40. Where rights would be divested.—*United States Bank v. Halstead*, 10 Wheat. 51, 6 L. Ed. 264; *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 35 L. Ed. 1134; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34, 39 L. Ed. 601; *Houghton v. Payne*, 194 U. S. 88, 48 L. Ed. 888; *Tayloe v. Thomson*, 5 Pet. 358, 8 L. Ed. 154.

It is not unimportant to state that the construction which the federal supreme court have given to the terms of the act giving priority of debts to the United

States, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons as of persons insolvent, who have made general assignments, have been settled upon the footing of its correctness. *United States v. North Carolina*, 6 Pet. 29, 39, 8 L. Ed. 308.

The act of July 2, 1864, known as the Northern Pacific act is not free from doubt, and the intention of congress is not so clearly expressed as to exclude the construction placed upon the act by Secretary Vilas of 1888, and upon which the land department has since acted. *Hewitt v. Schultz*, 180 U. S. 139, 156, 45 L. Ed. 463.

41. Houghton v. Payne, 194 U. S. 88, 48 L. Ed. 888, followed in *Smith v. Payne*, 194 U. S. 104, 48 L. Ed. 893; *Bates v. Payne*, 194 U. S. 106, 48 L. Ed. 893.

42. United States v. Finnell, 185 U. S. 236, 244, 46 L. Ed. 890.

The act, approved August 6, 1861, entitled "An act to increase the pay of privates in the regular army and in the volunteers in the service of the United States," provided that it "shall not be so construed, after the passage of this act, as to increase the emoluments of the commissioned officers of the army." This act virtually gave the legislative sanction to the construction which had heretofore prevailed at the departments, in respect to the past acts; but virtually, also, prohibited its future application. *United States v. Gilmore*, 8 Wall. 330, 332, 19 L. Ed. 396.

43. By whom construed.—President.—*United States v. Pugh*, 99 U. S. 265, 269, 25 L. Ed. 322; *Brown v. United States*, 113 U. S. 568, 571, 28 L. Ed. 1079.

44. Heads of departments.—*Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603; *Greely v. Thompson*, 10 How. 225, 13 L. Ed. 397; *Blake v. National Banks*, 23 Wall. 307, 321, 23 L. Ed. 119; *United States v. Graham*, 110 U. S. 219, 221, 28 L. Ed. 126; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 30 L. Ed. 627; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 259; *Heath v. Wallace*, 138 U. S. 573, 582, 34 L. Ed. 1063; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. Ed. 321; *Orchard v. Alexander*, 157 U. S. 372, 383, 39 L. Ed. 737; *United States v. Healey*, 160 U. S. 136, 141, 40 L. Ed. 369; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179; *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. Ed. 399;

nate officers of the different executive departments of the government,⁴⁵ the

Hewitt v. Schultz, 180 U. S. 139, 156, 45 L. Ed. 463; *United States v. Finnell*, 185 U. S. 236, 244, 46 L. Ed. 890; *Bates v. Payne*, 194 U. S. 106, 111, 48 L. Ed. 893.

While no practice of a department can nullify an act of congress, yet such practice, if uniform and long continued, is a matter worthy of consideration in determining its construction. So many rights, it may be presumed, have been created in reliance upon it that the courts will hesitate to decide that the construction thus practically asserted is erroneous, and so overthrow all the titles depending thereon. *Orchard v. Alexander*, 157 U. S. 372, 383, 39 L. Ed. 737; *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 35 L. Ed. 1134.

Treasury department.—The contemporaneous construction of a statute by the treasury department is entitled to great weight. *United States v. Dickson*, 15 Pet. 141, 161, 10 L. Ed. 689; *Smythe v. Fiske*, 23 Wall. 374, 382, 22 L. Ed. 47; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. Ed. 389; *Robertson v. Bradbury*, 132 U. S. 491, 493, 33 L. Ed. 405; *Merritt v. Cameron*, 137 U. S. 542, 552, 34 L. Ed. 772; *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 621, 35 L. Ed. 1134; *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113.

The construction given to revenue laws in their practical administration by the treasury department, though not controlling, is not without weight, and is entitled to respectful consideration. *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603; *United States v. Dickson*, 15 Pet. 141, 10 L. Ed. 689; *Marriott v. Brune*, 9 How. 619, 13 L. Ed. 282; *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396; *Smythe v. Fiske*, 23 Wall. 374, 382, 22 L. Ed. 47; *Five Per Cent. Cases*, 110 U. S. 471, 485, 28 L. Ed. 198; *Brown v. United States*, 113 U. S. 568, 571, 28 L. Ed. 1079; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. Ed. 559; *United States v. Hill*, 120 U. S. 169, 182, 30 L. Ed. 627; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. Ed. 389; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. Ed. 269; *Robertson v. Bradbury*, 132 U. S. 491, 493, 33 L. Ed. 405; *Dwight v. Merritt*, 140 U. S. 213, 218, 35 L. Ed. 450; *Fairbank v. United States*, 181 U. S. 283, 307, 45 L. Ed. 862; *United States v. Falk*, 204 U. S. 143, 51 L. Ed. 411; *Tracy v. Swartwout*, 10 Pet. 80, 95, 9 L. Ed. 354; *Greely v. Thompson*, 10 How. 225, 234, 13 L. Ed. 397; *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 301, 21 L. Ed. 841; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *United States v. Pugh*, 99 U. S. 265, 25 L. Ed. 322; *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. Ed. 1108; *United States v. Graham*, 110 U. S. 219, 28 L. Ed. 126.

War department.—*Wetmore v. United States*, 10 Pet. 647, 9 L. Ed. 567.

Navy department.—*Brown v. United States*, 113 U. S. 568, 571, 28 L. Ed. 1079; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588.

Department of interior.—*Sturr v. Beck*, 133 U. S. 541, 548, 33 L. Ed. 761; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. Ed. 363; *West v. Hitchcock*, 205 U. S. 80, 85, 51 L. Ed. 718; *United States v. Healey*, 160 U. S. 136, 145, 40 L. Ed. 369; *Bates v. Payne*, 194 U. S. 106, 111, 48 L. Ed. 893.

If any doubt existed on the construction of the timber and stone act of June 3, 1878, the construction so long recognized by the interior department in its administration of the public lands should be not overthrown, unless a different one is plainly required—as it is not—by the words of the act. *Hawley v. Diller*, 178 U. S. 476, 488, 44 L. Ed. 1157.

Attorney general.—The contemporaneous construction of a statute by the attorney general is entitled to great respect. *United States v. Falk*, 204 U. S. 143, 51 L. Ed. 411; *Surgett v. Lapice*, 8 How. 48, 68, 12 L. Ed. 982.

Postmaster general.—In *United States v. Alabama, etc., R. Co.*, 142 U. S. 615, 35 L. Ed. 1134, it was held that the uniform construction of six different postmaster generals of the act of July 12, 1876, providing for compensation of railroads for transportation of mails, should be followed.

45. Interstate commerce commission.—This rule applies to the construction of the interstate commerce act by the interstate commerce commission. *New York, etc., R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. Ed. 515.

Officers of land department.—The uniform ruling and practice of the land department in a case of doubt, is of great weight in determining the true construction of an act. *Wilcox v. Jackson*, 13 Pet. 498, 10 L. Ed. 264; *Surgett v. Lapice*, 8 How. 48, 68, 12 L. Ed. 982; *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994; *United States v. Moore*, 95 U. S. 760, 763, 24 L. Ed. 588; *Hastings, etc., R. Co. v. Whitney*, 132 U. S. 357, 366, 33 L. Ed. 363; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. Ed. 179; *Knowlton v. Moore*, 178 U. S. 41, 56, 92, 44 L. Ed. 969; *Tarpey v. Madsen*, 178 U. S. 215, 44 L. Ed. 1042; *Fairbank v. United States*, 181 U. S. 283, 306, 45 L. Ed. 862; *United States v. Southern Pac. R. Co.*, 184 U. S. 49, 56, 46 L. Ed. 425; *Scott v. Carew*, 196 U. S. 100, 109, 49 L. Ed. 403; *McMichael v. Murphy*, 197 U. S. 304, 49 L. Ed. 766; *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 51 L. Ed. 476; *United States v. Union Pac. R. Co.*, 148 U. S. 562, 572, 37 L. Ed. 560; *United States v. Healey*, 160 U. S. 136, 145, 40 L. Ed. 369.

The adjudications of the land depart-

inferior federal courts,⁴⁶ congress,⁴⁷ and by state⁴⁸ and territorial officers.⁴⁹

d. *Legislative History*.—The history of a statute from the time it was introduced until it was finally passed, may afford some aid to its construction.⁵⁰ The reports of committees,⁵¹ the introduction of amendments⁵² and the opposition made to the passage of a statute⁵³ are legitimate aids to its construction; but the motives of individual members in voting for or against its passage⁵⁴ and their views expressed in debate⁵⁵ are not.

ment, covering a consecutive period of nearly nine years, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase "land subject to periodical overflow," in the act of Sept. 28, 1850, by the officers of the department whose duty it is, and has been, to administer the swamp land grant. *Heath v. Wallace*, 138 U. S. 573, 582, 34 L. Ed. 1063. See, also, the title PUBLIC LANDS, vol. 10, p. 244.

Pension bureau.—*United States v. Alexander*, 12 Wall. 177, 181, 20 L. Ed. 381.

Accounting officers of treasury.—*United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396; *United States v. Hill*, 120 U. S. 169, 182, 30 L. Ed. 627.

Internal revenue commissioner.—*Peabody v. Stark*, 16 Wall. 240, 243, 21 L. Ed. 311; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 228, 22 L. Ed. 80.

46. Inferior courts.—The supreme court is influenced in the construction of statutes by their construction by the lower federal courts. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 442, 51 L. Ed. 553.

"If there is a divergence of views between the courts and the patent office and the divergence proceeds from a different interpretation of the statute, the views of the courts ought to prevail." *Steinmetz v. Allen*, 192 U. S. 543, 560, 48 L. Ed. 555.

Circuit courts.—In *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. Ed. 601, the construction of a statute by a circuit court of the United States was followed.

Court of claims.—The construction by the court of claims was followed in *United States v. Pugh*, 99 U. S. 265, 269, 25 L. Ed. 322.

47. Congress.—If there were doubt in reference to the true construction of a statute, the practical construction placed on it by congress is sufficient to remove the doubt. *Fairbank v. United States*, 181 U. S. 283, 308, 45 L. Ed. 862.

48. State officers.—*Union Ins. Co. v. Hoge*, 21 How. 35, 66, 16 L. Ed. 61; *Citizens' Bank v. Parker*, 192 U. S. 73, 81, 48 L. Ed. 346.

In *United States v. Michigan*, 190 U. S. 379, 401, 47 L. Ed. 1103, the supreme court followed the contemporaneous construction of an act of congress by the legislature of Michigan.

49. Territorial officers.—*Copper Queen*

Mining Co. v. Arizona Board, 206 U. S. 474, 51 L. Ed. 1143.

50. Andrews v. Hovey, 124 U. S. 694, 716, 31 L. Ed. 557; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 473, 35 L. Ed. 821; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318, 41 L. Ed. 1007; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

The courts are entitled to avail themselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford. *United States v. Burr*, 159 U. S. 78, 85, 40 L. Ed. 82.

51. Reports of committees.—*Holy Trinity Church v. United States*, 143 U. S. 457, 464, 36 L. Ed. 226; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 42, 39 L. Ed. 601; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 246, 46 L. Ed. 1144; *Binns v. United States*, 194 U. S. 486, 495, 48 L. Ed. 1087.

In construing the contract labor law of February 26, 1885, the court considered the report of the senate committee on education and labor recommending the passage of the bill. *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226. See the title CONTRACT LABOR LAW, vol. 4, p. 549.

52. Introduction of amendments.—A badly expressed and apparently contradictory enactment may be interpreted by a reference to the journals of congress, where it appeared that the peculiar phraseology was the result of an amendment introduced without due reference to language in the original bill. *Blake v. National Banks*, 23 Wall. 307, 23 L. Ed. 119. See, also, *Dunlap v. United States*, 173 U. S. 65, 75, 43 L. Ed. 616.

53. Opposition to passage.—Where an act of congress is passed over extreme opposition, it is to be considered that the words of the act represent all that the majority deemed it safe to ask. Every consideration requires that the ambiguous language of the act should not be stretched beyond the exact and literal meaning of the words. *Lincoln v. United States*, 202 U. S. 484, 498, 50 L. Ed. 1117.

54. Motives of individual members.—*United States v. Union Pac. R. Co.*, 91 U. S. 72, 79, 23 L. Ed. 224.

55. Debates.—*Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469; *The Collector v. Richards*, 23 Wall. 246, 258, 22 L. Ed. 95; *Blake v. National Banks*, 23 Wall. 307, 317, 23 L. Ed. 119; *United States v.*

e. *Existing Law and History*.—A statute is to be construed in the light of the existing law,⁵⁶ the history of the times,⁵⁷ and the circumstances existing at the

Union Pac. R. Co., 91 U. S. 72, 79, 23 L. Ed. 224; *Jennison v. Kirk*, 98 U. S. 453, 459, 25 L. Ed. 240; *District of Columbia v. Washington Market Co.*, 108 U. S. 243, 254, 27 L. Ed. 714; *Gilmer v. Stone*, 120 U. S. 586, 590, 30 L. Ed. 734; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 473, 35 L. Ed. 821; *Holy Trinity Church v. United States*, 143 U. S. 457, 464, 36 L. Ed. 226; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318, 41 L. Ed. 1007; *Dunlap v. United States*, 173 U. S. 65, 75, 43 L. Ed. 616; *Maxwell v. Dow*, 176 U. S. 581, 601, 44 L. Ed. 597; *Knowlton v. Moore*, 178 U. S. 41, 72, 44 L. Ed. 969; *Binns v. United States*, 194 U. S. 486, 495, 48 L. Ed. 1087; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other." *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318, 41 L. Ed. 1007.

The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as dictating the construction to be put upon the constitution by the courts. *Downes v. Bidwell*, 182 U. S. 244, 254, 45 L. Ed. 1088.

In expounding the customs laws "the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. *Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469. See, also, *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79, 23 L. Ed. 224; *Downes v. Bidwell*, 182 U. S. 244, 254, 45 L. Ed. 1088.

Statements and opinions of promoter of revenue law.—While the statements made and the opinions advanced by the promoters of a tariff act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the interests complaining of the pre-existing schedules and the reasons for fixing the duty at that amount. *The Collector v. Richards*, 23 Wall. 246, 258, 23 L. Ed. 95; *Blake v. National Banks*, 23

Wall. 307, 317, 23 L. Ed. 119; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79, 23 L. Ed. 224; *Jennison v. Kirk*, 98 U. S. 453, 459, 25 L. Ed. 240; *Gilmer v. Stone*, 120 U. S. 586, 590, 30 L. Ed. 734; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 473, 35 L. Ed. 821; *Dunlap v. United States*, 173 U. S. 65, 43 L. Ed. 616, citing *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

56. Existing law.—*Smythe v. Fiske*, 23 Wall. 374, 380, 22 L. Ed. 47; *The Strathairn*, 124 U. S. 558, 577, 31 L. Ed. 580; *Smith v. Townsend*, 148 U. S. 490, 494, 37 L. Ed. 533; *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. Ed. 890; *McLaughry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049; *White v. United States*, 191 U. S. 545, 552, 48 L. Ed. 295. See the title **MILITARY LAW**, vol. 8, p. 346.

"We are to presume that congress knew that, as the law stood on the 20th of June, 1874, the property in the district was liable to taxation, with certain exceptions, and that it knew of what such exceptions consisted." *Welch v. Cook*, 97 U. S. 541, 543, 24 L. Ed. 1112.

The act of congress providing a bill of rights for the Philippine Islands is to be construed with reference to the United States constitution, from which it was substantially adopted and not with reference to the existing Spanish law. *Kepler v. United States*, 195 U. S. 100, 124, 49 L. Ed. 114.

57. History of times.—*Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554; *Preston v. Browder*, 1 Wheat. 115, 120, 121, 4 L. Ed. 50; *Aldridge v. Williams*, 3 How. 9, 24, 11 L. Ed. 469; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 147, 17 L. Ed. 571; *Ex parte Milligan*, 4 Wall. 2, 114, 15 L. Ed. 281; *Legal Tender Cases*, 12 Wall. 457, 540, 20 L. Ed. 287; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 79, 80, 81, 23 L. Ed. 224; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 64, 25 L. Ed. 424; *Newman v. Arthur*, 109 U. S. 132, 27 L. Ed. 883; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 625, 28 L. Ed. 1109; *Siemens v. Sellers*, 123 U. S. 276, 285, 31 L. Ed. 153; *Crenshaw v. United States*, 134 U. S. 99, 108, 33 L. Ed. 825; *District of Columbia v. Hutton*, 143 U. S. 18, 26, 36 L. Ed. 60; *United States v. Ballin*, 144 U. S. 1, 10, 36 L. Ed. 321; *Smith v. Townsend*, 148 U. S. 490, 494, 496, 37 L. Ed. 533; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 502, 38 L. Ed. 793; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 55, 40 L. Ed. 71; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247; *United States v. American Bell Tel. Co.*, 159 U. S. 548, 40 L. Ed. 255; *Marks v. United States*, 161 U. S.

time of its enactment,⁵⁸ and not in the light of matters which may subsequently

297, 302, 40 L. Ed. 706; *United States v. Laws*, 163 U. S. 258, 41 L. Ed. 151; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318, 319, 41 L. Ed. 1007; *Payne v. Robertson*, 169 U. S. 323, 329, 42 L. Ed. 764; *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. Ed. 890; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *McClaghry v. Deming*, 186 U. S. 49, 46 L. Ed. 1049; *Johanson v. Washington*, 190 U. S. 179, 184, 47 L. Ed. 1008; *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. Ed. 346; *United States v. United Verde Copper Co.*, 196 U. S. 207, 49 L. Ed. 449.

At the time of the passage of the act of July 23, 1866, providing for the quieting of titles to lands in California derived from the Mexican and Spanish government, many persons were residing on those lands without formal grants, but without possession from wrongful claimants, therefore the act should be construed as to quiet the title of such persons. *Beley v. Naphtaly*, 169 U. S. 353, 42 L. Ed. 775.

The word "bridge" as used in an act of New Jersey of 1790 does not include a railroad bridge. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 147, 17 L. Ed. 571.

The exigencies which led to the passage of the act of February 13, 1893, c. 105, entitled "An act relating to navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property," embodied in a report of the committee on interstate and foreign commerce of the house of representatives, are a part of the history of the times, is a proper subject of consideration. *The Delaware*, 161 U. S. 459, 472, 40 L. Ed. 771; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 474, 35 L. Ed. 821.

Act to aid construction of Union Pacific Railroad.—*United States v. Union Pac. R. Co.*, 91 U. S. 72, 81, 23 L. Ed. 224.

Cutting timber.—*United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *United States v. Denver, etc., R. Co.*, 150 U. S. 1, 37 L. Ed. 975; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 28 L. Ed. 1109.

Act in regard to courts-martial.—*United States v. Smith*, 197 U. S. 386, 49 L. Ed. 801.

Act extending bill of rights to Philippine Islands.—The guarantees which congress has extended to the Philippine Islands by virtue of the bill of rights enacted by congress for the Philippine Islands, are to be interpreted as meaning what the like provisions meant at the time when congress made them applicable to the Philippine Islands. *Kepner v. United States*, 195 U. S. 100, 49 L. Ed.

114; *Serra v. Mortiga*, 204 U. S. 470, 474, 51 L. Ed. 571.

Act annexing Hawaiian Islands.—*Hawaii v. Mankichi*, 190 U. S. 197, 47 L. Ed. 1016.

Circuit court of appeals act.—*The Paquete Habana*, 175 U. S. 677, 684, 44 L. Ed. 320.

Contract labor law.—*Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226.

Habeas corpus act.—*Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554.

58. Circumstances at time of enactment.—*Pollard v. Kibbe*, 14 Pet. 353, 10 L. Ed. 490; *Lawrence v. Allen*, 7 How. 785, 793, 12 L. Ed. 913; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 54, 64, 25 L. Ed. 424; *In re Ross*, 140 U. S. 453, 475, 35 L. Ed. 581; *Holy Trinity Church v. United States*, 143 U. S. 457, 463, 36 L. Ed. 226; *Quackenbush v. United States*, 177 U. S. 20, 27, 44 L. Ed. 654; *Treat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 246, 46 L. Ed. 1144; *Binns v. United States*, 194 U. S. 486, 495, 48 L. Ed. 1087; *United States v. Thomas*, 195 U. S. 418, 420, 49 L. Ed. 259; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363; *United States v. Smith*, 197 U. S. 386, 393, 49 L. Ed. 801; *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801; *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 577, 50 L. Ed. 1149; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89, 51 L. Ed. 96.

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience." But in endeavoring to ascertain the meaning of the legislature the court should place itself in the light that the legislature enjoyed, look at things as they then appeared and discover its purpose from the language used in connection with the attending circumstances. *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 63, 25 L. Ed. 424.

A statute should be construed in the light of all the circumstances that may fairly be regarded as having been within the knowledge of the legislative branch of the government at the time it acted on the subject. *Dewey v. United States*, 178 U. S. 510, 520, 44 L. Ed. 1170.

Where the meaning of a statute is doubtful and susceptible on its face to two constructions, the court may construe in the light of the extraneous circumstances surrounding its enactment. *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219.

"Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were

arise.⁵⁹

f. Reason, Purpose and Object.—In the construction of a statute, the reason,⁶⁰ purpose,⁶¹ and object of its enactment may be resorted to.⁶²

made, rather than at a later period when different ideas and theories may prevail." *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 502, 38 L. Ed. 793.

Proof of circumstances.—These facts may be evidenced by public documents to which the court is at liberty to refer. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

59. Matter subsequently arising.—*Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

Where congress acted with reference to a state of things believed at the time to exist, in interpreting its legislation, no aid can be derived from subsequent events. *United States v. Union Pac. R. Co.*, 91 U. S. 72, 81, 23 L. Ed. 224.

The legislative intent is to be deduced from a consideration of all the connected circumstances, attendant or subsequent as well as preceding. *Lawrence v. Allen*, 7 How. 785, 793, 12 L. Ed. 913; *Bend v. Hoyt*, 13 Pet. 263, 273, 10 L. Ed. 154.

60. Reason for enactment.—*Ex parte Milligan*, 4 Wall. 2, 114, 18 L. Ed. 281; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 82, 23 L. Ed. 224; *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 663, 23 L. Ed. 336; *Viterbo v. Friedlander*, 120 U. S. 707, 724, 30 L. Ed. 776.

A statute may be construed with reference to the state of affairs which induced its enactment. *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219.

"There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment." *Heydenfeldt v. Daney Gold, etc., Min. Co.*, 93 U. S. 634, 638, 23 L. Ed. 995.

61. Purpose of enactment.—*Pierce v. Turner*, 5 Cranch 154, 3 L. Ed. 64; *The Paulina's Cargo*, 7 Cranch 52, 3 L. Ed. 266; *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199; *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37; *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23; *United States v. Morris*, 14 Pet. 464, 475, 10 L. Ed. 543; *Minis v. United States*, 15 Pet. 423, 448, 10 L. Ed. 791; *Wilson v. Rousseau*, 4 How. 646, 677, 11 L. Ed. 1141; *Surgett v. Lapice*, 8 How. 48, 68, 12 L. Ed. 982; *Gayler v. Wilder*, 10 How. 477, 496, 13 L. Ed. 504; *Brown v. Duchesne*, 19 How. 183, 194, 15 L. Ed. 595; *Davidson v. Lanier*, 4 Wall. 447, 454, 18 L. Ed. 377; *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830; *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *United States v. Saunders*, 22 Wall. 492, 22 L. Ed. 736; *Smythe v. Fiske*, 23 Wall. 374, 380, 22 L. Ed. 47; *United States v.*

Reese, 92 U. S. 214, 23 L. Ed. 563; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 54, 25 L. Ed. 424; *Chew Heong v. United States*, 112 U. S. 536, 559, 28 L. Ed. 770; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *United States v. Saunders*, 120 U. S. 126, 30 L. Ed. 594; *United States v. Chase*, 135 U. S. 255, 261, 34 L. Ed. 117; *In re Hohorst*, 150 U. S. 653, 660, 37 L. Ed. 1211; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. Ed. 601; *Brown v. Walker*, 161 U. S. 591, 596, 40 L. Ed. 819; *United States v. Laws*, 163 U. S. 258, 41 L. Ed. 151; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *Beley v. Naphtaly*, 169 U. S. 353, 360, 42 L. Ed. 775; *Vance v. Vandercook Co.*, 170 U. S. 438, 42 L. Ed. 1100; *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219; *Fairbank v. United States*, 181 U. S. 283, 289, 45 L. Ed. 862; *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *James v. Appel*, 192 U. S. 129, 48 L. Ed. 377; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *United States v. Crosley*, 196 U. S. 327, 49 L. Ed. 497; *United States v. Whitridge*, 197 U. S. 135, 49 L. Ed. 696; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. Ed. 790; *United States v. Smith*, 197 U. S. 386, 393, 49 L. Ed. 801; *United States v. Cadarr*, 197 U. S. 475, 49 L. Ed. 842; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 49 L. Ed. 925; *Holden v. Stratton*, 198 U. S. 202, 213, 49 L. Ed. 1018; *Hill v. American Surety Co.*, 200 U. S. 197, 50 L. Ed. 436.

62. Object of enactment.—*Huidekoper v. Douglass*, 3 Cranch 1, 70, 2 L. Ed. 347; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. Ed. 450; *United States v. Boisdore*, 8 How. 113, 12 L. Ed. 1009; *Platt v. Union Pac. R. Co.*, 99 U. S. 48, 59, 25 L. Ed. 424; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89, 51 L. Ed. 96.

Where a release from imprisonment is the only object of a statute, if properly construed it does not release the judgment authorizing the imprisonment. *Hunter v. United States*, 5 Pet. 173, 185, 8 L. Ed. 86.

It was the object of congress in enacting the safety appliance act of March 2, 1893, providing for the use of automatic couplers by railroads, to promote the safety of railroad employees, and the act should be construed to give effect to that object, by requiring all couplers to be of the same kind. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 14, 49 L. Ed. 363.

Mischief sought to be remedied.—A statute should be construed in the light of the defect or mischief which it has in-

g. *Governmental Policy*.—Although the rule is refuted in a few decisions,⁶³ it seems that a statute is to be construed to conform to the well settled governmental policy in reference to a particular subject of legislation,⁶⁴ unless it

tended to remedy. *Wilson v. Mason*, 1 Cranch 45, 101, 2 L. Ed. 29; *United States v. Sheldon*, 2 Wheat. 119, 4 L. Ed. 199; *United States v. Wiltberger*, 5 Wheat. 76, 95, 96, 5 L. Ed. 37; *Scott v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519; *United States v. Coombs*, 12 Pet. 72, 80, 9 L. Ed. 1004; *Rhode Island v. Massachusetts*, 12 Pet. 657, 723, 9 L. Ed. 1233; *United States v. Morris*, 14 Pet. 464, 475, 10 L. Ed. 543; *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *United States v. Reese*, 92 U. S. 214, 23 L. Ed. 563; *United States v. Chase*, 135 U. S. 255, 261, 34 L. Ed. 117; *Smith v. Townsend*, 148 U. S. 490, 494, 37 L. Ed. 533; *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219.

To determine this evil the court looks at contemporaneous events, the situation as it existed and as it is pressed upon the attention of the legislature. *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226; *United States v. Union Pac. R. Co.*, 91 U. S. 72, 23 L. Ed. 224; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, 499, 46 L. Ed. 289.

"But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress." *United States v. Chase*, 135 U. S. 255, 261, 34 L. Ed. 117.

A statute will not be given a strained and artificial construction, based upon a consideration of the mischief sought to be remedied. The act of congress of March 3, 1873, for the prevention of cruelty to animals while in transit by railroads or other means of transportation, in imposing a punishment for its violation upon "any company," was held not to use the word "company" to include a receiver of a railroad. *United States v. Harris*, 177 U. S. 305, 44 L. Ed. 780.

63. *Governmental policy*.—What is termed the policy of the government with reference to any particular legislation is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes. *Hadden v. The Collector*, 5 Wall. 107, 18 L. Ed. 518; *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *Dewey v. United States*, 178 U. S. 510, 521, 44 L. Ed. 1170.

64. *Jones v. Shore*, 1 Wheat. 462, 471, 4 L. Ed. 136; *The Palmyra*, 12 Wheat. 1, 15, 6 L. Ed. 531; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Gardner v. Collins*, 2 Pet. 58, 90, 7 L. Ed. 347; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. Ed. 450; *Minis v. United States*, 15 Pet. 423, 447, 10 L. Ed. 791; *Aldridge v.*

Williams, 3 How. 9, 24, 11 L. Ed. 469; *Lawrence v. Allen*, 7 How. 785, 792, 12 L. Ed. 913; *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *Ham v. Missouri*, 18 How. 126, 132, 15 L. Ed. 334; *United States v. Babbit*, 1 Black 55, 60, 17 L. Ed. 94; *Hadden v. The Collector*, 5 Wall. 107, 111, 18 L. Ed. 518; *Stewart v. Kahn*, 11 Wall. 493, 506, 20 L. Ed. 176; *The Collector v. Hubbard*, 12 Wall. 1, 17, 20 L. Ed. 272; *Blake v. National Banks*, 23 Wall. 307, 320, 23 L. Ed. 119; *Fabbri v. Murphy*, 95 U. S. 191, 196, 24 L. Ed. 468; *Venable v. Richards*, 105 U. S. 636, 638, 26 L. Ed. 1196; *Fink v. O'Neal*, 106 U. S. 272, 27 L. Ed. 196; *United States v. Fisher*, 109 U. S. 143, 27 L. Ed. 885; *Kansas Pac. R. Co. v. Atchison, etc., R. Co.*, 112 U. S. 414, 28 L. Ed. 794; *Fussell v. Cregg*, 113 U. S. 550, 563, 28 L. Ed. 993; *Viterbo v. Friedlander*, 120 U. S. 707, 724, 30 L. Ed. 776; *Kelley v. Milan*, 127 U. S. 139, 150, 32 L. Ed. 77; *United States v. Chase*, 135 U. S. 255, 262, 34 L. Ed. 117; *Auffmordt v. Hedden*, 137 U. S. 310, 329, 34 L. Ed. 674; *United States v. Perry*, 146 U. S. 71, 75, 36 L. Ed. 890; *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556; *Hudson v. Parker*, 156 U. S. 277, 292, 39 L. Ed. 424; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37, 39 L. Ed. 601; *United States v. Burr*, 159 U. S. 78, 82, 40 L. Ed. 82; *Marks v. United States*, 161 U. S. 297, 302, 40 L. Ed. 706; *Texas, etc., R. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, 218, 40 L. Ed. 940; *Keck v. United States*, 172 U. S. 434, 43 L. Ed. 505; *Dunbar v. Dunbar*, 190 U. S. 340, 47 L. Ed. 1084; *Benziger v. United States*, 192 U. S. 38, 48 L. Ed. 331; *Wetmore v. Markoe*, 196 U. S. 68, 49 L. Ed. 390; *Scottish, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 49 L. Ed. 614; *United States v. Whitridge*, 197 U. S. 135, 142, 49 L. Ed. 696; *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018; *Union Pac. R. Co. v. Mason City, etc., Co.*, 199 U. S. 160, 50 L. Ed. 134; *Blair v. Chicago*, 201 U. S. 400, 469, 50 L. Ed. 801.

"The symmetry of a system, apparently built up with great care and caution, as well as in strict accordance with the received principles of public law, is maintained and enforced." *The Star*, 3 Wheat. 78, 92, 4 L. Ed. 338.

Acts giving jurisdiction to federal courts.—"The policy of congress for a long time has been to give only a limited jurisdiction to the United States courts." *In re Wilson*, 140 U. S. 575, 578, 35 L. Ed. 513. See, also, *Petri v. Creelman Lumber Co.*, 199 U. S. 487, 50 L. Ed. 281. And see the title COURTS, vol. 4, p. 895.

Acts in regard to Indians.—*Ex parte Crow Dog*, 109 U. S. 556, 571, 27 L. Ed.

clearly and explicitly demonstrates an intention to depart therefrom.⁶⁵

h. *Subject Matter*.—A statute is to be construed with reference to the subject matter to which it relates.⁶⁶ The manner in which its subject matter comes into existence is immaterial.⁶⁷

i. *Common Law*.—See elsewhere.⁶⁸

j. *Foreign Laws*.—Aid to the construction of a statute may be afforded by comparing it to similar statutes of other countries⁶⁹ or states of the Union,⁷⁰ and by observing the judicial construction of such statutes.⁷¹ A statute without

1030; *United States v. Forty-Three Gallons of Whiskey*, 108 U. S. 491, 496, 27 L. Ed. 803.

Land grants.—*United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 28 L. Ed. 1109; *Tarpey v. Madson*, 178 U. S. 215, 220, 44 L. Ed. 1042; *Ard v. Brandon*, 156 U. S. 537, 543, 39 L. Ed. 524; *Northern Pac. R. Co. v. Amacker*, 175 U. S. 564, 567, 44 L. Ed. 274; *United States v. Healey*, 160 U. S. 136, 139, 40 L. Ed. 369; *Gertgens v. O'Connor*, 191 U. S. 237, 48 L. Ed. 163. See, generally, the title PUBLIC LANDS, vol. 10, p. 1.

Land grants—To railroads.—"The general policy established by congress has been in respect to the restriction of land grants made in aid of railroads to be constructed wholly within a state or territory." *St. Paul, etc., R. Co. v. Phelps*, 137 U. S. 528, 536, 34 L. Ed. 767. See, also, *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 38 L. Ed. 992. And see the title PUBLIC LANDS, vol. 10, p. 1.

Land grants—Of school lands.—*Johanson v. Washington*, 190 U. S. 179, 47 L. Ed. 1008. See the title PUBLIC LANDS, vol. 10, p. 1.

Authorizing building of bridges over navigable waters.—*Union Pac. R. Co. v. Mason City, etc., R. Co.*, 199 U. S. 160, 50 L. Ed. 134. See the title BRIDGES, vol. 3, p. 522.

Ship registry act.—*The Margaret*, 9 Wheat. 421, 424, 6 L. Ed. 125. See, generally, the title SHIPS AND SHIP-PING, vol. 10, p. 1148.

Abandoned and captured property act.—*United States v. Pugh*, 99 U. S. 265, 269, 25 L. Ed. 322. See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 2.

Acts in regard to intoxicating liquors.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 378.

65. Where policy departed from.—*United States v. Fisher*, 2 Cranch 358, 390, 2 L. Ed. 304; *United States v. Reese*, 92 U. S. 214, 219, 23 L. Ed. 563; *United States v. Cadarr*, 197 U. S. 475, 49 L. Ed. 842; *Blair v. Chicago*, 201 U. S. 400, 463, 50 L. Ed. 801.

Where a government has adopted a certain policy, it is presumed that subsequent legislation of the same subject pursues the same policy, unless the con-

trary be clearly expressed. By the act of May 10, 1800, in reducing the commission of the collector of the port of Petersburg, congress is presumed to have followed its previous policy in regard to compensation of government officers, and not to have intended to give the act a retrospective effect. *United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479, Johnson, J.

It has always been the policy of congress both in general legislation and bankruptcy acts to recognize and give effect to state exemption laws. This is to be kept in mind in construing § 70a of the bankruptcy act of 1898. An intention of congress to violate and abolish such rule must be made to appear by clear and unmistakable language. It will not be presumed from a doubtful and ambiguous provision which may be otherwise construed. *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018.

66. Subject matter.—*Huidekoper v. Douglass*, 3 Cranch 1, 66, 2 L. Ed. 347; *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408; *Reiche v. Smythe*, 13 Wall. 162, 164, 20 L. Ed. 566; *County of Callaway v. Foster*, 93 U. S. 567, 23 L. Ed. 911; *Pompton v. Cooper Union*, 101 U. S. 196, 202, 25 L. Ed. 803; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 650, 35 L. Ed. 1144; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007; *New York Indians v. United States*, 170 U. S. 1, 19, 42 L. Ed. 927; *Blair v. Chicago*, 201 U. S. 400, 453, 50 L. Ed. 801; *Cherokee Intermarriage Cases*, 203 U. S. 76, 89, 51 L. Ed. 96.

67. McCray v. United States, 195 U. S. 27, 49 L. Ed. 78.

68. Common law.—See the title COMMON LAW, vol. 3, p. 975.

69. Eidman v. Martinez, 184 U. S. 578, 583, 46 L. Ed. 697; *Yerke v. United States*, 173 U. S. 439, 442, 43 L. Ed. 760.

70. Eidman v. Martinez, 184 U. S. 578, 583, 46 L. Ed. 697.

A definition of a word as found in the statutes of the states may be considered in construing a statute of the United States. *Hackfeld & Co. v. United States*, 197 U. S. 442, 49 L. Ed. 826.

71. A statute may be construed in accordance with a construction placed upon a similar statute in another state. *Texas, etc., R. Co. v. Humble*, 181 U. S. 57, 45 L. Ed. 747.

limitations will not be so construed as to limit its operation, because there are limitations similar to the one sought to be established in the legislation of other states.⁷²

k. *Usage and Custom*.—A custom or usage cannot alter a statute, but may be looked to in its construction.⁷³ The usage must be definite, uniform and general at the date of the passage of the statute.⁷⁴

l. *Messages of President*.—In the construction of the acts of congress, the messages of the president may afford aid.⁷⁵

m. *Dictionary Definitions*.—To determine the meaning of a word used in a statute, the courts may refer to a dictionary of the language in which written.⁷⁶

K. Consequences to Be Avoided—1. **IN GENERAL**.—It is for the legislature to act in regard to the consequences of a statute and not the court to construe it otherwise than by its clearly expressed intent.⁷⁷ The question of the propriety, form and extent of legislation is one for the legislature and not for the courts.⁷⁸ In construing the bankruptcy act of 1898 the court paid slight attention to the consequences of its operation as urged by the counsel.⁷⁹ But it is a principle not to be controverted that the consequences are to be considered in expounding laws, where the intent is doubtful.⁸⁰ It is also true, that this rule of construction must be applied with caution.⁸¹ The influence of the rule is dependent on the nature of the case to which it is applied.⁸² The rule may be

72. *Holden v. Stratton*, 198 U. S. 202, 210, 49 L. Ed. 1018.

On the contrary, the departure from the legislation of other states conclusively shows the intention of the legislature to adopt a more comprehensive statute. *Holden v. Stratton*, 198 U. S. 202, 210, 49 L. Ed. 1018.

73. *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. Ed. 542; *United States v. Macdaniel*, 7 Pet. 1, 15, 8 L. Ed. 587; *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113; *Mitchell v. United States*, 9 Pet. 711, 9 L. Ed. 283; *Perrine v. Chesapeake, etc., Canal Co.*, 9 How. 172, 187, 13 L. Ed. 92; *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240; *Maddock v. Magone*, 152 U. S. 368, 38 L. Ed. 482; *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556; *Slidell v. Grandjean*, 111 U. S. 412, 421, 28 L. Ed. 321.

At the time an act of congress against false swearing was passed congress had knowledge of the usage of the treasury department to require evidence by affidavits in support of claims, whether the same had been expressly required by statute or not, and that a general regulation had been adopted for this purpose. It was held that in a criminal prosecution for a violation of such an act congress must be presumed to have legislated under this known state of the laws and usage and intended to sanction such usage. *United States v. Bailey*, 9 Pet. 238, 254, 9 L. Ed. 113.

In land grant cases.—See the title PUBLIC LANDS, vol. 10, p. 1.

74. *Berbecker v. Robertson*, 152 U. S. 373, 376, 38 L. Ed. 484.

75. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363; *Kepner v. United States*, 195 U. S. 100, 124, 49 L. Ed. 114.

76. *Arthur v. Moller*, 97 U. S. 365, 24 L. Ed. 1046; *Missionary Society v. Dallas*,

107 U. S. 336, 343, 27 L. Ed. 545; *Marvel v. Merritt*, 116 U. S. 11, 29 L. Ed. 550; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 654, 29 L. Ed. 755; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 35 L. Ed. 821; *Magone v. Heller*, 150 U. S. 70, 37 L. Ed. 1001; *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556; *Bogle v. Magone*, 152 U. S. 623, 38 L. Ed. 574; *Lowndes v. Huntington*, 153 U. S. 1, 22, 33 L. Ed. 615; *Marks v. United States*, 161 U. S. 297, 301, 40 L. Ed. 706; *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *Houghton v. Payne*, 194 U. S. 88, 96, 48 L. Ed. 888; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 16, 49 L. Ed. 363; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 362, 49 L. Ed. 790; *Hackfeld & Co. v. United States*, 197 U. S. 442, 49 L. Ed. 826; *Blair v. Chicago*, 201 U. S. 400, 455, 50 L. Ed. 801; *Gatewood v. North Carolina*, 203 U. S. 531, 536, 51 L. Ed. 305.

77. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Welch v. Cook*, 97 U. S. 541, 543, 24 L. Ed. 1112.

78. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

79. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 451, 45 L. Ed. 1171; *United States v. Fisher*, 2 Cranch 358, 389, 2 L. Ed. 304.

80. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

Statutory provisions must be interpreted in the light of all that may be done under them. Section 1014 of the Revised Statutes in regard to extradition must be so construed. *Beavers v. Henkel*, 194 U. S. 73, 83, 48 L. Ed. 882.

81. *Compagnie Francaise v. Board of Health*, 186 U. S. 380, 392, 46 L. Ed. 1209.

82. *United States v. Fisher*, 2 Cranch 358, 389, 2 L. Ed. 304.

counterpoised by other rules; it may be prevailed over by that one which requires the intent of the statute to be looked for in its words.⁸³

2. **INVALIDITY.**—A statute is to be so construed as to avoid rendering it of no effect.⁸⁴

3. **UNCONSTITUTIONALITY.**—There is a presumption that the legislature acts within the scope of its authority. If a statute which bears two constructions, one within the constitutional power of the legislature, and the other a transgression of its power, that is to be adopted which is consistent with the constitution, unless there is an apparent, or fairly to be implied, conflict between their respective provisions.⁸⁵ General terms of a statute are to be construed to exclude matters in excess of the constitutional power of the legislature.⁸⁶

4. **EXTRATERRITORIALITY.**—The general words of a statute are to be so restricted as to avoid giving it an extraterritorial effect.⁸⁷

5. **DEFEATING INTENT.**—It is a rule, if effects and consequences shall result from an interpretation of a statute contrary and in opposition to the policy which it discloses, that such an interpretation must be rejected.⁸⁸

6. **DEFEATING TRANSACTIONS UNDER ACT.**—The courts will lean to that construction of a statute which will uphold transactions consummated under it.⁸⁹

7. **BINDING GOVERNMENT.**—Where a statute is general and any prerogative, right, title, or interest is divested or taken from the government, it is not bound unless the statute is made by express words to extend to it;⁹⁰ but where an act is passed for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, it shall be bound by such act though not named.⁹¹

8. **VIOLATING TREATY.**—The laws of congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language.⁹² This rule operates with special force where a con-

83. *Pirie v. Chicago, etc., Co.*, 182 U. S. 438, 451, 45 L. Ed. 1171.

84. *United States v. Tappan*, 11 Wheat. 419, 426, 6 L. Ed. 509; *Planters' Bank v. Sharp*, 6 How. 300, 301, 319, 12 L. Ed. 447; *Mills v. St. Clair County*, 8 How. 569, 581, 12 L. Ed. 1201; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12, 36 L. Ed. 55; *Bird v. United States*, 187 U. S. 118, 124, 47 L. Ed. 100.

85. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 250.

86. *McCullough v. Virginia*, 172 U. S. 102, 112, 43 L. Ed. 382; *Chesapeake, etc., R. Co. v. Kentucky*, 179 U. S. 388, 394, 40 L. Ed. 244.

Impairing obligation of contract.—A statute will not be construed as impairing the obligation of contract, unless its language be imperatively to that effect. *Knights Templars', etc., Co., v. Jarman*, 187 U. S. 197, 47 L. Ed. 139; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114.

Unconstitutional in part.—See ante, "Partial Validity," IX, N. 3.

87. *The Exchange*, 7 Cranch 116, 3 L. Ed. 287; *Rose v. Himely*, 4 Cranch 241, 2 L. Ed. 608.

88. *Harris v. Runnels*, 12 How. 79, 86, 13 L. Ed. 901.

89. *Provident, etc., Trust Co. v. Mercer County*, 170 U. S. 593, 600, 42 L. Ed. 1156; *Andes v. Ely*, 158 U. S. 312, 321, 39 L. Ed. 996.

90. *United States v. Knight*, 14 Pet. 301, 315, 10 L. Ed. 465; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 239, 22 L.

Ed. 80; *United States v. Herron*, 20 Wall. 251, 263, 22 L. Ed. 275; *Fink v. O'Neil*, 106 U. S. 272, 27 L. Ed. 196.

"As a general rule the United States are not bound by the provisions of a law in which they are not expressly mentioned." *Cook County Nat. Bank v. United States*, 107 U. S. 445, 451, 27 L. Ed. 537. See, generally, the title **UNITED STATES**.

Acts of limitation.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 915.

91. *United States v. Herron*, 20 Wall. 251, 263, 22 L. Ed. 275; *United States v. Knight*, 14 Pet. 301, 315, 10 L. Ed. 465.

A statute laying down general rules of procedure in civil actions applies to the government. *Green v. United States*, 9 Wall. 655, 658, 19 L. Ed. 806; *United States v. Knight*, 14 Pet. 301, 315, 10 L. Ed. 465.

A statute granting rights and public property which if accepted will amount to a contract entitled to protection against impairment of its obligation of a state, is to be construed strictly and against such operation. This construction has been employed to prevent the statute from coming within the rule thus laid down in the *Darmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 784.

92. **Violating of treaty.**—*The Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *Foster v.*

flict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.⁹³

9. VIOLATING INTERNATIONAL LAW.—It has also been observed, that an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains,⁹⁴ and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.⁹⁵

10. RESTRAINING FUTURE LEGISLATURE.—See elsewhere.⁹⁶

11. INJUSTICE, INCONVENIENCE AND ABSURDITY.—As it is the province of the court to simply construe and enforce but not to make a statute, considerations of injustice, inconvenience and absurdity must be addressed to the legislature;⁹⁷ and, if the legislative intent is clear, it must prevail,⁹⁸ but, where it is ambiguous and susceptible of two constructions, the courts will give that construction which best comports with the principles of reason, justice and convenience.⁹⁹

Neilson, 2 Pet. 253, 314, 7 L. Ed. 415; The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227; United States v. Forty-Three Gallons of Whiskey, 108 U. S. 491, 496, 27 L. Ed. 803; Chew Heong v. United States, 112 U. S. 536, 539, 549, 28 L. Ed. 770; Head Money Cases, 112 U. S. 580, 599, 28 L. Ed. 798; Whitney v. Robertson, 124 U. S. 190, 195, 31 L. Ed. 386; The Chinese Exclusion Case, 130 U. S. 581, 600, 32 L. Ed. 1068; In re Ross, 140 U. S. 453, 475, 35 L. Ed. 581; In re Woods, 143 U. S. 202, 36 L. Ed. 125; Lau Ow Bew v. United States, 144 U. S. 47, 62, 36 L. Ed. 340; Lem Moon Sing v. United States, 158 U. S. 538, 549, 39 L. Ed. 1082; De Lima v. Bidwell, 182 U. S. 1, 195, 45 L. Ed. 1041.

Since the purpose avowed in the Chinese exclusion act is to faithfully execute the treaty with China, any interpretation of its provisions should be rejected which imputes to congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which will recognize and save rights secured by the treaty. Chew Heong v. United States, 112 U. S. 536, 549, 28 L. Ed. 770. See the title CHINESE EXCLUSION ACTS, vol. 3, p. 769.

Treaties with Indians.—Marks v. United States, 161 U. S. 297, 299, 40 L. Ed. 706; United States v. Forty-Three Gallons of Whiskey, 108 U. S. 491, 496, 27 L. Ed. 803.

93. United States v. Forty-Three Gallons of Whiskey, 108 U. S. 491, 496, 27 L. Ed. 803.

94. United States v. Arredondo, 6 Pet. 691, 710, 8 L. Ed. 547; In re Cooper, 143 U. S. 472, 36 L. Ed. 232. See the title TERRITORIES.

Statutes should not be so construed as to give them a meaning at variance with the principle of independence and sovereignty of foreign nations. The Apollon, 9 Wheat. 362, 370, 6 L. Ed. 111.

95. The Charming Betsy, 2 Cranch 64, 118, 2 L. Ed. 208.

96. Restraining future legislature.—See

ante, "Statutes," IV, B, 2; "Construed by Implication," XVI, G, 5.

97. Thornley v. United States, 113 U. S. 310, 315, 28 L. Ed. 999; United States v. Chase, 135 U. S. 255, 262, 34 L. Ed. 117; United States v. Alger, 152 U. S. 384, 397, 38 L. Ed. 488; Plessy v. Ferguson, 163 U. S. 537, 558, 41 L. Ed. 256; Hawaii v. Mankichi, 190 U. S. 197, 247, 47 L. Ed. 1016; Citizens' Bank v. Parker, 192 U. S. 73, 80, 48 L. Ed. 346; New Jersey v. Anderson, 203 U. S. 483, 490, 51 L. Ed. 284.

The contention that a statute operates unreasonably and unjustly is only an argument which assails the wisdom of the legislature and affords no justification for construing a statute so as to destroy it. Texas, etc., R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 447, 51 L. Ed. 553.

98. The Cherokee Tobacco, 11 Wall. 616, 620, 20 L. Ed. 227.

Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed. United States v. Fisher, 2 Cranch 358, 386, 2 L. Ed. 204.

Where the intention is plain, it is the duty of the court to expound the statute as it stands. Folsom v. United States, 160 U. S. 121, 127, 40 L. Ed. 363.

99. Wilson v. Mason, 1 Cranch 45, 101, 2 L. Ed. 29; United States v. Fisher, 2 Cranch 358, 390, 2 L. Ed. 304; Huidekoper v. Douglass, 3 Cranch 1, 72, 2 L. Ed. 347; United States v. Heth, 3 Cranch 399, 2 L. Ed. 479; Alexander v. Alexandria, 5 Cranch 1, 3 L. Ed. 19; Keene v. United States, 5 Cranch 304, 3 L. Ed. 108; Duroseau v. United States, 6 Cranch 307, 323, 3 L. Ed. 232; Bond v. Jay, 7 Cranch 350, 3 L. Ed. 367; Jones v. Shore, 1 Wheat. 462, 471, 4 L. Ed. 136; United States v. Tappan, 11 Wheat. 419, 426, 6 L. Ed. 509; United States v. Arredondo, 6 Pet. 691, 720, 8 L. Ed. 547; Wilson v. Rousseau, 4 How. 646, 680, 11 L. Ed. 1141; Bloomer v. McQuewan, 14 How. 539, 553, 14 L. Ed. 532; Ham v. Missouri, 18 How. 126, 132, 15 L. Ed. 334; United States v. Kirby, 7

It is to be construed to avoid, imposing double taxation,¹ implying bad faith on the part of the government.² In enacting a statute in general terms it is to be presumed that the legislature intended such exceptions to its language as would avoid its leading to injustice, oppression or an absurd consequence.³

L. Construction of Particular Statutes—1. ADOPTED STATUTES.—Where

Wall. 482, 486, 19 L. Ed. 278; *Lionberger v. Rouse*, 9 Wall. 468, 475, 19 L. Ed. 721; *State v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650; *Blake v. National Banks*, 23 Wall. 307, 320, 23 L. Ed. 119; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Henderson v. Mayor*, 92 U. S. 259, 23 L. Ed. 543; *Kohlsaat v. Murphy*, 96 U. S. 153, 160, 24 L. Ed. 844; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 93, 28 L. Ed. 76; *Chew Heong v. United States*, 112 U. S. 536, 28 L. Ed. 770; *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226; *Lau Ow Bew v. United States*, 144 U. S. 47, 50, 36 L. Ed. 340; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37, 39 L. Ed. 601; *Washington, etc., R. Co. v. Coeur D'Alene R., etc., Co.*, 160 U. S. 77, 101, 40 L. Ed. 346; *Folsom v. United States*, 160 U. S. 121, 127, 40 L. Ed. 363; *McKee v. United States*, 164 U. S. 287, 41 L. Ed. 437; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 354, 41 L. Ed. 1007; *In re Chapman*, 166 U. S. 661, 667, 41 L. Ed. 1154; *United States v. Goldenberg*, 168 U. S. 95, 103, 42 L. Ed. 394; *United States v. Mrs. Gue Lim*, 176 U. S. 459, 467, 44 L. Ed. 544; *Knowlton v. Moore*, 178 U. S. 41, 77, 44 L. Ed. 969; *Adams v. New York*, 192 U. S. 585, 48 L. Ed. 575; *The United States Petitioner*, 194 U. S. 194, 48 L. Ed. 931.

There is nothing in the language of § 5234 of the Revised Statutes in regard to the enforcement of the liability of stockholders in national banks, restricting the power of the comptroller of the treasury to a single assessment. Justice requires and the statute permits the construction that he may make successive assessments. *Studebaker v. Perry*, 184 U. S. 258, 46 L. Ed. 528.

Just operation presumed.—It is presumed that the legislature intended the law to operate justly. *Wetmore v. Markoe*, 196 U. S. 68, 77, 49 L. Ed. 390; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896.

Construed to present fraud.—A statute of limitations will not be construed as a statute for the encouragement of fraud. *Kirk v. Smith*, 9 Wheat. 241, 288, 6 L. Ed. 81.

To prevent interference with private rights.—"In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter

of the statute." *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 248, 46 L. Ed. 1144.

1. *Tennessee v. Whitworth*, 117 U. S. 129, 137, 29 L. Ed. 830; *McHenry v. Alford*, 168 U. S. 651, 672, 42 L. Ed. 614. See, generally, the title TAXATION.

2. **Construed to prevent implying bad faith of government.**—*Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Red Rock v. Henry*, 106 U. S. 596, 604, 27 L. Ed. 251; *United States v. Central Pac. R. Co.*, 118 U. S. 235, 241, 30 L. Ed. 173; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 38, 39 L. Ed. 601.

The legislature is presumed to act in good faith. *United States v. Des Moines, etc., R. Co.*, 142 U. S. 510, 544, 35 L. Ed. 1099.

When a state intends to terminate its obligation it is bound to do it openly, intelligibly, and in language not to be misunderstood. As a doubtful or obscure declaration would not be justifiable, so it is not to be imputed. *State v. Stoll*, 17 Wall. 425, 436, 21 L. Ed. 650.

An act of congress in regard to compensation of persons rendering service to the government upon prospect of reward and confidence of just treatment, will be construed as intending to do justice to such person, unless too imperious to admit of a different construction. The act of May 10, 1800, in regard to compensation of the collector of the port of Petersburg was construed not to operate retrospectively and thereby defeat the rights of the collector to a compensation expective upon which he had rendered official service. *United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479, *Johnson, J.*

3. **Where statute in general terms.**—*United States v. Kirby*, 7 Wall. 482, 487, 19 L. Ed. 278; *Carlisle v. United States*, 16 Wall. 147, 153, 21 L. Ed. 426; *Chew Heong v. United States*, 112 U. S. 536, 555, 28 L. Ed. 770; *Holy Trinity Church v. United States*, 143 U. S. 457, 461, 36 L. Ed. 226; *Lau Ow Bew v. United States*, 144 U. S. 47, 53, 58, 36 L. Ed. 340; *Smith v. Townsend*, 148 U. S. 490, 496, 37 L. Ed. 533; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016; *Jacobson v. Massachusetts*, 197 U. S. 11, 39, 49 L. Ed. 643.

"It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character." *Jacobson v. Massachusetts*, 197 U. S. 11, 39, 49 L. Ed. 643.

one legislature adopts,⁴ without change of phraseology,⁵ or with only a merely immaterial change⁶ a legislative act of another jurisdiction, if antecedent to its adoption,⁷ the statute had received a settled construction⁸ in the jurisdiction from which adopted, the legislature is presumed to have adopted the construction along with the statute.⁹ The rule is applicable to the construction of an

4. Adopted statutes.—The fact of adoption from a particular state must be established. In this case the plaintiff contended that the statute of Arkansas of 1873, in regard to the capacity of married women to sue, should be construed in accordance with the act of New York of 1860. He, however, did not establish the fact that the Arkansas statute was adopted from that of New York. It was held that this was not a case for the adoption of a construction by presumption, that the construction given the law in New York was incorporated in the Arkansas statute by its legislature, and that the court could construe the act in accordance with the decisions of the state of Massachusetts on a similar act prior to the passage of the act in Arkansas. *Texas, etc., R. Co. v. Humble*, 181 U. S. 57, 65, 45 L. Ed. 747.

5. Without change of phraseology.—Where the two statutes are different the rule does not apply. *Allen v. St. Louis Bank*, 120 U. S. 20, 34, 30 L. Ed. 573; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018; *Durousseau v. United States*, 6 Cranch 307, 321, 3 L. Ed. 232.

6. Immaterial change of phraseology.—The phraseology need not be identical for the rule to apply. *Pennock v. Dialogue*, 2 Pet. 1, 18, 7 L. Ed. 327.

The variations in the Arizona act of 1901 defining the powers of the board of equalization of taxation from its Colorado prototype warrant the refusal of the courts of Arizona to be bound by the construction of the courts of Colorado. *Copper Queen Min. Co. v. Arizona Board*, 206 U. S. 474, 479, 51 L. Ed. 1143.

"The mere change of phraseology will not be construed a change of the law unless such phraseology evidently purports an intention in the legislature to work a change. *Copper Queen Min. Co. v. Arizona Board*, 206 U. S. 474, 476, 51 L. Ed. 1143.

7. Previous construction.—The rule is not applicable where the construction was not announced prior to the adoption. *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018. Though not binding, it is strongly persuasive. *Hardenbergh v. Rav*, 151 U. S. 112, 123, 38 L. Ed. 93.

Subsequent legislation does not affect its construction, as the adoption has reference to the law as existing at the time of adoption. *Cathcart v. Robinson*, 5 Pet. 264, 280, 8 L. Ed. 120; *Kendall v. United States*, 12 Pet. 524, 625, 9 L. Ed. 1181; *In re Heath*, 144 U. S. 92, 94, 36 L. Ed. 358.

8. Allen v. St. Louis Bank, 120 U. S. 20, 34, 30 L. Ed. 573.

If the courts of the state from which a statute is adopted vary their construction of it, the courts of the adopting state need not fluctuate with them. *Cathcart v. Robinson*, 5 Pet. 264, 280, 8 L. Ed. 120.

Where the law adopted had received several constructions in the state from which adopted, it seems that neither of several conflicting constructions will be followed by the courts of the adopting state. But where the construction is conflicting as a part only of a statute and settled as to the balance, to the extent that it is settled it will be followed. The supreme court followed the decisions of the English courts upon the statute of the 27th Elizabeth, in regard to the rights of subsequent bona fide purchasers over a prior voluntary donee, to the extent that such decisions were uniform in declaring that a subsequent sale without a notice by a person who had made a settlement not for a valuable consideration, was presumptive evidence of fraud. *Cathcart v. Robinson*, 5 Pet. 264, 270, 279, 8 L. Ed. 120.

"A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question." *Andrews v. Hovey*, 124 U. S. 694, 716, 31 L. Ed. 557.

9. Construction adopted with statute.—*Tucker v. Oxley*, 5 Cranch 34, 42, 3 L. Ed. 29; *Pennock v. Dialogue*, 2 Pet. 1, 18, 7 L. Ed. 327; *Cathcart v. Robinson*, 5 Pet. 264, 279, 280, 8 L. Ed. 120; *Taylor v. Thomson*, 5 Pet. 358, 8 L. Ed. 154; *Spring v. Gray*, 6 Pet. 151, 8 L. Ed. 352; *Ex parte Wells*, 18 How. 307, 15 L. Ed. 421; *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. Ed. 269; *Allen v. St. Louis Bank*, 120 U. S. 20, 34, 30 L. Ed. 573; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. Ed. 825; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 572, 30 L. Ed. 1022; *Coulam v. Doull*, 133 U. S. 216, 33 L. Ed. 596; *Interstate Commerce Comm. v. Baltimore, etc., R. Co.*, 145 U. S. 263, 284, 36 L. Ed. 699; *Hardenbergh v. Ray*, 151 U. S. 112, 124, 38 L. Ed. 93; *Brown v. Walker*, 161 U. S. 591, 600, 40 L. Ed. 819; *Warner v. Texas, etc., R. Co.*, 164 U. S. 418, 423, 41 L. Ed. 495; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 309, 42 L. Ed. 752; *Henrietta, etc., Mill. Co. v. Gardner*, 173 U. S. 123, 130, 43 L. Ed. 637; *Robinson v. Belt*, 187 U. S. 41, 47, 47 L. Ed. 65; *James v. Appel*, 192 U. S. 129, 135, 48 L. Ed. 377; *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 475, 476, 51 L. Ed. 1143. See the

act of congress adopted from an English act,¹⁰ or an act of a state,¹¹ to an act of a state legislature adopted from an act of England¹² or other foreign country,¹³ or an act of another state,¹⁴ and to an act of a territorial legislature adopted from a state.¹⁵ The rule is not an absolute one, to be followed under

title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

"In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it." *Robinson v. Belt*, 187 U. S. 41, 47, 47 L. Ed. 65.

10. English statute adopted by congress.—*Durousseau v. United States*, 6 Cranch 307, 321, 3 L. Ed. 232; *Pennock v. Dialogue*, 2 Pet. 1, 18, 7 L. Ed. 327; *Cathcart v. Robinson*, 5 Pet. 264, 280, 8 L. Ed. 120; *Kendall v. United States*, 12 Pet. 524, 625, 9 L. Ed. 1181; *McDonald v. Hovey*, 110 U. S. 619, 630, 28 L. Ed. 269.

Patent laws.—See the title **PATENTS**, vol. 9, p. 151.

Bankruptcy acts.—Dissenting opinion in *Merrill v. National Bank*, 173 U. S. 131, 160, 43 L. Ed. 640. See, also, *Tucker v. Oxley*, 5 Cranch 34, 3 L. Ed. 29.

Interstate commerce act.—In adopting words of the English traffic act, in the interstate commerce act, congress is presumed to do so with reference to the construction given such words by the English courts, and is supposed to have intended to incorporate them in the statute. *Interstate Commerce Comm. v. Baltimore, etc., R. Co.*, 145 U. S. 263, 36 L. Ed. 699.

Acts of limitation.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 910.

11. State statute adopted by congress.—*Kendall v. United States*, 12 Pet. 524, 625, 9 L. Ed. 1181; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 572, 30 L. Ed. 1022; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 307, 308, 42 L. Ed. 752.

Adopted in District of Columbia.—*Capital Traction Co. v. Hof*, 174 U. S. 1, 36, 43 L. Ed. 873. See, also, *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 572, 30 L. Ed. 1022; *Willis v. Eastern Trust, etc., Co.*, 169 U. S. 295, 307, 308, 42 L. Ed. 752; *Miller v. Herbert*, 5 How. 72, 82, 12 L. Ed. 55.

The act of congress establishing the judicial system in the District of Columbia was adopted from the legislature in the state of New York. In the construction of such act the decisions of New York are to be followed instead of those in the state of Maryland. *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 570, 30 L. Ed. 1022.

The act of congress of 1823, granting civil jurisdiction to justices of the peace in the District of Columbia, was taken from the acts of New York of 1801, 1808. The New York decisions followed in construction. *Capital Traction Co. v. Hof*, 174 U. S. 1, 35, 43 L. Ed. 873.

Of course, the recent decisions of the courts of Maryland, giving to the statutes of that state a construction at variance with that which prevailed at the time of the cession, cannot control our decision as to the effect of those statutes on the territory within the limits of the District of Columbia since the legislative power has become vested in the United States. *Morris v. United States*, 174 U. S. 196, 240, 43 L. Ed. 946; *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. Ed. 450; *Russell v. Allen*, 107 U. S. 163, 171, 27 L. Ed. 397; *De Vaughn v. Hutchinson*, 165 U. S. 566, 41 L. Ed. 827.

Where opinions of court of Maryland in regard to the manumission of children, are expressed since the cession of the District of Columbia to the United States, the courts in the district are not to be controlled by them in the interpretation of the act under review; as they would be, and as the federal supreme court would be, by the decisions of state courts, upon state statutes affecting local rights and interests. *Wallingsford v. Allen*, 10 Pet. 583, 593, 9 L. Ed. 542.

Adopted in territory.—The rule applies to the construction of a statute adopted by congress from an act of a state as a law in one of the territories. *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012.

12. English act adopted by state.—*Pennock v. Dialogue*, 2 Pet. 1, 18, 7 L. Ed. 327; *Cathcart v. Robinson*, 5 Pet. 264, 280, 8 L. Ed. 120; *Bank v. Dyer*, 14 Pet. 141, 10 L. Ed. 391; *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. Ed. 269; *Warner v. Texas, etc., R. Co.*, 164 U. S. 418, 423, 41 L. Ed. 495; *Robinson v. Belt*, 187 U. S. 41, 47, 47 L. Ed. 65.

"It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes." *Kendall v. United States*, 12 Pet. 524, 625, 9 L. Ed. 1181.

Statute of frauds.—See the title **FRAUDS, STATUTE OF**, vol. 6, p. 452.

Statute of limitations.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 910.

13. Adopted from Code Napoleon.—An act of Louisiana adopted from the Code Napoleon is to be so construed. *Viterbo v. Friedlander*, 120 U. S. 707, 727, 30 L. Ed. 776.

14. Adopted from another state.—*Stutsman County v. Wallace*, 142 U. S. 293, 312, 35 L. Ed. 1018; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535; *Allen v. St. Louis Bank*, 120 U. S. 20, 34, 30 L. Ed. 573.

15. Act of state adopted by territory.—*Hardenbergh v. Ray*, 151 U. S. 112, 124, 38

all circumstances.¹⁶ Where a statute originates in one state, is adopted in another and again adopted in a third and the construction placed upon it in the first two states is conflicting, the courts of the United States are at liberty to adopt their own construction.¹⁷ Where a statute has been adopted and is afterwards re-enacted, the construction placed upon the statute by state officers between the time of its adoption and re-enactment, rather than the decision of the court of original enactment, is presumed to be present in the minds of the legislature on re-enactment.¹⁸ The act of congress extending the bill of rights in a slightly changed form to the Philippine Islands, is to be construed with reference to the United States constitution from which it was substantially adopted.¹⁹

2. RE-ENACTED STATUTES.—A re-enactment statute is to be construed with reference to the original act²⁰ and its judicial and practical construction.²¹ Where a statute has been repealed in part and then re-enacted, the re-enactment does not restore the construction placed upon the original act with sufficient force to overcome the clear meaning of a statute derived from its language and reason.²² When the purpose of a prior law is continued, usually its words also are, and an omission of certain words imply an omission of the purpose.²³ The omission is presumed to be intentional.²⁴

3. REVISED STATUTES AND CODIFICATIONS.—Although a legislative declaration of what the statute law of the United States was on the 1st of December, 1873,²⁵ the Revised Statutes²⁶ are merely a compilation, revised, simplified, arranged and consolidated,²⁷ and are to be construed as a continuation of the previous statutes and not as new enactments.²⁸ Where their provisions are

L. Ed. 93; *Whitney v. Fox*, 166 U. S. 337, 647, 41 L. Ed. 1145; *Wood v. Fox*, 166 U. S. 648, 41 L. Ed. 1149; *McFaddin v. Evans-Snider-Buel Co.*, 185 U. S. 505, 46 L. Ed. 1012; *Robinson v. Belt*, 187 U. S. 41, 47 L. Ed. 65; *Henrietta, etc., Mill Co. v. Gardner*, 173 U. S. 123, 128, 43 L. Ed. 637.

16. Rule not followed in all cases.—*Coulam v. Doull*, 133 U. S. 216, 233, 33 L. Ed. 596; *Whitney v. Fox*, 166 U. S. 637, 647, 41 L. Ed. 1145, followed in *Wood v. Fox*, 166 U. S. 648, 41 L. Ed. 1149.

17. *Coulam v. Doull*, 133 U. S. 216, 233, 33 L. Ed. 596.

18. *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 479, 51 L. Ed. 1143.

19. *Kepner v. United States*, 195 U. S. 100, 124, 49 L. Ed. 114.

20. Re-enacted statutes.—Where a later statute substantially re-enacts a prior statute with the exception of one section, and the later act is upon "the same terms and conditions" as contained in the prior act, the later statute is not to be construed as to express the full intention of congress, but the reference to the prior statute is to be given effect to. *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 41 L. Ed. 399.

21. *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474, 479, 51 L. Ed. 1143; *New York, etc., R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361, 401, 402, 50 L. Ed. 515; *United States v. Falk*, 204 U. S. 143, 51 L. Ed. 411.

22. *The Strathairly*, 124 U. S. 558, 571,

31 L. Ed. 580.

23. *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. Ed. 1175.

24. *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171.

25. Revised statutes.—*Smythe v. Fiske*, 23 Wall. 374, 382, 23 L. Ed. 47; *United States v. Bowen*, 100 U. S. 508, 513, 25 L. Ed. 631; *Arthur v. Dodge*, 101 U. S. 34, 36, 25 L. Ed. 948; *Vietor v. Arthur*, 104 U. S. 498, 499, 26 L. Ed. 633; *Deffebach v. Hawke*, 115 U. S. 392, 402, 29 L. Ed. 423; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 57, 30 L. Ed. 60; *United States v. Auffmordt*, 122 U. S. 197, 208, 30 L. Ed. 1182; *United States v. Averill*, 130 U. S. 335, 339, 32 L. Ed. 977; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39, 39 L. Ed. 601.

"Whatever might have been our abstract views of the effect of a prior act we are, as to all the future cases, bound by the law as found in the Revised Statutes by the express language of congress on the subject." *Murdock v. Memphis*, 20 Wall. 590, 617, 22 L. Ed. 429.

26. See ante, "Revised Statutes and Codes," III, N.

27. *Barrett v. United States*, 169 U. S. 218, 42 L. Ed. 723; *United States v. Lacher*, 134 U. S. 624, 626, 33 L. Ed. 1080; *Doyle v. Wisconsin*, 94 U. S. 50, 51, 24 L. Ed. 64; *Dwight v. Merritt*, 140 U. S. 213, 217, 35 L. Ed. 450.

28. *Hammock v. Loan, etc., Co.*, 105 U. S. 77, 85, 26 L. Ed. 1111.

ambiguous²⁹ resort may be had to the original acts from which they were taken³⁰ to ascertain what, if any, change of phraseology from the original act the revised act contains,³¹ and whether such change works a change in the law.³² Where there is no change of phraseology, or a merely immaterial change,³³ not clearly showing an intention to change the law,³⁴ but only made necessary for

29. In cases of ambiguity.—*Doyle v. Wisconsin*, 94 U. S. 50, 51, 24 L. Ed. 64; *United States v. Bowen*, 100 U. S. 508, 512, 513, 25 L. Ed. 631; *Arthur v. Dodge*, 101 U. S. 34, 25 L. Ed. 948; *Myer v. Car Co.*, 102 U. S. 1, 11, 26 L. Ed. 59; *Vietor v. Arthur*, 104 U. S. 498, 499, 26 L. Ed. 633; *Deffebach v. Hawke*, 115 U. S. 392, 402, 29 L. Ed. 423; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 57, 30 L. Ed. 60; *United States v. Averill*, 130 U. S. 335, 32 L. Ed. 977; *United States v. Lacher*, 134 U. S. 624, 627, 33 L. Ed. 1080; *Dwight v. Merritt*, 140 U. S. 213, 217, 35 L. Ed. 450; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 39, 39 L. Ed. 601; *The Conqueror*, 166 U. S. 110, 122, 41 L. Ed. 937; *Hamilton v. Rathbone*, 175 U. S. 414, 420, 44 L. Ed. 219.

When the meaning of the Revised Statutes of the United States is plain, the court cannot recur to the original statutes to see if errors were committed in revising them, but it may do so when necessary to construe doubtful language used in the revision. *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. Ed. 219.

Section 4820 of the Revised Statutes admits of no other reasonable construction than that only the invalid pensioners who had not contributed to the funds of the Soldiers' Home were bound to surrender to it their pensions while receiving its benefits. There is no occasion, therefore, to look at the pre-existing law on the subject. *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631.

30. Construed with reference to original act.—*Stewart v. Kahn*, 11 Wall. 493, 502, 20 L. Ed. 176; *United States v. Hirsch*, 100 U. S. 33, 35, 25 L. Ed. 539; *United States v. Bowen*, 100 U. S. 508, 513, 25 L. Ed. 631; *Myer v. Car Co.*, 102 U. S. 1, 11, 26 L. Ed. 59; *Vietor v. Arthur*, 104 U. S. 498, 499, 26 L. Ed. 633; *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 29 L. Ed. 755; *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766; *Viterbo v. Friedlander*, 120 U. S. 707, 725, 30 L. Ed. 776; *United States v. Goldenberg*, 168 U. S. 95, 42 L. Ed. 394; *Barrett v. United States*, 169 U. S. 218, 227, 42 L. Ed. 723; *Hamilton v. Rathbone*, 175 U. S. 414, 420, 44 L. Ed. 219.

"This rule has been repeatedly applied in the construction of the Revised Statutes. The earliest case is that of *United States v. Hirsch*, 100 U. S. 33, 25 L. Ed. 539, in which a section (5440), defining and punishing conspiracies to defraud generally, was held not to be restricted by the prior act of March 2, 1867, from which

the section was taken, which was limited to conspiracies arising under the revenue laws." *Hamilton v. Rathbone*, 175 U. S. 414, 419, 44 L. Ed. 219.

Section 546 of the Revised Statutes in regard to the provision of South Carolina in the judicial district is to be construed with reference to the act of February 21, 1823. *Barrett v. United States*, 169 U. S. 218, 42 L. Ed. 723.

In construction of revenue laws.—This rule applies to the construction of revenue laws. *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Arthur v. Dodge*, 101 U. S. 34, 36, 25 L. Ed. 948; *Vietor v. Arthur*, 104 U. S. 498, 499, 26 L. Ed. 633; *The Conqueror*, 166 U. S. 110, 122, 41 L. Ed. 937.

31. *Hamilton v. Rathbone*, 175 U. S. 414, 420, 44 L. Ed. 219.

32. *Barrett v. United States*, 169 U. S. 218, 42 L. Ed. 723; *United States v. Lacher*, 134 U. S. 624, 626, 33 L. Ed. 1080.

33. Change of phraseology.—The phraseology of the act of June 1, 1872, and of the 1008th section of the Revised Statutes is so nearly identical with that of the 22d section of the act of 1789, in reference to the point under consideration, that it must be presumed they were intended to have the same construction, and the act of 1789 contains no language which requires that it should have a different construction from that which had long been established in reference to all the statutes of limitation then known, whether in the mother country or in this. On the contrary, the terms of the act of 1789 fairly call for the same construction which had for centuries prevailed in reference to those statutes. *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. Ed. 269.

34. *United States v. Ryder*, 110 U. S. 729, 740, 28 L. Ed. 308; *McDonald v. Hovey*, 110 U. S. 619, 629, 28 L. Ed. 269.

"A change of language in a revised statute will not change the law from what it was before, unless it be apparent that such was the intention of the legislature." The second section of the act of congress of February 5, 1867, amending the judiciary act of 1789, is to a great extent a transcript of the 25th section of the prior act. There are several alterations of phraseology which are not material. *Stewart v. Kahn*, 11 Wall. 493, 502, 20 L. Ed. 176.

"The re-enacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested." *United States v. Le Bris*, 121 U. S. 278, 280, 30 L. Ed. 946.

the purposes of arrangement,³⁵ condensation³⁶ or consolidation,³⁷ or a change which is the result of inadvertence³⁸ or a mere clerical error,³⁹ the Revised Statutes are to be construed as having the same meaning as the original act, although the act has been repealed,⁴⁰ and are to be construed in the light of history and circumstances existing at the time of the enactment of the act⁴¹ and

35. For purposes of arrangement, etc.—

Hedden v. Robertson, 151 U. S. 520, 526, 38 L. Ed. 257; *McDonald v. Hovey*, 110 U. S. 619, 620, 28 L. Ed. 269.

36. Taylor v. Bowker, 111 U. S. 110, 115, 116, 28 L. Ed. 368.

If in the codification or condensation of a statute, a word is omitted for the sake of condensation, but without any change in the sense, it is to be construed as originally enacted. Section 4253 of the Revised Statutes is to be construed as though the word "penalty" had not been omitted. *The Strathairly*, 124 U. S. 558, 571, 31 L. Ed. 580.

"Upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law." *McDonald v. Hovey*, 110 U. S. 619, 629, 28 L. Ed. 269.

37. The combination and transposition of the provisions of the appropriation acts of 1862, 1864 and 1865, in a single section of the Revised Statutes, putting the two provisos of the later statutes first, and the general rule of the earlier statute last, but hardly changing the words of either except so far as necessary to connect them together, cannot be held to have altered the scope and purpose of these enactments, or of any of them. It is not to be inferred that congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed. *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111; *McDonald v. Hovey*, 110 U. S. 619, 28 L. Ed. 269; *United States v. Ryder*, 110 U. S. 729, 740, 28 L. Ed. 308; *Logan v. United States*, 144 U. S. 263, 302, 36 L. Ed. 429.

38. Inadvertent change.—Ex parte *Crow Dog*, 109 U. S. 556, 558, 27 L. Ed. 1030.

"Where inadvertent changes have been made by incorporating different statutes together, it has been held not to change their original construction." *McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. Ed. 269.

39. Change resulting from error.—The words "judicial circuit" is the act of September 19, 1890, providing that no lottery, circular, ticket, etc., shall be carried through the mails, were probably printed by a clerical error for "judicial district," as in the act of March 2, from which it is taken, the words are "judicial district." *Horner v. United States*, No. 1, 143 U. S.

207, 36 L. Ed. 126.

40. Prior statutes repealed simultaneously with the enactment of the Revised Statutes, may be referred to and considered, in order to interpret the meaning of obscure and ambiguous phrases in any section of said revision. *Dwight v. Merritt*, 140 U. S. 213, 217, 35 L. Ed. 450.

The Revised Statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made regulating intercourse with the Indian tribes, have, nevertheless, omitted all definition of what now must be taken to be "the Indian country." The section of the act of 1834 containing the definition of that date has been repealed; it is not to be regarded as if it had never been adopted, but may be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. Ex parte *Crow Dog*, 109 U. S. 556, 560, 27 L. Ed. 1030; *United States v. Le Bris*, 121 U. S. 278, 280, 30 L. Ed. 946.

The title of an original act not copied in a revision thereof may be referred to. *Myer v. Car Co.*, 102 U. S. 1, 11, 26 L. Ed. 59.

Prior revenue statutes, though repealed simultaneously with the enactment of the Revised Statutes, may be referred to and considered, in order to interpret the meaning of obscure and ambiguous phrases in any section of said revision. *Dwight v. Merritt*, 140 U. S. 213, 217, 35 L. Ed. 450; *Saxonville Mills v. Russell*, 116 U. S. 13, 21, 29 L. Ed. 554.

41. History and circumstances at time of original enactment.—"When it was re-enacted with all other statutes of general interest, the political exigency which furnished the primary motive for its re-enactment had drifted away with the lapse of time; but we do not think it can avail to give to a statute which, after all, is but a re-enactment in the exact language of the original act, a meaning almost directly the reverse of that given to the original act. To give such effect to the action of congress codifying the statutes would go far to subvert all decisions and introduce chaos into our jurisprudence." *Crenshaw v. United States*, 134 U. S. 99, 109, 33 L. Ed. 825.

the judicial⁴² and practical construction placed thereon.⁴³ A substantial change of phraseology which necessitates a change of construction will be deemed as intended to make a change in the law.⁴⁴ It is said that this is especially so where the act authorizing the revision directs marginal references.⁴⁵ These rules apply to the construction of the second edition of the Revised Statutes of the United States,⁴⁶ and to the construction of the codes of the different states,⁴⁷ and the compilations of the Cherokee Indian nation.⁴⁸

4. AMENDED AND AMENDATORY STATUTES.—An amended statute and the amendments thereto are to be construed together as one statute,⁴⁹ as originally in the amended form.⁵⁰

5. REPEALED AND REPEALING STATUTES.—The fact that a statute has been repealed with reference to future facts, does not relieve the court of the duty of construing and enforcing it. The fact of repeal may be taken as an indication of the judgment of the legislature that the law was not founded in wisdom.⁵¹

42. Construction of original enactment.—*McDonald v. Hovey*, 110 U. S. 619, 628, 28 L. Ed. 269; *United States v. Mooney*, 116 U. S. 104, 106, 29 L. Ed. 550.

"Congress, having in the Revised Statutes adopted the language used in the act of 1837, must be considered to have adopted also the construction given by this court to this sentence, and made it a part of the enactment." *Sessions v. Romadka*, 145 U. S. 29, 42, 36 L. Ed. 609.

The rule that a revised statute is presumed to use the words of the old statute with their existing judicial definitions, does not apply where the judicial definition was unsettled. There had been no settled judicial interpretation of the terms of § 10 of the act of March 3, 1891, in regard to the duty of returning rejected immigrants to their country, prior to the re-enactment in § 9 of the act of 1903, 32 Stat. 1213. *Hackfeld & Co. v. United States*, 197 U. S. 442, 49 L. Ed. 826.

43. The construction given to the internal revenue act by commissioners of internal revenue, even though published in an Internal Revenue Record, is not a construction of so much dignity that a re-enactment of the statute subsequent to the construction having been made and published, is to be regarded as a legislative adoption of that construction; especially not when the construction made a proviso to an act repugnant to the body of the act. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80.

44. Substantial change of phraseology.—*McDonald v. Hovey*, 110 U. S. 619, 629, 28 L. Ed. 269.

45. Where there are marginal references.—*Barrett v. United States*, 169 U. S. 218, 227, 42 L. Ed. 723; *United States v. Lacher*, 134 U. S. 624, 627, 33 L. Ed. 1080.

46. Second edition of Revised Statutes.—That part of § 2146 of Revised Statutes placed within brackets was in the act of March 27, 1854, omitted by the revisers in the original revision, and restored by the act of February 18, 1875, and now appears in the second edition of the Revised Statutes. It is assumed for the purposes of this opinion that the omission

in the original revision was inadvertent, and that the restoration evinces no other intent on the part of congress than that the provision should be considered as in force, without interruption, and not a new enactment of it for any other purpose than to correct the error of the revision. *Ex parte Crow Dog*, 109 U. S. 556, 558, 27 L. Ed. 1030.

47. *Viterbo v. Friedlander*, 120 U. S. 707, 726, 30 L. Ed. 776; *McDonald v. Hovey*, 110 U. S. 619, 629, 28 L. Ed. 269; *Myer v. Car Co.*, 102 U. S. 1, 11, 26 L. Ed. 59.

48. *Cherokee Intermarriage Cases*, 203 U. S. 76, 84, 51 L. Ed. 96.

49. Amended and amendatory statutes.—*Chew Heong v. United States*, 112 U. S. 536, 551, 28 L. Ed. 770; *United States v. Central Pac. R. Co.*, 118 U. S. 235, 239, 30 L. Ed. 173; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 40 L. Ed. 247; *United States v. Wong Kim Ark*, 169 U. S. 649, 653, 42 L. Ed. 890; *Vanderbilt v. Eidman*, 196 U. S. 480, 49 L. Ed. 563; *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 50 L. Ed. 1149. See the title CHINESE EXCLUSION ACTS, vol. 3, p. 778. And see ante, "Construed as Prospective or Retrospective," XVI, I, 6; "In Amendatory Acts," XVI, J, 3, a, (3), (b).

"It is not unusual, in a succession of statutes on the same subject matter, amending or modifying previous provisions, that a word or phrase may remain, although rendered useless or meaningless by the amendments. Such words are merely vestigial, and should not be permitted to impair or defeat the fair meaning of the enactment." *Saltonstall v. Birtwell*, 164 U. S. 54, 70, 41 L. Ed. 348.

50. The act of Illinois of February 14, 1859, incorporating street railway companies, for twenty-five years, amended by the act of February 6, 1865, extending the corporation from twenty-five to ninety-nine years, is to be construed as if it had originally granted the life of the corporation for ninety-nine years. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

51. *Dewey v. United States*, 178 U. S. 510, 44 L. Ed. 1170. See the title PRIZE, vol. 9, p. 744.

6. **SUSPENDED AND SUSPENDING STATUTES.**—For most purposes, though not for all, a suspended statute is to be construed as of the date it is intended to go into effect.^{51a}

7. **FOREIGN STATUTES.**—In construing a doubtful foreign law, it is permissible to admit the determination of an expert witness as to the accepted and proper construction of the law in the foreign country.⁵² The construction of a statute of another state without questioning its constitutionality does not necessarily involve a federal question.⁵³

8. **GENERAL STATUTES.**—A general statute is not applicable to a particular case, except as the facts therein bring the case within the language of the statute.⁵⁴

9. **LOCAL AND PRIVATE STATUTES.**—The rule of contemporaneous and practical construction has especial application to local acts.⁵⁵

10. **STATUTES OF INDIAN TRIBES.**—An act of an Indian tribe is to be construed with reference to the United States constitution and the acts of congress under which the Indian legislation is made.⁵⁶

11. **PENAL STATUTES.**—If its language be plain, a penal statute⁵⁷ is to be construed as it reads and its words are to be given their full, natural and obvious meaning;⁵⁸ if ambiguous, it is to be construed strictly,⁵⁹ so as to safeguard

51a. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 612, 615, 47 L. Ed. 328.

52. **Foreign statutes.**—The circuit court erred in refusing to admit the deposition of a Mexican lawyer as to the accepted construction of the Mexican Railroad regulation laws. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 48 L. Ed. 900.

53. See the title **APPEAL AND ERROR**, vol. 1, p. 651.

54. **General statutes.**—The act of March 3, 1875, granting the right to railroads to cut timber from adjacent land is general and applicable to no particular road, except that the facts in each case bring the road within its language. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548.

55. *Carroll v. Safford*, 3 How. 441, 460, 11 L. Ed. 671.

56. *Cherokee Intermarriage Cases*, 203 U. S. 76, 89, 51 L. Ed. 96. See the title **INDIANS**, vol. 6, p. 946.

57. **Penal statutes—What are penal.**—See ante, "Penal," III, C.

58. **According to language used.**—*Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156; *United States v. Reese*, 92 U. S. 214, 219, 23 L. Ed. 563. See ante, "According to Letter," XVI, G, 1.

The courts, in construing penal statutes, cannot safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed public policy or purpose. *Sarlls v. United States*, 152 U. S. 570, 575, 38 L. Ed. 556; *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37.

Full meaning of words.—The words of a penal statute are to be given their full meaning. *United States v. Hartwell*, 6 Wall. 385, 386, 18 L. Ed. 830.

Effect must be given to every word in a penal enactment, if it can be done, with-

out violating the obvious intention of the legislature. *United States v. Gooding*, 12 Wheat. 460, 477, 6 L. Ed. 693.

59. **Construed strictly.**—*Respublica v. Weidle*, 2 Dall. 88, 90, 1 L. Ed. 301; *Fairfax v. Hunter*, 7 Cranch 603, 625, 3 L. Ed. 453; *United States v. Sheldon*, 2 Wheat. 119, 121, 4 L. Ed. 199; *United States v. Bevans*, 3 Wheat. 336, 4 L. Ed. 404; *United States v. Palmer*, 3 Wheat. 610, 628, 4 L. Ed. 471; *United States v. Wiltberger*, 5 Wheat. 76, 85, 95, 96, 5 L. Ed. 37; *The Emily*, 9 Wheat. 381, 388, 6 L. Ed. 116; *United States v. Gooding*, 12 Wheat. 460, 477, 6 L. Ed. 693; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. Ed. 450; *United States v. Eighty-four Boxes of Sugar*, 7 Pet. 453, 8 L. Ed. 745; *United States v. Bailey*, 9 Pet. 238, 264, 9 L. Ed. 113; *United States v. Morris*, 14 Pet. 464, 476, 10 L. Ed. 543; *Taylor v. United States*, 3 How. 197, 210, 11 L. Ed. 559; *Harrison v. Vose*, 9 How. 372, 378, 13 L. Ed. 179; *Greely v. Thompson*, 10 How. 225, 238, 13 L. Ed. 397; *Maxwell v. Griswold*, 10 How. 242, 13 L. Ed. 405; *United States v. Nickerson*, 17 How. 204, 210, 15 L. Ed. 219; *Cliquot's Champagne*, 3 Wall. 114, 144, 18 L. Ed. 116; *United States v. Hartwell*, 6 Wall. 385, 395, 397, 18 L. Ed. 830; *Tiffany v. National Bank*, 18 Wall. 409, 410, 21 L. Ed. 862; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *United States v. Reese*, 92 U. S. 214, 219, 23 L. Ed. 563; *Steam-Engine Co. v. Hubbard*, 101 U. S. 188, 25 L. Ed. 786; *Baldwin v. Franks*, 120 U. S. 678, 691, 692, 30 L. Ed. 766; *In re Coy*, 127 U. S. 731, 739, 32 L. Ed. 274; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080; *United States v. Rodgers*, 150 U. S. 249, 278, 279, 37 L. Ed. 1071; *Sarlls v. United States*, 152 U. S. 570, 574, 575, 38 L. Ed. 556; *Todd v. United States*, 158 U. S. 278, 282, 39 L. Ed. 982; *Park Bank v. Remsen*, 158 U. S. 337, 39 L. Ed. 1008; *The Delaware*, 161 U. S. 459, 471,

the rights of the defendant,⁶⁰ but at the same time to preserve the obvious intent of the legislature.⁶¹ In every case the court will endeavor to effect substantial justice⁶² and the punishment of crime⁶³ and to avoid absurd results.⁶⁴

40 L. Ed. 771; *France v. United States*, 164 U. S. 676, 41 L. Ed. 595; *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, 42 L. Ed. 1033; *Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156; *United States v. Harris*, 177 U. S. 305, 44 L. Ed. 780; *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438, 45 L. Ed. 1171; *Francis v. United States*, 188 U. S. 375, 381, 47 L. Ed. 508; *Helwig v. United States*, 188 U. S. 605, 617, 47 L. Ed. 614; *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679; *Johanson v. Southern Pac. Co.*, 196 U. S. 1, 17, 49 L. Ed. 363; *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 362, 49 L. Ed. 790; *Hackfeld & Co. v. United States*, 197 U. S. 442, 450, 49 L. Ed. 826; *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 50 L. Ed. 367; *Burton v. United States*, 202 U. S. 344, 391, 50 L. Ed. 1057.

Strict construction defined.—A statute which contains criminal provisions must be strictly construed. This rule is a very ancient and salutary one. It means only that cases must not be brought within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679.

Basis of rule.—"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37.

60. Construed favorable to accused.—*Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156; *Harrison v. Vose*, 9 How. 372, 378, 13 L. Ed. 179.

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. * * * Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080." *United States v. Brewer*, 139 U. S. 278, 288, 35 L. Ed. 190; *United States v. Reese*, 92 U. S. 214, 219, 23 L. Ed. 563.

"In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent." *Harrison v. Vose*, 9 How. 372, 378, 13 L. Ed. 179; *Tiffany v. National Bank*, 18 Wall. 409, 410, 21 L. Ed. 862.

Penal statutes are to be construed strictly; that is, for the benefit of him against whom the penalty is inflicted. In

re Coy, 127 U. S. 731, 739, 32 L. Ed. 274.

"While we are bound to give the person accused the benefit of every statutory provision, we are not bound to import words into the statute which are not found there." *Grin v. Shine*, 187 U. S. 181, 186, 47 L. Ed. 130.

61. Intent controls.—*United States v. Wiltberger*, 5 Wheat. 76, 85, 95, 96, 5 L. Ed. 37; *The Emily*, 9 Wheat. 381, 388, 6 L. Ed. 116; *American Fur Co. v. United States*, 2 Pet. 358, 367, 7 L. Ed. 450; *United States v. Morris*, 14 Pet. 464, 475, 10 L. Ed. 543; *United States v. Murphy*, 16 Pet. 203, 212, 10 L. Ed. 937; *United States v. Hartwell*, 6 Wall. 385, 395, 396, 18 L. Ed. 830; *United States v. Reese*, 92 U. S. 214, 219, 23 L. Ed. 563; *In re Coy*, 127 U. S. 731, 739, 32 L. Ed. 274; *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080; *Wiborg v. United States*, 163 U. S. 632, 647, 41 L. Ed. 289; *Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156; *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 17, 49 L. Ed. 363; *Hackfeld & Co. v. United States*, 197 U. S. 442, 450, 49 L. Ed. 826.

Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature. *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37.

"In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction." *The Emily*, 9 Wheat. 381, 388, 6 L. Ed. 116.

The principle that a case which is within the reason or mischief of a statute is within its provisions cannot be carried so far as to punish a crime not enumerated in a statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37.

62. Construed to effect justice.—*Bolles v. Outing Co.*, 175 U. S. 262, 265, 44 L. Ed. 156.

63. Construed to punish crime.—When the words of a statute, in their most obvious sense, comprehend an offense, which offense is apparently placed by the legislature in the highest class of crimes, it furnishes an additional motive for rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished. *United States v. Palmer*, 3 Wheat. 610, 629, 4 L. Ed. 471.

64. Construed to avoid absurdities.—The rule of strict construction of penal statutes

A penal statute is not to be extended beyond its express language by implication.⁶⁵ That which is not enumerated in a statute cannot be punished as a crime because of equal atrocity or of a kindred kind with others which are enumerated.⁶⁶ Where a statute is in part penal and in part remedial, the penal is to be construed strictly and the remedial part liberally.⁶⁷ Where a statute is both remedial and penal, but the design to give relief is dominant over that

does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830. See ante, "Injustice, Inconvenience and Absurdity," XVI, K, 11.

65. Extended by implication.—*United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37; *United States v. Gooding*, 12 Wheat. 460, 471, 6 L. Ed. 693; *United States v. Bailey*, 9 Pet. 238, 265, 9 L. Ed. 113; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *United States v. Benecke*, 98 U. S. 447, 449, 25 L. Ed. 192; *Elliott v. Railroad Co.*, 99 U. S. 573, 25 L. Ed. 292; *United States v. Lacher*, 134 U. S. 624, 33 L. Ed. 1080; *Todd v. United States*, 158 U. S. 278, 282, 39 L. Ed. 982; *Yates v. Jones Nat. Bank*, 206 U. S. 158, 179, 51 L. Ed. 1002.

"There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute." *United States v. Lacher*, 134 U. S. 624, 628, 33 L. Ed. 1080; *Todd v. United States*, 158 U. S. 278, 282, 39 L. Ed. 982.

Where a statute creates a new offense and denounces the penalty, the punishment can be that only which the state prescribes. *Farmes', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196.

A penalty is not to be readily implied, and on the contrary a person or corporation is not to be subjected to a penalty unless the words of the statute plainly impose it. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 362, 49 L. Ed. 790.

"In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words." *United States v. Morris*, 14 Pet. 464, 475, 10 L. Ed. 543; *Northern Securities Co. v. United States*, 193 U. S. 197, 358, 48 L. Ed. 679; *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. Ed. 37.

In acts of sovereignty highly penal, it is against the ordinary rule to enlarge, by implication and inference, the extent of the language employed. *Fairfax v. Hunter*, 7 Cranch 603, 625, 3 L. Ed. 453.

"We know of no rule of law which requires a court to declare, in penal cases, that to be actually done which ought previously to have been done." *Fairfax v. Hunter*, 7 Cranch 603, 625, 3 L. Ed. 453.

The court cannot introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is

general only. *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563.

"It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute." A statute of March 3, 1873, entitled "An act to prevent cruelty to animals while in transit by railroad or other means of transportation within the United States," imposing a penalty upon "any company," was construed not to include a receiver of a railroad company. *United States v. Harris*, 177 U. S. 305, 306, 44 L. Ed. 780, following *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37; *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556.

The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature. *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830.

Where a statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the legislature intended that a penalty should be inflicted for a lawful act. *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247, 252, 16 L. Ed. 682.

66. Extended to crimes not described.—*United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37; *Sarlls v. United States*, 152 U. S. 570, 575, 38 L. Ed. 556.

67. Where statute both penal and remedial.—"If congress sees fit to impose a penalty on any individual who attempts to enter a homestead without possessing the statutory qualifications, the clause imposing the penalty may require a strict construction in a proceeding against the alleged wrongdoer, but that does not give to the residue of the statute, prescribing the qualifications, a penal character. That portion which describes the qualifications for entry is to be liberally construed, in order that no one be permitted to avail himself of the bounty of congress, unless evidently of the classes congress intended should enjoy that bounty." *Smith v. Townsend*, 148 U. S. 490, 497, 37 L. Ed. 533.

to inflict a punishment, it is not to be strictly construed.⁶⁸ There has probably been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, but the rule still prevails to the extent that the intention of a penal statute is to be found in the language actually used, interpreted according to its fair and obvious meaning.⁶⁹ This rule applies to a statute imposing a forfeiture,⁷⁰ but not to revenue laws. Although there is a penalty imposed for their violation, their provisions are not penal in the sense that requires a strict construction.⁷¹

12. REMEDIAL STATUTES.—A remedial statute⁷² is to be liberally construed

68. The primary object of the safety appliance act of March 2, 1893 was to promote the public welfare by securing the safety of employees and travelers, and was in that respect remedial, while its secondary object was to impose a penalty for its violation, and it was in that respect penal. In construing the statute the primary intention of the legislature was carried out by giving it a liberal construction. *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

A statute imposing a penalty or forfeiture for taking usurious interest and permitting recovery by the injured party is remedial as well as penal and is to be liberally construed. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196.

69. Relaxation of rule of strict construction.—*United States v. Harris*, 177 U. S. 305, 309, 44 L. Ed. 780.

70. Incurring forfeiture.—When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121; *Douglas v. Lewis*, 131 U. S. 75, 33 L. Ed. 53.

A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. Being a penalty imposed by law, the legislature had a right to remit it. *Maryland v. Baltimore, etc., R. Co.*, 3 How. 534, 11 L. Ed. 714.

In construing a statute imposing a forfeiture, it is considered that the legislature does not intend to inflict a heavy forfeiture under ambiguous terms. The natural as well as usual course would be to inflict the forfeiture in direct and substantive terms, not by way of loss and uncertain reference. *The Paulina's Cargo*, 7 Cranch 52, 3 L. Ed. 266.

The statute of Kentucky, allowing further time to owners to survey their entries, is made to save a forfeiture to the government; and acts imposing forfeitures are always construed strictly as against the government, and liberally as to the other parties. It is manifest that the act meant to protect the rights of infants and femes covert from forfeiture, until three years after the disability should be removed. Yet if the argument at bar be correct, their

rights are completely gone, in all cases where they are not the sole and exclusive owners. Such a construction would materially impair the apparent beneficial intention of the legislature. *Shipp v. Miller*, 2 Wheat. 316, 325, 4 L. Ed. 248.

71. Revenue laws.—See post, "Construed Liberally," XVI, L, 24, c.

72. Remedial statutes.—Giving effect to existing rights.—An act which gives effect to existing rights is in its nature remedial. *Wilkinson v. Leland*, 2 Pet. 627, 661, 7 L. Ed. 542.

An act confirming the title of a purchaser from an executor is remedial. *Wilkinson v. Leland*, 2 Pet. 627, 661, 7 L. Ed. 542.

Abandoned and captured property act.—See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 2.

Restoring rights suspended by war.—*United States v. Wiley*, 11 Wall. 508, 515, 20 L. Ed. 211.

Relating to procedure.—*Bechtel v. United States*, 101 U. S. 597, 599, 25 L. Ed. 1019.

Granting appellate review.—*Stephen v. Cherokee Nation*, 174 U. S. 445, 478, 43 L. Ed. 1041.

The act of 1855, establishing the court of claims, is not an enabling act. *United States v. Gillis*, 95 U. S. 407, 415, 24 L. Ed. 503.

Quieting title to public land.—See the title PUBLIC LANDS, vol. 10, p. 1.

Making corporation liable for tort.—A statute providing for liability of incorporated companies for torts is remedial. *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 50 L. Ed. 367. See the title CORPORATIONS, vol. 4, p. 759.

Fishing bounty acts.—The act of congress passed on the 29th of July, 1813, which enacts that the owner of every fishing vessel shall, previous to receiving the allowance of bounty money mentioned in the act, produce to the collector the original agreement which may have been made with the fishermen, and also a certified copy of the days of sailing and returning, to the truth of which he shall swear before the collector, is not penal but directory merely and is not to be construed strictly. *United States v. Nickerson*, 17 How. 204, 15 L. Ed. 219. See the title BOUNTIES, vol. 3, p. 512.

The interstate commerce act is a remedial statute. *New York, etc., R. Co. v.*

to accomplish the purpose of its enactment.⁷³ A statute which is remedial as well as penal is to be liberally construed to effect the object which congress had in view in enacting it.⁷⁴

13. CURATIVE STATUTES.—Curative acts are to be liberally construed for the purpose of obtaining the benefits intended to give in the case of a defective execution of otherwise valid instruments.⁷⁵

14. AFFECTING THE PUBLIC.—Statutes enacted for the good of the general public are to be liberally construed,⁷⁶ and although they impose penalties or forfeitures are not to be construed strictly as penal statutes generally;⁷⁷ while

Interstate Commerce Comm., 200 U. S. 361, 50 L. Ed. 515.

A statute by which property is subjected to sale under execution issued upon a judgment is a remedial law for the benefit of creditors, and should be liberally construed. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 475, 20 L. Ed. 199.

A statute passed to adjust various land grants to railroads, in regard to which much confusion had existed in the construction and administration of those grants, is remedial. *Gertgens v. O'Connor*, 191 U. S. 237, 48 L. Ed. 163.

Providing for administration of insolvent estates.—A statute which establishes a complete system for the administration of the estates of insolvent debtors conveyed for the benefit of creditors, is remedial in its character and should be liberally construed so as to give effect to the legislative will. *Tracy v. Tuffly*, 134 U. S. 206, 223, 33 L. Ed. 879.

Relating to assignments to creditors.—*White v. Cotzhausen*, 129 U. S. 329, 337, 341, 32 L. Ed. 677.

Providing for appointment of naval officers.—The act of February 16, 1897, providing for the appointment and retirement of naval officers, is remedial. *Quackenbush v. United States*, 177 U. S. 20, 27, 44 L. Ed. 654.

73. Remedial statutes.—*Scott v. Reid*, 10 Pet. 524, 526, 9 L. Ed. 519; *Parks v. Turner*, 12 How. 39, 46, 13 L. Ed. 883; *United States v. Nickerson*, 17 How. 204, 209, 15 L. Ed. 219; *United States v. Padelford*, 9 Wall. 531, 537, 19 L. Ed. 788; *United States v. Hodson*, 10 Wall. 395, 19 L. Ed. 937; *Stewart v. Kahn*, 11 Wall. 493, 504, 20 L. Ed. 176; *Insurance Co. v. Dunn*, 19 Wall. 214, 224, 22 L. Ed. 68; *Telegraph Co. v. Eyser*, 19 Wall. 419, 427, 22 L. Ed. 43; *Texas v. Chiles*, 21 Wall. 488, 491, 22 L. Ed. 650; *McBurney v. Carson*, 99 U. S. 567, 569, 25 L. Ed. 378; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622, 626, 25 L. Ed. 1030; *Gertgens v. O'Connor*, 191 U. S. 237, 48 L. Ed. 163; *Beley v. Naphthalen*, 169 U. S. 353, 359, 360, 42 L. Ed. 775; *New York, etc., R. Co. v. Interstate Commerce Comm.*, 200 U. S. 361, 50 L. Ed. 515.

In a remedial act of congress the term "citizens" is to be considered as including state corporations, unless there be something beyond the mere use of the word to indicate an intent on the part of congress to exclude them. *Ramsey v. Tacoma Land Co.*, 196 U. S. 360, 362, 49 L.

Ed. 513. See the title CORPORATIONS, vol. 4, p. 648.

74. Both penal and remedial.—*Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196. See ante, "Penal Statutes," XVI, L. 11.

75. Curative acts.—*Williams v. Paine*, 169 U. S. 55, 80, 42 L. Ed. 658. See the titles ACKNOWLEDGMENTS, vol. 1, p. 91; CHATTEL MORTGAGES, vol. 3, p. 741.

76. Affecting public beneficially.—*United States v. North Carolina*, 6 Pet. 29, 8 L. Ed. 308; *Beaston v. Farmers Bank*, 12 Pet. 102, 134, 9 L. Ed. 1017; *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595; *Ross v. Jones*, 22 Wall. 576, 592, 22 L. Ed. 730; *Texas, etc., R. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, 210, 40 L. Ed. 940.

Statutes enacted for the public good and to suppress a public wrong are to be construed fairly and reasonably to carry out the legislative intent. *United States v. Stowell*, 133 U. S. 1, 12, 33 L. Ed. 555.

In construing a benevolent statute of the government, made for the benefit of its own citizens, and inviting and encouraging them to settle on its distant public lands, the words "single man" and "married man," may, especially if aided by the context and other parts of the statute, be taken in a generic sense. *Silver v. Ladd*, 7 Wall. 219, 19 L. Ed. 138.

Grant to aid work of improvement construed reasonably.—*Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 740, 23 L. Ed. 634.

Statutes enacted to encourage science and learning are to be liberally construed. *Benziger v. United States*, 192 U. S. 38, 48 L. Ed. 331.

Giving United States priority over other creditors.—The act of congress giving the United States priority over other creditors is for the public good and to be liberally construed. *United States v. North Carolina*, 6 Pet. 29, 8 L. Ed. 308. See the titles BANKRUPTCY, vol. 2, p. 919; UNITED STATES.

Intention controls.—The fact that a statute is passed to secure the public advantages and to subserve the public interests, it is not to be so liberally construed as to violate the language of the statute. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 540, 48 L. Ed. 548.

77. United States v. Stowell, 133 U. S. 1, 12, 33 L. Ed. 555.

statutes which injuriously affect the rights of the general public are to be strictly construed.⁷⁸

15. AFFECTING RIGHTS OF INDIANS.—Where a statute affects the rights of both white persons and Indians, it is to be construed most favorably to the rights of the latter.⁷⁹

16. AFFECTING COMMERCE.—Statutes affecting commerce are to be construed to promote and facilitate rather than to hamper and destroy it.⁸⁰

17. AFFECTING CONTRACTS.—Where a statute forms a part of a contract, it is to be construed according to the rules of construction for contracts.⁸¹

18. CREATING NEW RIGHTS AND REMEDIES.—Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive.⁸²

19. IN DEROGATION OF SOVEREIGNTY.—Unless its language be clear and imperative a statute will not be construed as a delegation of governmental powers.⁸³ And where a statute does delegate such powers it is to be strictly construed.⁸⁴

20. IN DEROGATION OF COMMON LAW.—A statute in derogation of the common law is to be construed strictly;⁸⁵ but not so strictly as to defeat the inten-

78. Affecting public injuriously.—An act of congress which hampers or destroys a branch of commerce is to be strictly construed. *Texas, etc., R. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, 218, 40 L. Ed. 940.

Statutes which allow gaming are to be construed strictly. *Aicardi v. State*, 19 Wall. 635, 22 L. Ed. 215.

79. Affecting rights of Indians.—*Worcester v. Georgia*, 6 Pet. 515, 582, 8 L. Ed. 483; *Choctaw Nation v. United States*, 119 U. S. 1, 28, 30 L. Ed. 306; *Minnesota v. Hitchcock*, 185 U. S. 373, 396, 402, 46 L. Ed. 954; *Cherokee Intermarriage Cases*, 203 U. S. 76, 94, 51 L. Ed. 96.

80. *Texas, etc., R. Co. v. Interstate Commerce Comm.*, 162 U. S. 197, 218, 219, 40 L. Ed. 940. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 478.

81. *Huidekoper v. Douglass*, 3 Cranch 1, 70, 2 L. Ed. 347. See the title CONTRACTS, vol. 4, p. 570.

A statute which amounts to a contract binding upon a state is to be strictly construed. *Williams v. Wingo*, 177 U. S. 601, 603, 44 L. Ed. 905.

82. *Barnet v. National Bank*, 98 U. S. 555, 558, 25 L. Ed. 212; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. See post, "In Derogation of Common Law," XVI, L. 20.

83. In derogation of sovereignty.—No sovereignty power which the community has an interest in preserving, undiminished, will be held to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 435, 14 L. Ed. 997; *Wright v. Nagle*, 101 U. S. 791, 796, 25 L. Ed. 921; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 628, 45 L. Ed. 702; *Wheeling, etc.,*

Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 292, 34 L. Ed. 967; *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595.

The power of taxation cannot be delegated by equivocal language. *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 435, 14 L. Ed. 997. See the title TAXATION.

84. *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 628, 45 L. Ed. 702.

85. In derogation of common law.—*McCool v. Smith*, 1 Black 459, 470, 17 L. Ed. 218; *Ransom v. Williams*, 2 Wall. 313, 318, 17 L. Ed. 803; *Meister v. Moore*, 96 U. S. 76, 79, 24 L. Ed. 826; *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 753, 30 L. Ed. 825; *Cope v. Cope*, 137 U. S. 682, 685, 34 L. Ed. 832; *Northern Securities Co. v. United States*, 193 U. S. 197, 361, 48 L. Ed. 679.

Presumption against derogation.—"The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law." *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 17, 49 L. Ed. 363. See, also, *Ross v. Jones*, 22 Wall. 576, 592, 22 L. Ed. 730; *Meister v. Moore*, 96 U. S. 76, 79, 24 L. Ed. 826.

Derogation of power of judiciary.—A statute intrenching upon the power of the judiciary as conferred by the common law must be strictly construed. *Nudd v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286.

Introducing new remedies.—Remedies of a statutory character, where the right to be enforced was unknown at the common law, are to be followed with strictness, both as to the methods to be pursued and the cases to which they are to be applied. *Ross v. Jones*, 22 Wall. 576, 591, 22 L. Ed. 730.

Imposing new liabilities.—Section 2059 of the Washington Code, providing for a right of action by a person injured by a person intoxicated, may leave a right of

tion of the legislature⁸⁶ or to prejudice the public.⁸⁷ It is not an objection to a construction that it makes the statute operate merely as declaratory of the common law.⁸⁸ A statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.⁸⁹

21. IN DEROGATION OF COMMON RIGHT.—A legislature can never be presumed to intend to destroy a vested right,⁹⁰ and its acts ought never to be so construed as to subvert rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object.⁹¹

action against the person furnishing the intoxicated person with liquor, creates a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 164, 37 L. Ed. 686.

Admitting succession of illegitimates.—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 340.

Authorizing taking depositions in absence of party.—The act of September 24, 1879, by which a deposition may be taken in the absence of the adverse party, is in derogation of the common law and to be strictly construed. *Bell v. Morrison*, 1 Pet. 351, 352, 7 L. Ed. 174.

Changing commercial law.—There is no case to which that rule should be applied with greater intensity than where the attempt is made to change by local legislation the rules of commercial law. *Ross v. Jones*, 22 Wall. 576, 591, 22 L. Ed. 730.

Although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation. *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892.

Changing rule of revival of repealed act.—The act of Virginia of 1789, declaring that the repeal of a repealing act shall not revive the first act repealed, is in derogation of the common law and to be construed strictly. *Brown v. Barry*, 3 Dall. 365, 1 L. Ed. 638.

Imposing liability upon stockholder.—*Brunswick Terminal Co. v. National Bank*, 192 U. S. 386, 48 L. Ed. 491. See, also, *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 753, 30 L. Ed. 825. See, generally, the title STOCK AND STOCKHOLDERS.

Providing form of solemnizing marriage.—See the title MARRIAGE, vol. 8, p. 251.

86. Not to defeat intent.—The safety appliance act of March 2, 1893, while in derogation of the common law, is not to be given a strict and narrow construction but to be construed so as to give effect to the intention of congress "to promote the safety of employees." *Johnson*

v. Southern Pac. Co., 196 U. S. 1, 49 L. Ed. 363.

87. Not to prejudice public.—"When a statute alters the common law, the meaning shall not be strained beyond the meaning of the words, except in cases of public utility, as when the end in view appears to be more comprehensive than the enacting words." *Ross v. Jones*, 22 Wall. 576, 592, 22 L. Ed. 730.

88. Cincinnati v. Morgan, 3 Wall. 275, 293, 18 L. Ed. 146.

89. Texas, etc., R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 427, 51 L. Ed. 553.

90. United States v. Fisher, 2 Cranch 358, 390, 2 L. Ed. 304; *Russell v. Transylvania University*, 1 Wheat. 432, 4 L. Ed. 129; *Lewis v. Lewis*, 7 How. 776, 784, 12 L. Ed. 909; *Murray v. Gibson*, 15 How. 421, 423, 14 L. Ed. 755; *Hamilton v. Dillin*, 21 Wall. 73, 22 L. Ed. 528; *Lincoln v. United States*, 202 U. S. 484, 498, 50 L. Ed. 1117.

91. Russell v. Transylvania University, 1 Wheat. 432, 4 L. Ed. 129; *United States v. Arredondo*, 6 Pet. 691, 736, 8 L. Ed. 547; *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Bartemeyer v. Iowa*, 18 Wall. 129, 137, 21 L. Ed. 929; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205.

"Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction or title." *Griffith v. Bogert*, 18 How. 158, 163, 15 L. Ed. 307.

"No general terms, intended for property to which they may be fairly applicable, and not particularly applied by the legislature; no silent, implied and constructive repeals, ought ever to be so understood as to divest a vested right." *Rutherford v. Greene*, 2 Wheat. 196, 203, 4 L. Ed. 218.

In *Doddridge v. Thompson*, 9 Wheat. 469, 479, 6 L. Ed. 137, an act of congress was construed to avoid annulling a title. See *Beals v. Hale*, 4 How. 37, 53, 11 L. Ed. 865; *Doolittle v. Bryan*, 14 How. 563, 566, 14 L. Ed. 543.

The swamp land grant act of the state of Oregon of October 18, 1878, in regard

22. GRANTS OF POWERS AND PRIVILEGES.—While legislative grants of powers and privileges are to be construed according to the clearly expressed legislative intention,⁹² if ambiguous, they are to be construed against the grantee and in favor of the grantor,⁹³ and in such grants nothing passes by implication or infer-

to applications for purchases made under a prior act of October 26, 1870, was construed liberally to avoid incurring a forfeiture of property rights. *Pennoyer v. McConnaughy*, 140 U. S. 1, 20, 35 L. Ed. 363.

Statutes affecting private rights, and particularly rights of freehold, are to be strictly construed. *Washington v. Pratt*, 8 Wheat. 681, 683, 5 L. Ed. 714.

Statutes concerning questions of property are to be construed liberally and in accordance with the sense of the instrument. *Respublica v. Weidle*, 2 Dall. 88, 1 L. Ed. 301.

"As privileges under the law of Louisiana are in derogation of common right, they cannot rest on implication, and can only result from express terms or from clear and irresistible intendment." *Burdon Cent. Sugar Refin. Co. v. Payne*, 167 U. S. 127, 142, 42 L. Ed. 105.

92. *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147; *Morgan v. Miami County*, 2 Black 722, 17 L. Ed. 342; *Wisconsin Cent. R. Co. v. Forsythe*, 159 U. S. 46, 55, 40 L. Ed. 71; *Sioux City, etc., R. Co. v. United States*, 159 U. S. 349, 360, 40 L. Ed. 177.

"A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires." *Schulenberg v. Harri-man*, 21 Wall. 44, 62, 22 L. Ed. 551.

93. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 545, 548, 9 L. Ed. 773; *Martin v. Waddell*, 16 Pet. 367, 411, 10 L. Ed. 997; *Mills v. St. Clair County*, 8 How. 569, 581, 12 L. Ed. 1201; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71, 81, 14 L. Ed. 55; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. 66, 88, 16 L. Ed. 500; *Rice v. Railroad Co.*, 1 Black 358, 380, 17 L. Ed. 147; *Morgan v. Miami County*, 2 Black 722, 17 L. Ed. 342; *The Binghampton Bridge*, 3 Wall. 51, 75, 18 L. Ed. 137; *Turnpike Co. v. State*, 3 Wall. 210, 18 L. Ed. 180; *United States v. Alexander*, 12 Wall. 177, 20 L. Ed. 381; *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133; *Peabody v. Stark*, 16 Wall. 240, 21 L. Ed. 311; *The Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Aicardi v. State*, 19 Wall. 635, 640, 22 L. Ed. 215; *Bailey v. Magwire*, 22 Wall. 215, 22 L. Ed. 850; *Smythe v. Fiske*, 23 Wall. 374, 22 L. Ed. 47; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 740, 758, 23 L. Ed. 634; *United States v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Turnpike Co. v. Illinois*, 96 U. S. 63, 24 L. Ed. 651; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 660, 666, 24 L. Ed. 1036; *United States v. Pugh*, 99 U. S. 265, 25 L. Ed. 322;

Wright v. Nagle, 101 U. S. 791, 796, 25 L. Ed. 921; *Missionary Society v. Dalles*, 107 U. S. 336, 343, 27 L. Ed. 545; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 371, 27 L. Ed. 419; *Hahn v. United States*, 107 U. S. 402, 406, 27 L. Ed. 527; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. Ed. 812; *Slidell v. Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321; *Railroad Commission Cases*, 116 U. S. 307, 325, 29 L. Ed. 636; *Hannibal, etc., R. Co. v. Missouri River Packet Co.*, 125 U. S. 260, 271, 31 L. Ed. 731; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 26, 32 L. Ed. 837; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. Ed. 267; *Wheeling, etc., Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 34 L. Ed. 967; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 80, 81, 35 L. Ed. 622; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. Ed. 537; *United States v. Southern Pac. R. Co.*, 146 U. S. 570, 36 L. Ed. 1091; *Shively v. Bowlby*, 152 U. S. 1, 10, 38 L. Ed. 331; *Lowndes v. Huntington*, 153 U. S. 1, 22, 33 L. Ed. 615; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, 325, 38 L. Ed. 992; *Sioux City, etc., R. Co. v. United States*, 159 U. S. 349, 360, 40 L. Ed. 177; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 664, 40 L. Ed. 838; *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677, 685, 40 L. Ed. 849; *Wisconsin Cent. R. Co. v. United States*, 164 U. S. 190, 202, 41 L. Ed. 399; *United States v. Oregon, etc., R. Co.*, 164 U. S. 526, 539, 41 L. Ed. 541; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 573, 588, 41 L. Ed. 560; *Burdon Cent. Sugar Refin. Co. v. Payne*, 167 U. S. 127, 142, 42 L. Ed. 105; *Detroit Citizens' St. R. Co. v. District Railway*, 171 U. S. 48, 43 L. Ed. 67; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 570, 44 L. Ed. 886; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 599, 45 L. Ed. 679; *Danville Water Co. v. Danville City*, 180 U. S. 619, 45 L. Ed. 696; *Rogers Park Water Co. v. Fergus*, 180 U. S. 624, 45 L. Ed. 702; *Northern Pac. R. Co. v. Soderberg*, 188 U. S. 526, 534, 47 L. Ed. 575; *Sena v. United States*, 189 U. S. 233, 239, 47 L. Ed. 787; *United States v. Michigan*, 190 U. S. 379, 401, 47 L. Ed. 1103; *Kean v. Calumet Canal, etc., Co.*, 190 U. S. 452, 499, 47 L. Ed. 1134; *Cornell v. Coyne*, 192 U. S. 418, 431, 48 L. Ed. 504; *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 49 L. Ed. 245; *Metropolitan St. R. Co. v. New York*, 199 U. S. 1, 50 L. Ed. 65; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 38, 50 L. Ed. 353; *Blair v. Chicago*, 201 U. S. 400, 471, 50 L. Ed. 801.

"Where a statute operates as a grant of

ence.⁹⁴ This rule applies to the construction of land grants,⁹⁵ to grants of powers and privileges to municipal⁹⁶ and private corporations,⁹⁷ though it seems not to public service corporations.⁹⁸ It does not apply to the construction of a grant

public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the state." *Slidell v. Grandjean*, 111 U. S. 412, 437, 28 L. Ed. 321.

Statutes which license gaming are to be construed strictly. *Aicardi v. State*, 19 Wall. 635, 22 L. Ed. 215.

The acts of the state of Illinois of February 14, 1859, and February 6, 1865, conferring rights and privileges upon street railway companies in the city of Chicago, are to be construed in favor of the city as against the railway companies. *Blair v. Chicago*, 201 U. S. 400, 50 L. Ed. 801.

"Grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege." *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696, 41 L. Ed. 1165.

94. In the interpretation of statutes the rule is that, as against the state, nothing is to be taken as conceded but what is given in express and explicit terms, or by an implication equally clear. *Newton v. Commissioners*, 100 U. S. 548, 25 L. Ed. 710. See cases cited above.

95. Grants of land.—See the titles MINES AND MINERALS, vol. 8, pp. 390, 412; PUBLIC LANDS, vol. 10, pp. 120, 150, 188, 219.

96. Grants to municipal corporations.—The rule is expressed in *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 43 L. Ed. 67, to be that the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. If inferred from other powers, it is not enough that the power is convenient to other powers; it must be indispensable to them. *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 598, 45 L. Ed. 679.

"A municipality is a governmental agency—its functions are for the public good, and the powers given it and to be exercised by it must be construed with reference to that good and to the distinctions which are recognized as important in the administration of public affairs." *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 55, 43 L. Ed. 67. See the title MUNICIPAL CORPORATIONS, vol. 8, p. 557.

97. Grants to private corporations.—*Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773; *Morgan v. Miami County*, 2 Black 722, 17 L. Ed. 342; *New Orleans v. Texas*, etc., R. Co., 171 U. S. 312, 343, 43 L. Ed. 178; *Holyoke*

Co. v. Lyman, 15 Wall. 500, 512, 21 L. Ed. 133.

Grants of immunity to a corporation from legitimate governmental control are never to be presumed. *Ruggles v. Illinois*, 108 U. S. 526, 531, 27 L. Ed. 812.

"This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority." *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 49, 35 L. Ed. 55; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, 26, 27, 32 L. Ed. 837.

Wherever privileges are granted to a corporation, and the grant comes under revision in the courts, it is to be construed strictly against the corporation and in favor of the public, and nothing passes except what is given in clear and explicit terms. *Rice v. Railroad Co.*, 1 Black 358, 17 L. Ed. 147.

98. Grants to public service corporations.—The rule that public grants are to be strictly construed is not applicable to a grant to a public service corporation where a liberal construction is conducive to the public welfare. Such grants should receive a more liberal construction than grants for a purely private purpose. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548; *United States v. Denver, etc., R. Co.*, 150 U. S. 1, 37 L. Ed. 975; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 28 L. Ed. 1109.

The granting to railroads of the right to cut timber on adjacent land in the act of March 3, 1875, was a grant to quasi public enterprises, and is to be more liberally construed than the grant to those strictly private. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 48 L. Ed. 548.

General legislation, offering advantages in the public lands to individuals or corporations, as an inducement to the accomplishment of enterprises of a quasi public character through undeveloped public domain, should receive a more liberal construction than is given to an ordinary private grant. *United States v. Denver, etc., R. Co.*, 150 U. S. 1, 37 L. Ed. 975, followed in *United States v. Denver, etc., R. Co.*, 150 U. S. 16, 37 L. Ed. 980.

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private convey-

to aid a work of public benefit.⁹⁹ This rule is the last to be resorted to, and never to be relied upon, but when all other rules of exposition fail.¹

23. GRANTS OF FEES TO PUBLIC OFFICERS.—Statutes granting fees to public officers are to be strictly construed.²

24. REVENUE STATUTES.—a. *In General*.—The observance of a settled principle for the construction of revenue statutes is absolutely necessary. Without it, the public revenue could not be collected, and inextricable embarrassments and difficulties must constantly occur.³

b. *Construed by General Rules*.—For general rules of construction applicable to the construction of revenue laws, see elsewhere in this title.^{3a}

c. *Construed Liberally*.—Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.⁴ Such statutes are to be construed favorably to the government.⁵

ances." *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 625, 28 L. Ed. 1109.

A grant to a railroad company of an exemption from legislative interference within a certain limit must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. * *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 182, 32 L. Ed. 377.

99. Grants for public benefit.—A grant made for the purpose of aiding a work of internal improvement, does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of congress. *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 740, 23 L. Ed. 634.

This rule of construction obtains in grants from the United States to states or corporations in aid of the construction of public works. *United States v. Michigan*, 190 U. S. 379, 401, 47 L. Ed. 1103.

1. Gives way to other rates.—*Richmond, etc., R. Co. v. Louisiana R. Co.*, 13 How. 71, 86, 14 L. Ed. 55, McLean, J., dissenting.

2. Grants of fees to public officers.—*United States v. Van Duzee*, 185 U. S. 278, 281, 46 L. Ed. 909.

3. Revenue statutes.—*Stuart v. Maxwell*, 16 How. 150, 14 L. Ed. 883.

Construction of tariff act of 1883.—*Hartman v. Oliver*, 125 U. S. 525, 527, 31 L. Ed. 813; *Sherman v. Robertson*, 136 U. S. 570, 571, 34 L. Ed. 540.

3a. See ante, "General Rules of Construction," XVI, I.

4. Revenue laws—Construed liberally.—*United States v. Burdett*, 9 Pet. 682, 9 L. Ed. 273; *Taylor v. United States*, 3 How. 397, 210, 11 L. Ed. 559; *Rankin v. Hoyt*, 3 How. 327, 332, 11 L. Ed. 996; *Cliquot's Champagne*, 3 Wall. 114, 145, 18 L. Ed. 116; *United States v. Hodson*, 10 Wall. 395, 406, 19 L. Ed. 937, affirmed in *United States v. Hodson*, 154 U. S., appx., 580, 19

L. Ed. 937; *Smythe v. Fiske*, 23 Wall. 374, 380, 33 L. Ed. 47; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *United States v. Stowell*, 133 U. S. 1, 12, 33 L. Ed. 555; *United States v. Goldenberg*, 168 U. S. 95, 42 L. Ed. 394; *Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363.

It was formerly held that a statute which provides for the condemnation and forfeiture of goods which are entered for the payment of duties under a false denomination with a view to defraud the revenue, is a highly penal law, and should, in conformity with the rule on the subject, be strictly construed. *United States v. Eighty-Four Boxes of Sugar*, 7 Pet. 453, 8 L. Ed. 745.

And that it is requisite that revenue laws should be strictly worded, though, undoubtedly, there are cases where the construction of the words must be such as to prevent more injury being done than was intended. *Phile v. The Ship Anna*, 1 Dall. 197, 206, 1 L. Ed. 98.

But by the now settled doctrine of the federal supreme court (notwithstanding the opposing dictum of Mr. Justice McLean in *United States v. Eighty-Four Boxes of Sugar*, 7 Pet. 453, 462, 463, 8 L. Ed. 745), statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the legislature. *Taylor v. United States*, 3 How. 197, 210, 11 L. Ed. 559; *Cliquot's Champagne*, 3 Wall. 114, 145, 18 L. Ed. 116; *United States v. Hodson*, 10 Wall. 395, 406, 19 L. Ed. 937; *Smythe v. Fiske*, 23 Wall. 374, 380, 23 L. Ed. 47; *United States v. Stowell*, 133 U. S. 1, 12, 33 L. Ed. 555.

5. Construed favorably to government.—*Earnshaw v. Cadwalader*, 145 U. S. 247, 36 L. Ed. 693.

d. *Construed with Reference to Purpose and Object.*—In considering the tariff laws the court will, in aid of interpretation, recognize the fact that such acts are generally intended for the protection of American industries.⁶

25. **EXEMPTION LAWS.**—A statute creating an exemption from future legislation is to be construed strictly.⁷ This rule applies to statutes creating exemptions from taxation,⁸ and exemptions from governmental control.⁹ A statute creating an exemption to aid the accomplishment of a particular result should be so construed as to have the exemption cease when that result has been accomplished.¹⁰

26. **MINING LAWS.**—In most actions concerning mining claims, the parties agree as to the proper rule of construction to be applied to the mining laws, and the controversies are usually limited to questions of fact relating to the compliance with these laws.¹¹

27. **STATUTE OF FRAUDS.**—See elsewhere.¹²

28. **OTHER PARTICULAR STATUTES.**—See elsewhere.¹³

M. Construction of Particular Words and Phrases.—For the judicial construction of particular words and phrases by the supreme court, see such words in alphabetical order throughout this work; e. g., *ABROAD*, vol. 1, p. 50; *ACROSS*, vol. 1, p. 95; *CURRENT*, vol. 5, p. 154; *DEBT*, vol. 5, p. 203; etc.

1. **INTRODUCTORY TERMS.**—If a sentence be construed literally and grammatically, introductory words attached to all the after descriptions.¹⁴

2. **GENERAL TERMS**—a. *In General.*—A general clause as fully comprehends the particulars within its designation, as if those particulars has been especially enumerated.¹⁵

6. **Construed with reference to purpose and object.**—*Arnold v. United States*, 147 U. S. 494, 37 L. Ed. 253.

7. **Exemption laws.**—An exemption from future general legislation by an act of the legislature, cannot be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 84, 33 L. Ed. 267; *Louisville, etc., R. Co. v. Kentucky*, 183 U. S. 503, 46 L. Ed. 298; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. Ed. 419.

8. **Exemption from taxation.**—See the title *TAXATION*.

9. **Exemption from governmental control.**—See ante, "Grants of Powers and Privileges," XVI, L, 22.

10. **Exemption to aid particular purpose.**—*Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247.

11. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 510, 44 L. Ed. 864.

12. See the title *FRAUDS, STATUTE OF*, vol. 6, p. 452.

13. **Abandoned and captured property acts.**—See the title *ABANDONED AND CAPTURED PROPERTY*, vol. 1, p. 2.

Bankruptcy acts.—See the title *BANKRUPTCY*, vol. 2, p. 805. And see ante, "Construed with Reference to Statutes in Pari Materia," XVI, I, 4.

Mechanics' lien laws.—See the titles *MECHANICS' LIENS*, vol. 8, p. 329; *UNITED STATES*.

Taxation laws.—For the construction of laws imposing taxation, creating exemptions and providing for tax sales, see the title *TAXATION*.

Patent and copyright laws.—See the titles *COPYRIGHT*, vol. 4, p. 605; *PATENTS*, vol. 9, p. 151.

Prize acts.—See the title *PRIZE*, vol. 9, p. 744.

Statutes of descent and distribution.—See the title *DESCENT AND DISTRIBUTION*, vol. 5, p. 340.

Statutes of limitations.—See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 909.

14. *The Paulina's Cargo*, 7 Cranch 52, 64, 3 L. Ed. 266.

15. *Gardner v. Collins*, 2 Pct. 58, 91, 7 L. Ed. 347; *United States v. Denver, etc., R. Co.*, 150 U. S. 1, 12, 37 L. Ed. 975.

The general clause, "other domestic purposes," in the act of June 3, 1878, is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. *United States v. United Verde Copper Co.*, 196 U. S. 207, 215, 49 L. Ed. 449.

Any car.—*Johnson v. Southern Pac. Co.*, 196 U. S. 1, 49 L. Ed. 363, followed in *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. Ed. 681. And see *ANY*, vol. 1, p. 330; *MASTER AND SERVANT*, vol. 8, p. 285.

The words "assistant surgeon" have been construed to mean the whole class of assistant surgeons, passed as well as those not passed. It was so held in construing the act of March 3, 1894, providing for the pay of the medical corps of

b. *Qualifying General Terms*—(1) *In General*.—General expressions of the legislature cannot be restricted or qualified by the courts,¹⁶ unless required by the legislative intent,¹⁷ the object and purpose of the act,¹⁸ their context,¹⁹ other laws,²⁰ the circumstances existing at the time of its enactment,²¹ the common law,²² specified provisions,²³ the legislative jurisdiction,²⁴ or to avoid inconvenience, absurdity and injustice.²⁵ The extent of the limitation is determined by the legislative intent.²⁶

(2) *By Special Terms*—(a) *In General*.—Where there is, in a statute, a particular enactment, and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the par-

the army. *United States v. Farenholt*, 206 U. S. 226, 51 L. Ed. 1036.

Bastards.—According to the principles of the common law, an illegitimate child is *filius nullius*, and can have no father known to the law; and when the legislature speaks in general terms of children of that description, without making any exceptions, the court is bound to suppose they design to include the whole class. *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408. On this subject, see note a, to 5 Wheat. 262.

16. *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 246, 46 L. Ed. 1144; *United States v. Coombs*, 12 Pet. 72, 80, 9 L. Ed. 1004.

"We cannot supply qualifications which the legislature has failed to express." *United States v. Fox*, 95 U. S. 670; 672, 673, 24 L. Ed. 538.

"When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all." *United States v. Hartwell*, 6 Wall. 385, 396, 18 L. Ed. 830.

Where a statute granted the right to cut timber for the construction of a railroad, it is to be construed as not imposing any limitation as to the place where the timber may be used. The road is to be treated as an entirety, and the use of the timber not confined to any particular portion of the road. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 532, 48 L. Ed. 548; *Winona, etc., R. Co. v. Barney*, 113 U. S. 618, 28 L. Ed. 1109.

17. **Restraind by intention.**—*United States v. Chicago, etc., R. Co.*, 195 U. S. 524, 49 L. Ed. 306; *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471; *McKee v. United States*, 164 U. S. 287, 293, 41 L. Ed. 437; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 320, 41 L. Ed. 1007; *Brewer v. Blougher*, 14 Pet. 178, 198, 10 L. Ed. 408; *Petri v. Commercial Nat. Bank*, 142 U. S. 644, 650, 35 L. Ed. 1144; *McKee v. United States*, 164 U. S. 287, 41 L. Ed. 437.

The general words in a statute may be limited to those objects to which the legislature intended its legislation to apply.

Holy Trinity Church v. United States, 143 U. S. 457, 36 L. Ed. 226; *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471.

Revenue laws.—In the construction of revenue laws it is the duty of the court to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention. *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566, citing *Brewer v. Blougher*, 14 Pet. 178, 10 L. Ed. 408.

18. *United States v. Coombs*, 12 Pet. 72, 9 L. Ed. 1004.

"Any grant of power in general terms read literally can be construed to be unlimited, but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it." *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 55, 43 L. Ed. 67.

19. General expressions must be restrained by the more special and definite indications of intention furnished by the context. *United States v. Jones*, 131 U. S. 1, 19, 33 L. Ed. 90.

20. *Mills v. Scott*, 99 U. S. 25, 28, 25 L. Ed. 294.

21. *United States v. United Verde Copper Co.*, 196 U. S. 207, 215, 49 L. Ed. 449.

22. "Where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature, for statutes are not presumed to make any alteration in the common law, beyond what is expressed in the statutes." *Ross v. Jones*, 22 Wall. 576, 592, 22 L. Ed. 730.

23. **Restraind by specific terms.**—See post, "By Special Terms," XVI, M, 2, b, (2).

24. *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471.

25. *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Carlisle v. United States*, 16 Wall. 147, 21 L. Ed. 426; *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226; *Hawaii v. Mankichi*, 190 U. S. 197, 212, 47 L. Ed. 1016. See ante, "Injustice, Inconvenience and Absurdity," XVI, K, 11.

26. *United States v. Palmer*, 3 Wheat. 610, 631, 4 L. Ed. 471.

ticular enactment.²⁷ This rule applies where an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include,²⁸ and where it contains an exception from an exemption from its general provisions.²⁹

(b) *Ejusdem Generis Rule*—aa. *In General*.—It is a correct rule of interpretation that where particular words of a statute are used in connection with general, the general words are restricted in meaning to objects of like kind with those specified.³⁰ But this rule is subject to the qualification that general words

27. **By special terms.**—*Homer v. The Collector*, 1 Wall. 486, 17 L. Ed. 688; *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 556; *Smythe v. Fiske*, 23 Wall. 374, 22 L. Ed. 47; *Movius v. Arthur*, 95 U. S. 144, 24 L. Ed. 420; *Arthur v. Lahey*, 96 U. S. 112, 24 L. Ed. 766; *Arthur v. Stephani*, 96 U. S. 125, 126, 24 L. Ed. 771; *Arthur v. Rheims*, 96 U. S. 143, 24 L. Ed. 813; *Vietor v. Arthur*, 104 U. S. 498, 26 L. Ed. 633; *Robertson v. Glendenning*, 132 U. S. 158, 159, 33 L. Ed. 298; *United States v. Chase*, 135 U. S. 255, 260, 34 L. Ed. 117; *Seeberger v. Cahn*, 137 U. S. 95, 97, 34 L. Ed. 599; *American Net, etc., Co. v. Worthington*, 141 U. S. 468, 35 L. Ed. 821; *Bogle v. Magone*, 152 U. S. 623, 626, 38 L. Ed. 574; *Chew Hing Lung v. Wise*, 176 U. S. 156, 160, 44 L. Ed. 412; *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 558, 48 L. Ed. 788; *McKee v. United States*, 164 U. S. 287, 294, 41 L. Ed. 437; *Kepner v. United States*, 195 U. S. 100, 125, 49 L. Ed. 114.

A statute, after it had declared by enumeration, in the clause under consideration, what articles shall be nonmailable, adds a separate and distinct clause declaring that "every letter upon the envelope of which * * * indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed * * * shall not be conveyed in the mails," and the person knowingly or wilfully depositing the same in the mails "shall be deemed guilty of a misdemeanor," etc. This distinctly additional clause, specifically designating and describing the particular class of letters which shall be nonmailable, clearly limits the inhibitions of the statute to that class of letters alone, whose indecent matter is exposed on the envelope. *United States v. Chase*, 135 U. S. 255, 260, 34 L. Ed. 117.

General and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general. *Townsend v. Little*, 109 U. S. 504, 512, 27 L. Ed. 1012.

"It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." *Kepner v. United States*, 195 U. S. 100, 125, 49 L. Ed. 114.

28. **General provisions embracing special.**—*United States v. Chase*, 135 U. S. 255, 260, 34 L. Ed. 117.

29. *United States v. Perry*, 146 U. S. 71, 75, 36 L. Ed. 890; *Robertson v. Glendenning*, 132 U. S. 158, 33 L. Ed. 298.

30. **Ejusdem generis rule.**—*Faw v. Mars-teller*, 2 Cranch 10, 22, 2 L. Ed. 191; *United States v. Fisher*, 2 Cranch 358, 387, 2 L. Ed. 304; *Bend v. Hoyt*, 13 Pet. 263, 272, 10 L. Ed. 154; *Moore v. American Transp. Co.*, 24 How. 1, 36, 16 L. Ed. 674; *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566; *Arthur v. Lahey*, 96 U. S. 112, 117, 24 L. Ed. 766; *Cutler v. Kouns*, 110 U. S. 720, 723, 28 L. Ed. 305; *Vane v. Newcomber*, 132 U. S. 220, 236, 33 L. Ed. 310; *United States v. Rodgers*, 150 U. S. 249, 278, 37 L. Ed. 1071.

The rule that when general words follow particular words, the former must be construed as applicable to the things or persons particularly mentioned, is too narrow. *Cutler v. Kouns*, 110 U. S. 720, 723, 28 L. Ed. 305.

"When the sentence proceeds with the words, 'or in any other place or district of country, under the sole and exclusive jurisdiction of the United States,' the construction seems irresistible, that, by the words 'other place,' was intended another place of a similar character with those previously enumerated, and with that which follows." *United States v. Bevans*, 3 Wheat. 336, 390, 4 L. Ed. 404.

In the postal act of July 12, 1876, the word "writing" is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written. *United States v. Chase*, 135 U. S. 255, 258, 34 L. Ed. 117.

Where the general terms "spirituous liquors" are followed by the special term "wine," and it is evident the general terms were not intended to include all intoxicating drinks, the statute does not include lager beer. *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556.

That the details of one part of a statute may contain regulations restricting

will be construed more broadly than specific, where such construction is clearly necessary to give effect to the meaning of the legislature.³¹ The rule does not apply where a distinct member of a sentence, describing one entire class of offenses, would be rendered almost totally useless, by its application.³²

bb. *In Construction of Revenue Laws*.—In applying the rule of ejusdem generis in the construction of tariff laws, it has been held that headless hair pins could not be relegated to the category of pins, solid-head or other,³³ nor iron show cards used for advertising purposes to the category of printed matter, books and pamphlets,³⁴ nor hosiery made of silk to hosiery made of wool,³⁵ nor birds with horses, mules, cattle, sheep, hogs, and other live animals.³⁶ The rule has been applied also in the construction of the statute enumerating the officers to whom penalties and forfeitures should be distributed.³⁷

3. PROVISOS AND EXCEPTIONS.—a. *In General*.—The law does not attach a fixed and invariable meaning to a proviso.³⁸ Its provisions are to be construed by the same rules as the provisions of the enacting clause.³⁹

b. *As Exceptions to Enacting Clause*.—The general rule is that the purpose and effect of a proviso is to make an exception from the enacting clause, to restrain generality and to prevent misinterpretation,⁴⁰ but it is frequently in

the extent of general expressions used in another part of the same act, is one of the plain rules laid down by common sense for the exposition of statutes, and which has been uniformly acknowledged. *Pennington v. Cox*, 2 Cranch 33, 52, 2 L. Ed. 199.

The natural import of general words in the first instance and when standing alone may be qualified by another part of the act. *Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199.

In the act of March 3, 1875, the word "adjacent" is therein used in connection with the words "contiguous" and "adjoining," so as to give an impression that it is almost, though not entirely, synonymous with those words. And the court think this is true. "Contiguous, lying close at hand, near," is the meaning given it by the lexicographers. It need not be adjoining or actually contiguous, but it must be, as said, near or close at hand. *United States v. St. Anthony R. Co.*, 192 U. S. 524, 533, 48 L. Ed. 548.

31. *When rule not applicable*.—*Cutler v. Kouns*, 110 U. S. 720, 728, 28 L. Ed. 305; *United States v. Briggs*, 9 How. 351, 13 L. Ed. 170; *Faw v. Marsteller*, 2 Cranch 10, 23, 2 L. Ed. 191.

32. *Adams v. Woods*, 2 Cranch 336, 341, 2 L. Ed. 297.

33. *Robertson v. Rosenthal*, 132 U. S. 460, 33 L. Ed. 392.

34. *Forbes Lithograph Mfg. Co. v. Worthington*, 132 U. S. 655, 33 L. Ed. 453.

The words "printed matter" as used in the tariff laws apply only to articles ejusdem generis with books and pamphlets, which iron show cards are not. *Forbes Lithograph Mfg. Co. v. Worthington*, 132 U. S. 655, 33 L. Ed. 453.

35. *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154.

36. *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566, cited and discussed in *Arthur v. Lahey*, 96 U. S. 112, 116, 24 L. Ed. 766.

37. *Ring v. Maxwell*, 17 How. 147, 151, 15 L. Ed. 25.

38. *Provisos and exceptions*.—*Austin v. United States*, 155 U. S. 417, 431, 39 L. Ed. 206.

39. *United States v. Whitridge*, 197 U. S. 135, 143, 49 L. Ed. 696.

A proviso should be construed in connection with its context. A proviso in § 70a of the bankruptcy act of 1898 is to be construed with and limited by the words of the context "except in so far as it is to property which is exempt." *Holden v. Stratton*, 198 U. S. 202, 49 L. Ed. 1018.

40. *As exception to enacting clause*.—*Wayman v. Southard*, 10 Wheat. 1, 30, 6 L. Ed. 253; *Patterson v. Winn*, 11 Wheat. 380, 387, 6 L. Ed. 500; *Voorhees v. United States Bank*, 10 Pet. 449, 471, 9 L. Ed. 490; *United States v. Dickson*, 15 Pet. 141, 165, 10 L. Ed. 689; *Minis v. United States*, 15 Pet. 423, 445, 10 L. Ed. 791; *Smith v. Turner*, 7 How. 283, 407, 12 L. Ed. 702; *Surgett v. Lapice*, 8 How. 48, 68, 12 L. Ed. 982; *Bank v. Collector*, 3 Wall. 495, 18 L. Ed. 207; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 758, 23 L. Ed. 634; *Ryan v. Carter*, 93 U. S. 78, 83, 23 L. Ed. 807; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 181, 32 L. Ed. 377; *Thaw v. Ritchie*, 136 U. S. 519, 542, 34 L. Ed. 531; *Selma, etc., R. Co. v. United States*, 139 U. S. 560, 566, 35 L. Ed. 266; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 602, 36 L. Ed. 829; *Austin v. United States*, 155 U. S. 417, 431, 39 L. Ed. 206; *Quackenbush v. United States*, 177 U. S. 20, 26, 44 L. Ed. 654; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 242, 46 L. Ed. 1144; *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295; *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 36, 46 L. Ed. 860; *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. Ed. 681.

"It restrains the generality of the previous provisions." *Dollar Sav. Bank v.*

acts of congress used to introduce new matter extending rather than limiting that which precedes.⁴¹ It is not presumed that the legislature intends to limit by a proviso the whole of the power granted by the statute.⁴² The word provided is used in our legislature for many purposes besides that of expressing a condition.⁴³

c. *As Repeal of Enacting Clause.*—A proviso cannot be considered as a repeal or a change of the body of a section where it does not contradict it, but is in harmony and consistent therewith.⁴⁴

d. *Construed Strictly.*—Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms.⁴⁵ When it is shown that a person comes within the general provisions of an act, the burden of proof is upon him to show that he comes within an exception thereto.⁴⁶ The rules in regard to burden of proof and construction are the same in this case.⁴⁷

e. *Construed with Reference to Enacting Clause.*—While not always so limited,⁴⁸ it is a general rule of construction that a proviso refers only to the pro-

United States, 19 Wall. 227, 236, 22 L. Ed. 80.

The proviso in the act of Mississippi of June 8, 1822, making a sheriff liable for an escape, takes the case of an escape, where the prisoner is in custody on an execution, out of the provisions in the enacting clause. *Long v. Palmer, etc., Co.*, 16 Pet. 65, 69, 10 L. Ed. 888.

41. *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 37, 46 L. Ed. 860; *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 242, 46 L. Ed. 1144; *Minis v. United States*, 15 Pet. 423, 445, 10 L. Ed. 791; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 181, 32 L. Ed. 377.

The act of February 19, 1903, to further regulate commerce with foreign nations and among the states, uses the word "Provided" to introduce matter to enlarge rather than limit the application of previous terms and should not receive so narrow a construction as to defeat its purpose. *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 46 L. Ed. 860.

"It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater significance than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences." *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 181, 32 L. Ed. 377.

"It is undoubtedly true that in congressional legislation provisos have been included in statutes which are really independent pieces of legislation, but this is a misuse of the usual purpose and effect of a proviso." *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295.

42. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 54.

43. Use of word "provided."—The word

"provided" is frequently used to separate and distinguish the different paragraphs of sentences in a statute and has no greater signification than the conjunctions "but" and "and." *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 181, 32 L. Ed. 377; *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 46 L. Ed. 860; *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. Ed. 681.

44. *Greely v. Thompson*, 10 How. 225, 13 L. Ed. 397.

45. *United States v. Ewing*, 140 U. S. 142, 148, 35 L. Ed. 388; *United States v. Dickson*, 15 Pet. 141, 165, 10 L. Ed. 689. See, also, *Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791; *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. Ed. 681.

46. *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. Ed. 681; *Interstate Commerce Comm. v. Baird*, 194 U. S. 25, 46 L. Ed. 860; *Ryan v. Carter*, 93 U. S. 78, 23 L. Ed. 807; *United States v. Dickson*, 15 Pet. 141, 10 L. Ed. 689; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 758, 23 L. Ed. 634; *Beaston v. Farmers' Bank*, 12 Pet. 102, 134, 9 L. Ed. 1017.

47. *Schlemmer v. Buffalo, etc., R. Co.*, 205 U. S. 1, 51 L. Ed. 681; *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538.

48. *Wayman v. Southard*, 10 Wheat. 1, 30, 6 L. Ed. 253.

"While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we cannot forget that in practice no such limit is observed." *United States v. Whitridge*, 197 U. S. 135, 143, 49 L. Ed. 696; *United States v. Falk*, 204 U. S. 143, 51 L. Ed. 411; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 181, 32 L. Ed. 377.

The second proviso, in the third section of the act of March 22, 1852, which declares "that no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law," is not limited in its effect to the section where it is found, but is an independent proposition,

visions of the enacting clause,⁴⁹ and is to be construed with reference thereto.⁵⁰

f. *Proviso to Temporary Act.*—The general rule is that a proviso ingrafted upon an act making a special and temporary appropriation is to be construed as not having a general and permanent application to all future appropriations, on the ground that it is the office of a proviso to merely except a thing from or qualify or restrain the enacting clause;⁵¹ but such proviso is to be construed as applicable to future appropriations, where the same reasons for its application will exist in future years equally as well as in the year in which the appropriation is made.⁵²

4. **REPUGNANT TERMS.**—A law requiring two repugnant and incompatible things is incapable of receiving a literal construction, and must sustain some change of language to be rendered intelligible. This change, however, ought to be as small as possible, and with a view to the sense of the legislature as manifested by themselves.⁵³

5. **WORDS DENOTING TENSE.**—In order to carry out what purports to be the intention of the legislature, a present participle may be construed as a verb in the future tense.⁵⁴ A verb in a statute in the present tense is not to be construed with reference to the date of the statute, but with reference to future acts of persons thereunder,⁵⁵ and though in the past tense with reference to its operation it may be future in relation to the period when it is to take effect.⁵⁶

6. **WORDS DENOTING NUMBER.**—The general rule is that words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular.⁵⁷

7. **WORDS OF REFERENCE.**—Whenever, in the statutes of any government, a general reference is made to law, either implicitly or expressly, it can only relate to the laws of the government making this reference.⁵⁸ The words “un-

which applies alike to all officers of this class. *United States v. Babbitt*, 1 Black 55, 17 L. Ed. 94.

49. *United States v. Whitridge*, 197 U. S. 135, 143, 49 L. Ed. 696; *United States v. Falk*, 204 U. S. 143, 149, 51 L. Ed. 411.

“The operation of the proviso may be limited by the scope of the enacting clause.” *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295.

50. *Huidekoper v. Douglass*, 3 Cranch 1, 67, 2 L. Ed. 347; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 235, 22 L. Ed. 80.

The purview of the act and the words of the proviso must be reconciled if possible that the two may stand together. *White v. United States*, 191 U. S. 545, 551, 48 L. Ed. 295.

A construction of a proviso to an act which makes the proviso plainly repugnant to the body of the act, is inadmissible. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80.

It was so held as to the construction of the proviso in § 50 of the tariff act of 1890, in connection with § 33 of the act of 1897. *United States v. Falk*, 204 U. S. 143, 149, 51 L. Ed. 411.

The general clause of the navy personnel act of March 3, 1899, directs that increased pay shall begin on June 30, a proviso thereto directs credit on the date of appointment. It was argued that this means as on the date of appointment. It was held, however, that the act took effect

on June 30. *White v. United States*, 191 U. S. 545, 48 L. Ed. 295.

51. *Minis v. United States*, 15 Pet. 423, 10 L. Ed. 791; *United States v. Ewing*, 140 U. S. 142, 35 L. Ed. 388.

52. *United States v. Ewing*, 140 U. S. 142, 35 L. Ed. 388.

53. *Huidekoper v. Douglass*, 3 Cranch 1, 66, 2 L. Ed. 347.

54. *Huidekoper v. Douglass*, 3 Cranch 1, 66, 2 L. Ed. 347.

The words “as made or amended” in regard to rights and privileges of street railway companies under contracts with a city, refer to the past and not to the future engagement. *Blair v. Chicago*, 201 U. S. 400, 464, 50 L. Ed. 801. See ante, “Construed as Prospective or Retrospective,” XVI, I, 6.

55. *Wilson v. Mason*, 1 Cranch 45, 101, 2 L. Ed. 29.

56. The word “imported” in the act of May 10, 1800, in regard to the commission allowed the collector of the port of Petersburg, was construed to be future in relation to the period when the charge of commission was to take effect. *United States v. Heth*, 3 Cranch 399, 2 L. Ed. 479, Washington, J.

57. **Words denoting number.**—It is so provided by the first section of the Revised Statutes. *United States v. Oregon*, etc., R. Co., 164 U. S. 526, 541, 41 L. Ed. 541.

58. *Houston v. Moore*, 5 Wheat. 1, 42, 5 L. Ed. 19.

less otherwise provided by law"⁵⁹ and the words "not herein otherwise provided for" do not refer to previous statutes.⁶⁰

8. "OR" AND "AND."—See elsewhere.⁶¹

9. "MAY" AND "SHALL."—See elsewhere.⁶²

N. Effect of Construction—1. IN GENERAL.—A long settled interpretation of a statute is to be considered as part of the statute itself. Especially is this true where the statute and its interpretation together form a rule of title and property.⁶³

2. AS STARE DECISIS.—While the courts are under no obligation to put the same construction upon a later statute that has placed upon a similar earlier one;⁶⁴ yet, if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction.⁶⁵

XVII. Operation and Effect.

A. As Contract.—A statute may operate as a contract between the United States⁶⁶ or a state and another contracting party.⁶⁷ It may form a part of a contract between individuals,⁶⁸ but where the statute so states, a reference thereto must be made.⁶⁹

B. As Grant.—See elsewhere.⁷⁰

C. As Source of International Law.—The most certain guide for the decision of questions of international law is a treaty or a statute of this country.⁷¹

D. As Source of Usage and Custom.—See elsewhere.⁷²

E. As Ratification of Past Transactions.—See elsewhere.⁷³

F. As Evidence.—The most that can be attributed to a recital of facts in the preamble of an act is, that it was represented to the legislature that they existed.⁷⁴ While recitals in public acts are regarded as evidence of the facts

59. It is settled that the words "unless otherwise provided by law," in § 6 of the circuit court of appeals act of 1891, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes. *The Paquete Habana*, 175 U. S. 677, 683, 44 L. Ed. 320.

60. *Movius v. Arthur*, 95 U. S. 144, 147, 24 L. Ed. 420.

61. "Or" and "and."—See OR, vol. 8, p. 1004.

62. "May" and "shall."—See MAY, vol. 8, p. 325; SHALL, vol. 10, p. 1130.

63. *Taylor v. Thomson*, 5 Pet. 358, 369, 8 L. Ed. 154.

The settled judicial construction of a statute, so far as contract rights were thereunder acquired, is as much a part of the statute as the text itself, and a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment by legislative enactment. *Douglass v. County of Pike*, 101 U. S. 677, 25 L. Ed. 968.

64. *Bacon v. Texas*, 163 U. S. 207, 226, 41 L. Ed. 132; *Wood v. Brady*, 150 U. S. 18, 37 L. Ed. 981. See, generally, the title STARE DECISIS.

65. *Schell v. Fauche*, 138 U. S. 562, 572, 34 L. Ed. 1040.

66. *United States v. Union Pac. R. Co.*, 91 U. S. 72, 23 L. Ed. 224; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. Ed. 496; *Union Pac. R. Co. v. United States*, 104 U. S. 662, 26 L. Ed. 884; *United States v.*

Central Pac. R. Co., 118 U. S. 235, 238, 30 L. Ed. 173.

67. A statute may operate as a contract within the impairment clause of the United States constitution. *Fletcher v. Peck*, 6 Cranch 87, 137, 3 L. Ed. 162.

68. *United States v. Arredondo*, 6 Pet. 691, 715, 8 L. Ed. 547.

69. **Reference to statute.**—Where parties have contracted under an original act and there is an amendatory act thereto which provides that a contracting party "shall be entitled" to the remedy it provides if the contract be of express stipulation to that effect. It was held that as the contract did not refer to the amendatory act the party did not avail himself of its benefits. *Hubbert v. Campbellsville Lumber Co.*, 191 U. S. 70, 48 L. Ed. 101.

70. **As grant.**—See the titles MINES AND MINERALS, vol. 8, p. 390; PUBLIC LANDS, vol. 10, p. 1.

71. **As source of international law.**—*Hilton v. Guyot*, 159 U. S. 113, 163, 40 L. Ed. 95. See the title INTERNATIONAL LAW, vol. 7, p. 241.

72. See the title USAGES AND CUSTOMS.

73. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 640.

74. **As evidence—Recitals in preamble.**—It is not the province of the legislature to find facts which shall affect the rights of others; that is the province of the ju-

recited,⁷⁵ it is otherwise with reference to private acts. They are not evidence except against the parties who procure them.⁷⁶

G. To Give Validity to Void Thing.—A legislative enactment may give validity to a void thing.⁷⁷

H. Prevails over Common Law.—See elsewhere.⁷⁸

I. Prevails over Custom and Usage.—See elsewhere.⁷⁹

J. Prevails over Contract.—The effect is the same, if a contract is in fact illegal, or made in violation of a statute, whether the statute declares it to be void or not.⁸⁰

K. Territorial Extent of Operation.—An act of congress is presumed to operate throughout the whole country.⁸¹ An act of a state legislature operates only within the state limits.⁸²

L. Of Act of Congress.—An act of congress is the supreme law of the land,⁸³ and if a state court should refuse to enforce it, congress may further legislate.⁸⁴

XVIII. Pleading Statutes.

See elsewhere.⁸⁵

XIX. Proof of Statutes.

A. In General.—No clause of the constitution either expressly or by necessary implication precludes congress from adopting any mode which its wisdom suggests as to the proof of its enactments.⁸⁶ Any state may by its constitution and laws prescribe what shall be conclusive evidence of its statutes.⁸⁷ Whenever a question arises in a court of law of the existence of a statute, the judges who are called upon to decide it, have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.⁸⁸

diciary. *Antoni v. Greenhow*, 107 U. S. 769, 792, 27 L. Ed. 468, Field, J., dissenting.

75. *Branson v. Wirth*, 17 Wall. 32, 44, 21 L. Ed. 566.

"A mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case." *Kinkead v. United States*, 150 U. S. 483, 497, 37 L. Ed. 1152.

76. *Branson v. Wirth*, 17 Wall. 32, 44, 21 L. Ed. 566; *Kinkead v. United States*, 150 U. S. 483, 37 L. Ed. 1152.

An act of a state legislature confirming a deed made by an executor, is, in connection with the deed, conclusive evidence of title in the grantee. *Leland v. Wilkinson*, 10 Pet. 294, 9 L. Ed. 430.

77. *Wilkinson v. Leland*, 2 Pet. 627, 662, 7 L. Ed. 542.

78. Prevails over common law.—See the title COMMON LAW, vol. 3, p. 973.

79. See the title USAGES AND CUSTOMS.

80. *Ewell v. Daggs*, 108 U. S. 143, 149, 27 L. Ed. 682; *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508.

81. *Treat v. White*, 181 U. S. 264, 45 L. Ed. 853.

82. *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *McCool v. Smith*, 1 Black 459, 17 L. Ed. 218.

83. *United States v. Arredondo*, 6 Pet. 691, 715, 8 L. Ed. 547; *Iron Silver Min. Co. v. Campbell*, 135 U. S. 286, 299, 34 L. Ed. 155; *DeLima v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041; *United States v. Lee Yen Tai*, 185 U. S. 213, 222, 46 L. Ed. 878.

84. Thus far in these cases, as in many others, there has been no reason to suppose that any state court would decline to enforce the laws of the United States or to carry into effect their provisions. *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 513, 44 L. Ed. 864.

85. Necessity for pleading.—See the title JUDICIAL NOTICE, vol. 7, p. 692.

Negating exceptions to enacting clause.—See the titles INDICTMENTS, INFORMATION, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 993; PLEADING, vol. 9, p. 424.

86. *Field v. Clark*, 143 U. S. 649, 671, 36 L. Ed. 294.

87. *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154.

88. *Gardner v. Collector*, 6 Wall. 499, 511, 18 L. Ed. 890; *Jones v. United States*, 137 U. S. 202, 216, 34 L. Ed. 691; *In re Duncan*, 139 U. S. 449, 35 L. Ed. 219; *Field v. Clark*, 143 U. S. 649, 36 L. Ed. 294; *United States v. Ballin*, 144 U. S. 1, 3, 36 L. Ed. 321; *Lyons v. Woods*, 153 U. S. 649, 663, 38 L. Ed. 854.

B. Judicial Notice.—See elsewhere.⁸⁹

C. Of Foreign Statutes.—See elsewhere.⁹⁰

XX. Enforcement.

A. In General.—Full effect must be given to a constitutional statute.⁹¹

B. By Whom Enforced.—See elsewhere.⁹²

C. By Common-Law Proceeding.—Where a right is given by a statute without a remedy, it may be enforced by an appropriate common-law action.⁹³

D. By Statutory Proceeding.—Where the grant of a right is coupled with a provision for a partial remedy, that remedy may alone be resorted to.⁹⁴

E. By Action for Damages.—Compensatory damages only can be recovered for the violation of a doubtful statute, where the defendant acts upon the advice of counsel.⁹⁵

F. Of Statute Conferring Discretion.—Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.⁹⁶

G. Enjoining Enforcement.—See elsewhere.⁹⁷

STATUTES OF ENGLAND.—See note 1.

STATUTORY BONDS.—See the titles BONDS, vol. 3, p. 395; FORTHCOMING AND DELIVERY BONDS, vol. 6, p. 387. As to attachment bonds, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 677. As to administration bonds, see the title EXECUTORS AND ADMINISTRATORS, vol. 5, p. 174. As to replevin bond, see the title REPLEVIN, vol. 10, p. 725.

STATUTORY OFFENSES.—See the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 7, p. 988.

STATUTORY REMEDIES.—See the titles ACTIONS, vol. 1, p. 106; ADMIRALTY, vol. 1, p. 130.

STAY LAW.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1000.

STAY OF EXECUTION.—See the title EXECUTIONS, vol. 6, p. 106.

STAY OF PROCEEDINGS.—See, generally, the title SUPERSEDEAS AND STAY OF PROCEEDINGS. As to effect of bankruptcy proceedings as stay of suits in other courts, see the title BANKRUPTCY, vol. 2, p. 955. As to stay of proceedings in land office, see the title MINES AND MINERALS, vol. 8, p. 411.

STEALING.—See the title LARCENY, vol. 7, p. 844.

89. Judicial notice.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 56; JUDICIAL NOTICE, vol. 7, p. 688.

90. Of foreign statutes.—See the title FOREIGN LAWS, vol. 6, p. 376.

91. Enforcement.—The *Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *United States v. Fisher*, 2 Cranch 358, 386, 2 L. Ed. 304. See the title CONSTITUTIONAL LAW, vol. 4, p. 255.

92. Enforcement of state statute by federal court.—See the title COURTS, vol. 4, p. 1049.

Enforcement of federal statute by state court.—See the title COURTS, vol. 4, p. 1153. And see ante, "Of Acts of Congress," XVII, L.

93. Pollard v. Bailey, 20 Wall. 520, 526, 22 L. Ed. 376.

94. By statutory proceeding.—*Pollard v. Bailey*, 20 Wall. 520, 526, 22 L. Ed.

376; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535. See the title STOCK AND STOCKHOLDERS.

95. United States v. St. Anthony R. Co., 192 U. S. 524, 540, 48 L. Ed. 548. See the title DAMAGES, vol. 5, p. 157.

96. Of statute conferring discretion.—*Martin v. Mott*, 12 Wheat. 19, 31, 6 L. Ed. 537; *Mullan v. United States*, 140 U. S. 240, 245, 35 L. Ed. 489.

97. Enjoining enforcement.—See the title INJUNCTIONS, vol. 6, p. 1045.

1. Statutes of England.—Where the legislature of New York enacted, "that none of the statutes of England or Great Britain shall be considered as laws of this state," the court said that the statutes of England could mean nothing else but the acts of parliament. *Levy v. McCartee*, 6 Pet. 102, 110, 111, 8 L. Ed. 334. See, generally, the titles COMMON LAW, vol. 3, p. 968; STATUTES, ante, p. 62.

STEAM.

CROSS REFERENCES.

As to injuries due to escape of steam, see the title CARRIERS, vol. 3, p. 587.

Whether there is negligence in permitting the accumulation of steam beyond the capacity of a boiler, is a question of fact for the jury.¹

STEAMBOAT CHANNEL.—See note 2.

STEAMBOAT DEBTS.—See the title PAROL EVIDENCE, vol. 9, p. 17.

STEAMBOATS.—See the title SHIPS AND SHIPPING, vol. 10, p. 1148.

STEARINE.—See note 3.

STEEL.—Steel is a product, or, perhaps, more accurately, a species of iron, refined of some of its grosser elements, intermediate in the amount of its carbon between wrought and cast iron, and tempered to a hardness which enables it to take a cutting edge, a toughness sufficient to bear a heavy strain, an elasticity which adapts it for springs and other articles requiring resiliency, as well as a susceptibility to polish, which makes it useful for ornamental and artistic purposes.⁴

STENOGRAPHERS.—See the title RECORDS, vol. 10, p. 598

1. **Capacity of steam boiler a question of fact.**—Where in an action to recover damages for personal injuries, caused by the explosion of a steam boiler, owing to negligence on the part of defendant, in this respect, "that more steam was allowed to generate than the engine had capacity to contain," the court held that whether there was negligence in respect to the accumulation of steam was a question of fact, involving the capacity of the boiler, the amount of steam which had accumulated, and the precautions which were taken to prevent its going above a

certain pressure. *Richmond, etc., R. Co. v. Elliott*, 149 U. S. 266, 271, 37 L. Ed. 728. See, generally, the title NEGLIGENCE, vol. 8, p. 890.

2. **Steamboat channel.**—See *Iowa v. Illinois*, 147 U. S. 1, 2, 37 L. Ed. 55.

3. **Stearine.**—See *Tilghman v. Proctor*, 102 U. S. 708, 26 L. Ed. 279; *Tilghman v. Proctor*, 125 U. S. 136, 139, 31 L. Ed. 664.

4. **Steel.**—*Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 410, 46 L. Ed. 968. See the title REVENUE LAWS, vol. 10, p. 885.

STIPULATIONS.

CROSS REFERENCES.

As to stipulation conferring jurisdiction on court, see the titles ADMIRALTY, vol. 1, p. 152; APPEAL AND ERROR, vol. 1, p. 409; COURTS, vol. 4, p. 1018; JURISDICTION, vol. 7, p. 741. As to stipulation for release of property from custody in admiralty, see the title ADMIRALTY, vol. 1, p. 171. As to stipulation to answer judgment in admiralty, see the title ADMIRALTY, vol. 1, p. 172. As to stipulation for judgment in admiralty, see the title ADMIRALTY, vol. 1, p. 174. As to stipulation conferring appellate jurisdiction, see the title APPEAL AND ERROR, vol. 1, p. 409. As to review where jury trial in territorial court waived by stipulation, see the title APPEAL AND ERROR, vol. 1, p. 531. As to review of facts submitted by stipulation in lower court, see the title APPEAL AND ERROR, vol. 1, p. 1005. As to review of facts submitted in supreme court by stipulation, see the title APPEAL AND ERROR, vol. 1, p. 1016. As to review of facts where jury trial waived by stipulation, see the title APPEAL AND ERROR, vol. 1, p. 1035. As to review of judgment founded on stipulation, see the title APPEAL AND ERROR, vol. 1, p. 1056. As to stipulation as ground for reversal, see the title APPEAL AND ERROR, vol. 2, p. 295. As to stipulation for dismissal of appeal, see the title APPEAL AND ERROR, vol. 2, pp. 300, 307. As to waiver of errors by stipulation, see the title APPEAL AND ERROR, vol. 2, p. 351. As to hearing on stipulation in supreme court, see the title APPEAL AND ERROR, vol. 2, p. 352. As to stipulation for submission of cause on printed argument, see the title APPEAL AND ERROR, vol. 2, p. 358. As to stipulation for reversal, see the title APPEAL AND ERROR, vol. 2, p. 382. As to stipulation for remand without costs, see the title APPEAL AND ERROR, vol. 2, p. 419. As to stipulation for submission to arbitration, see the title ARBITRATION AND AWARD, vol. 2, p. 472; ATTORNEY AND CLIENT, vol. 2, p. 712. As to stipulation by attorney for arbitration or reference, see the titles ARBITRATION AND AWARD, vol. 2, p. 472; REFERENCE, vol. 10, p. 604. As to stipulation to abide event of another suit, see the title ATTORNEY AND CLIENT, vol. 2, p. 712. As to power of an attorney to stipulate before commencement of suit, see the title ATTORNEY AND CLIENT, vol. 2, p. 712. As to stipulation in regard to process, see the titles ATTORNEY AND CLIENT, vol. 2, p. 712; SUMMONS AND PROCESS. As to stipulation for release of bail, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 777. As to stipulation between carrier and shipper, see the title CARRIERS, vol. 3, pp. 605, 606. As to compromise and settlement, see the title COMPROMISE AND SETTLEMENT, vol. 3, p. 980. As to jurisdiction to enforce stipulation for assignment of patent, see the title COURTS, vol. 4, p. 918. As to whether stipulation is penalty or forfeiture, see the title DAMAGES, vol. 5, p. 177. As to stipulation for use of depositions, see the title DEPOSITIONS, vol. 5, p. 331, note 68. As to stipulation to substitute statement of case for bill of exceptions, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 31. As to stipulation by guardian ad litem for surrender of rights of infant, see the title INFANTS, vol. 6, p. 1019, note 40. As to stipulation by several underwriters of insurance to be bound by a special verdict, see the title INSURANCE, vol. 7, p. 214. As to stipulation not to issue execution on judgment not resisted, see the title JUDGMENTS AND DECREES, vol. 7, p. 601. As to stipulation for waiver of jury trial, see the title JURY, vol. 7, p. 763. As to remand of cause on stipulation, see the title MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 105. As to stipulation for payment of subscription to municipal aid bonds, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 645. As to stipulation for reference of pending suit, see the title REFERENCE, vol. 10, p. 604. As to stipulation for appointment of referee, see the title REFERENCE, vol. 10, p. 606. As to stipulation for sale of corporate stock to satisfy lien, see the title STOCK AND STOCKHOLDERS. As to stipulation for opening sealed verdict, see

the title VERDICT. As to stipulation for quieting title to watercourse, see the title WATERS AND WATERCOURSES.

Construction of Stipulation.—A stipulation is to be construed with reference to existing legislation affecting the subject matter.¹

Withdrawal of Stipulation.—A stipulation cannot be withdrawn by one party without the consent of the other party.²

Setting Aside Stipulation.—A stipulation entered into under a clear mistake will be set aside.³

Contravening Rules of Court.—A stipulation of the parties cannot contravene positive rules of court.⁴

Submitting Single Issue.—Where the parties agree that a case should be heard in the court below upon a single question it is improper for the counsel for the defendant in error to state things which he declares to be "incontrovertible facts," and within the knowledge of opposing counsel, but which are wholly unsustained by anything in the record. The extreme brevity of the record furnishes no apology whatever for his violation of the terms of the stipulation.⁵

In Regard to Evidence.—Stipulations for the admission of evidence are ordinarily entered into for the purpose of saving time and expense. They ought not to be used as pitfalls, and upon giving notice in sufficient time to prevent prejudice to the opposite party, a fact inadvertently incorporated therein may be repudiated.⁶ A stipulation that testimony heretofore taken and filed in a cause, may be used in any future litigation does not bring into the record all the testimony referred to. The stipulation only gives permission to use such testimony.⁷ A stipulation that either of the parties will produce any papers in his possession at the trial does not include an invoice of goods shipped, which is presumed to be in the possession of the consignee.⁸ The parties may stipulate to dispense with the taking of evidence and accept the evidence in another case.⁹

1. A stipulation by the parties in a suit by a railroad company to enjoin the collection of a tax, that the property is within the boundaries of an Indian reservation, together with the findings of the court thereon will be construed, on appeal, with reference to existing legislation affecting the subject matter. It will not be so construed as to allow the company to escape taxation by force of such stipulation as to an alleged fact which that legislation shows does not exist. *Utah, etc., Railway v. Fisher*, 116 U. S. 28, 29 L. Ed. 542. See the title INDIANS, vol. 6, p. 956.

2. *Aurrecochea v. Bangs*, 110 U. S. 217, 28 L. Ed. 125.

3. *The Hiram*, 1 Wheat. 440, 4 L. Ed. 131. See the title MISTAKE AND ACCIDENT, vol. 8, p. 420.

4. *Keene v. Whittaker*, 13 Pet. 459, 10 L. Ed. 246.

5. *Schley v. Pullman Car Co.*, 120 U. S. 575, 578, 30 L. Ed. 789.

6. *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 444, 46 L. Ed. 968.

7. *Kneeland v. Luce*, 141 U. S. 437, 440, 35 L. Ed. 808.

8. The defendants called on the plaintiff to produce an invoice under the following agreement: "It is agreed between the plaintiff and defendant in this cause,

that either party shall produce, upon notice at the trial table, any papers which may be in his possession, subject to all proper legal exceptions as to their admissibility or affect as evidence; and that handwriting, where genuine, shall be admitted without proof. S. T. Wallis, for plaintiff, Benj. C. Barroll, for defendants." The plaintiff said the invoice was not in his possession. The defendants then offered to prove its contents. But the court was of opinion it was to be presumed the invoice had gone to the consignees in London, who were competent witnesses to produce the original; and therefore parol evidence of the contents of the paper was excluded. For it was not within the written agreement to produce such papers. The agreement applied only to those in the possession of the plaintiff; and though the plaintiff was an agent of those consignees, and seems to have been suing for their benefit, yet aside from the written agreement they must be treated either as parties or third persons. If as parties, they were entitled to notice to produce the paper; if as third persons, their deposition should have been taken, or some proper attempt made to obtain it. *Turner v. Yates*, 16 How. 14, 26, 14 L. Ed. 824.

9. *Pacific Railroad v. Ketchum*, 101 U.

To Abide Event of Another Suit.—The parties may stipulate to abide by the decision in another case.¹⁰

Blending Suits in Law and Equity.—Suits in law and equity cannot be blended in a federal court by a stipulation of the parties.¹¹

Stipulation by United States Attorney.—In a prosecution of the master of a vessel for the escape of immigrants where the facts are all stated, the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom, but there is no known rule of public policy which will prevent the United States attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy.¹²

STIPULATORS.—See the title ADMIRALTY, vol. 1, p. 172.

STOCK.—See the title STOCK AND STOCKHOLDERS. As to “stock and carriers” including men and horses, see the title POSTAL LAWS, vol. 9, p. 570.

S. 289, 25 L. Ed. 932; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584.

10. *Pacific Railroad v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584.

A party may recede from a stipulation to abide the result of another suit. *The Hiram*, 1 Wheat. 440, 4 L. Ed. 131.

11. *Hurt v. Hollingsworth*, 100 U. S. 100, 25 L. Ed. 569.

12. “It is to be presumed that such an officer will do his duty to the government and not stipulate away the rights of the prosecution.” *Hackfeld & Co. v. United States*, 197 U. S. 442, 446, 49 L. Ed. 826.

STOCK AND STOCKHOLDERS.

BY JAMES F. MINOR.

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CROSS REFERENCES.

See the titles *CORPORATIONS*, vol. 4, p. 621; *FOREIGN CORPORATIONS*, vol. 6, p. 305; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 8, p. 957; and the references made from those titles.

Of banks, see the title *BANKS AND BANKING*, vol. 3, p. 1. Of other particular kinds of corporations, see the specific titles, e. g., *BUILDING AND LOAN ASSOCIATIONS*, vol. 3, p. 542. As to acquisition by corporation of its own stock or that of another corporation, see the title *CORPORATIONS*, vol. 4, p. 736. As to confiscation and sequestration of stock, see the title *WAR*. As to declaration of trust in stock, see the title *TRUSTS AND TRUSTEES*. As to investments by guardian in stock, see the title *GUARDIAN AND WARD*, vol. 6, p. 605. As to promise of stockholder, or guaranty of stock, as within statute of frauds, see the title *FRAUDS, STATUTE OF*, vol. 6, p. 454. As to stock paid in as part of capital of bank, see the title *BANKS AND BANKING*, vol. 3, p. 125. As to taxation of stock, see the title *TAXATION*. As to force of state decisions as to nature of stock and liability of stockholders, see the title *COURTS*, vol. 4, p. 1077.

I. Scope.

This title treats of stock and stockholders in private corporations, except so far as already necessarily treated in the titles *CORPORATIONS*, vol. 4, p. 621; *FOREIGN CORPORATIONS*, vol. 6, p. 305; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 8, p. 957, and in the titles treating of the particular kinds of corporations, such as *BANKS AND BANKING*, vol. 3, p. 1; *BUILDING AND LOAN ASSOCIATIONS*, vol. 3, p. 542. The nature and incidents of stock, and the relations of stockholders to the corporation, to each other and to third parties, are

considered, with copious references to places in this work where parts of the subject have already been treated, as above stated.

II. Definitions, Nature and General Consideration of Stock.

A. Definitions and Distinctions.—Capital Stock.—The capital or the capital stock of a corporation is its property,¹ and is distinct from the franchise, which is also corporate property.²

Capital Stock and Shares Distinguished.—There is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders.³

B. Necessity for Stock.—It is impossible to conceive of a corporation existing without stock, or certificates representing the interests of the corporators in the organization.⁴

C. Capital Stock as Trust Fund.—See post, "Subscriptions to Stock," VII. See, also, the title CORPORATIONS, vol. 4, p. 639, et seq.

D. Stock as Personal Property.—The state under whose laws the company came into existence lawfully might declare that such stock is to be deemed personal property.⁵

1. **Capital or capital stock.**—Bank Tax Case, 2 Wall. 200, 17 L. Ed. 793; National Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 701; Sturges v. Carter, 114 U. S. 511, 521, 29 L. Ed. 240. See, also, CAPITAL—CAPITAL STOCK, vol. 3, p. 553.

2. The franchise is the corporate property of the stockholders. The capital stock is another property—corporately associated, for the corporate purpose—but in its parts is the individual property of the stockholders in the proportions they may own them. Gordon v. Appeal Tax Court, 3 How. 133, 149, 11 L. Ed. 529. See the title CORPORATIONS, vol. 4, p. 630. See, also, FRANCHISES, vol. 6, p. 392.

Stock in insurance companies.—See the title INSURANCE, vol. 7, p. 77.

Conversion of debts into stock.—See post, "Preferred or Interest Bearing Stock," II, K; "Issue of Stock," III.

3. **Capital stock and shares distinguished.**—Van Allen v. Assessors, 3 Wall. 573, 18 L. Ed. 229; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. Ed. 558; Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654; Railroad Co. v. Vance, 96 U. S. 450, 455, 24 L. Ed. 752; Railroad Companies v. Gaines, 97 U. S. 697, 24 L. Ed. 1091; Sturges v. Carter, 114 U. S. 511, 521, 29 L. Ed. 240; Tennessee v. Whitworth, 117 U. S. 129, 138, 29 L. Ed. 830; New Orleans v. Houston, 119 U. S. 265, 277, 30 L. Ed. 411; Bank v. Tennessee, 161 U. S. 134, 146, 40 L. Ed. 645; Shelby County v. Union, etc., Bank, 161 U. S. 149, 154, 40 L. Ed. 650.

"**Stock.**"—"The terms 'stock of the company,' imported the capital stock of such company, the subscribed fund which the company held, as distinguished from the separate interests of the individual stockholders." Trask v. McGuire, 18 Wall. 391, 402, 21 L. Ed. 938. See, also, Bailey v. Railroad Co., 22 Wall. 604, 636, 22 L. Ed. 840.

"Stock, when it means anything else than the capital of a corporation, usually refers to the interests of the respective shareholders, and the aggregate of those interests may with propriety in many cases be denominated the stock of the corporation." Bailey v. Railroad Co., 22 Wall. 604, 636, 22 L. Ed. 840.

Shares of stock.—"In the first place, the share of a stockholder is, in one aspect, something different from the capital stock of the company; the latter only is the property of the corporation; the former is the individual interest of the stockholder, constituting his right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved, after payment of its debts." The Delaware Railroad Tax, 18 Wall. 206, 229, 21 L. Ed. 888. See, also, Farrington v. Tennessee, 95 U. S. 679, 686, 687, 24 L. Ed. 558.

The capital stock divided into shares has an existence separate and distinct from the property into which the money paid for it has been converted. Tennessee v. Whitworth, 117 U. S. 129, 138, 29 L. Ed. 830.

As to distinction between capital stock or property of corporation and the shares of stock for purposes of taxation, see the title TAXATION.

As to title of stockholders to corporate property, see post, "Title and Rights to Property," VIII, C, 2.

Bonds convertible into stock.—See post, "Bonds Convertible into Stock," I, L.

Dividends.—See post, "Definition," IV, A.

Stockholders.—See post, "Definitions and General Considerations," VIII, A.

4. Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 309, 38 L. Ed. 450.

5. Citizens' Sav., etc., Co. v. Illinois Cent. R. Co., 205 U. S. 46, 57, 51 L. Ed. 703; Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647. See, also, the title TAXATION.

E. Certificate of Stock.—The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner.⁶

F. Situs.—As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner.⁷ But the share of the stockholder, merely representing his interest or right, has no locality independent of his domicile.⁸

G. Governmental Regulation of Ownership.—The sovereignty which creates a corporation has the incidental right to impose reasonable regulations concerning the ownership of stock therein.⁹

H. Liability to Attachment or Execution.—Attachment.—While shares of stock are liable to attachment for claims against the stockholder, it only reaches the interest of the owner, and does not affect the property of the corporation, or its right to alienate same.¹⁰ Stocks and credits are attachable in admiralty and revenue cases by means of the simple service of a notice, without the aid of any statute, and the service of the attachment binds the stock in the hands of the corporation from the time thereof.¹¹

Execution.—See the title *EXECUTIONS*, vol. 6, p. 90.

I. Liability to Condemnation, Confiscation or Sequestration.—See the titles *EMINENT DOMAIN*, vol. 5, p. 759; *WAR*.

J. Lien of Corporation.—See post, "Lien of Corporation," VI, F.

K. Preferred or Interest Bearing Stock.—Preferred stock is neverthe-

6. Certificate of stock.—*Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 57, 51 L. Ed. 703; *Bailey v. Railroad Co.*, 22 Wall. 604, 636, 22 L. Ed. 840; *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. Ed. 558; *McAllister v. Kuhn*, 96 U. S. 87, 89, 24 L. Ed. 615; *Gibbons v. Mahon*, 136 U. S. 549, 569, 34 L. Ed. 525; *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647.

The stock of corporations may be held by a valid title without a certificate. The certificate is only one of the indicia of title. *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654; *National Bank v. Watsontown Bank*, 105 U. S. 217, 222, 26 L. Ed. 1039.

"A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself." *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 234, 35 L. Ed. 702, reaffirmed in *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711; *Scott v. Deweese*, 181 U. S. 202, 216, 45 L. Ed. 822; *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713; *Potts v. Wallace*, 146 U. S. 689, 703, 36 L. Ed. 1135.

Negotiability.—See post, "Transferability," VI, A.

Statement in certificate of limitations and burdens unnecessary.—*Hammond v. Hastings*, 134 U. S. 401, 33 L. Ed. 960. See post, "Lien of Corporation," VI, F.

Right to certificates.—See post, "Issue of Stock," III.

7. Situs.—*Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 59, 51

L. Ed. 703; *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647. This principle is not affected by the fact that the defendant is authorized by the laws of the state to have an office in another state, at which a book showing the transfers of stock may be kept. *Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, 205 U. S. 46, 59, 51 L. Ed. 703; *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647. See, also, *Dick v. Foraker*, 155 U. S. 304, 39 L. Ed. 201.

8. The Delaware Railroad Tax., 18 Wall. 206, 229, 21 L. Ed. 888. See, also, the title *TAXATION*.

9. Corry v. Baltimore, 196 U. S. 466, 476, 49 L. Ed. 566. See the title *CORPORATIONS*, vol. 4, p. 634, et seq.

10. Gottfried v. Miller, 104 U. S. 521, 528, 26 L. Ed. 851.

Share in association for illegal purpose.—*Deacon v. Oliver*, 14 How. 610, 14 L. Ed. 563.

11. Miller v. United States, 11 Wall. 268, 20 L. Ed. 135. See the title *ADMIRALTY*, vol. 1, p. 162; *REVENUE LAWS*, vol. 10, p. 838.

Seizure.—Seizure of corporate stocks may be made by giving notice of seizure to the president or vice-president of the railroad company; and a seizure thus made by the marshal in obedience to a warrant and monition is sufficient to give the district court jurisdiction of a confiscation proceeding. *Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135.

Priority of assignment.—See post, "Transfer on Books of Corporation," VI, B, 3.

less stock, and not a debt, except, to a certain extent, as to accrued dividends or interest.¹²

Assent to Corporate Mortgage.—The assent of preferred stockholders is either unnecessary or may be implied.¹³

L. Bonds Convertible into Stock.—The recital, in a coupon railroad bond, of the right to convert same into preferred stock, by surrender of same to the corporation with "the scrip preferred stock" attached to the bond by a pin when it was issued, does not affect the negotiability of the bond.¹⁴

III. Issue of Stock.

A. Right Thereto and Liability for Failure to Issue.—One who has paid for his stock subscribed is certainly entitled to his certificates of shares,¹⁵ but the liability for not issuing them is upon the corporation and not upon an officer, such as the treasurer, who has accounted for the money to the corporation.¹⁶

B. Conversion of Debts into Stock.—Where a corporation proposes to the holders of its notes secured by mortgage to convert them into stock, upon the condition that they all do so within a fixed time, as soon as the time prescribed by this resolution had expired, and it appeared that all the holders of notes secured by the mortgage of the company had not converted them into stock, those who had offered to convert were remitted to their rights as creditors of the company. A mortgage creditor, who had refused to convert, could not, by assuming that the property of the company was released from the mortgage, seize it for the satisfaction of his own debt to the exclusion of all the other mortgage creditors.¹⁷

C. Issue of New Certificate.—The corporation may be liable to the owner of stock where it issues a new certificate therefor to another party upon sur-

12. Preferred stock not a debt.—Branch v. Jesup, 106 U. S. 468, 475, 27 L. Ed. 279; Warren v. King, 108 U. S. 389, 392, 396, 400, 27 L. Ed. 769. See, also, New York, etc., Railroad v. Nickals, 119 U. S. 296, 307, 30 L. Ed. 363, where it was said: "The rights of the holders of preferred stock in this case must be determined by the language of the stock certificate. That is exactly the same as the language of the written instruments which preceded the issuing of the certificates." Warren v. King, 108 U. S. 389, 396, 27 L. Ed. 769. See, also, Bailey v. Railroad Co., 17 Wall. 96, 21 L. Ed. 611.

Creditors accepting preferred stock in reorganized corporation, in place of debts surrendered, cease to be creditors and become stockholders. St. John v. Erie R. Co., 22 Wall. 136, 147, 22 L. Ed. 743.

Relation to corpus of property.—"The holders of preferred stock have the same relation, by virtue of the certificate, to the corpus of the property, which they have to its net earnings. Their position in regard to both is one inferior to that of all creditors." Warren v. King, 108 U. S. 389, 398, 27 L. Ed. 769. See, also, St. John v. Erie R. Co., 22 Wall. 136, 147, 22 L. Ed. 743. See post, "Dividends," IV.

Power to issue and validity.—See post, "Issue of Stock," III.

Dividends or interest thereon.—See post, "Dividends," IV.

13. Assent to mortgages.—Warren v. King, 108 U. S. 389, 400, 27 L. Ed. 769. See the title CORPORATIONS, vol. 4, p. 739, et seq.

14. Bonds convertible into stock.—Hotchkiss v. National Banks, 21 Wall. 354, 22 L. Ed. 645. See the titles BONDS, vol. 3, p. 415; COUPONS, vol. 4, p. 848, et seq. See, also, post, "Conversion of Debts into Stock," III, B.

15. Right to certificates.—Loring v. Frue, 104 U. S. 223, 226, 26 L. Ed. 713.

Specific performance or damages.—Where the plaintiff prayed the specific performance of a resolution, passed by the board of directors of a railway company, under which he alleged that he was entitled to have a certain number of shares allotted to him; and also prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages, all the shares having been allotted before the filing of the bill, it was held that, as no remedy by way of specific performance was possible, plaintiff's claim for damages failed also. Townsend v. Vanderwerker, 160 U. S. 171, 181, 40 L. Ed. 383.

16. Loring v. Frue, 104 U. S. 223, 226, 26 L. Ed. 713. And the jury, in an action against the officer, should have been so instructed, and not left to act on plaintiff's sworn opinion of the legal result of the matter. Loring v. Frue, 104 U. S. 223, 226, 26 L. Ed. 713.

17. Pugh v. Fairmount, etc., Min. Co., 112 U. S. 238, 242, 28 L. Ed. 684. See ante, "Bonds Convertible into Stock," II, L.

render thereof with a forged power of attorney purporting to be executed by the rightful owner.¹⁸

New Certificate to Vendee or Pledgee and Parol Evidence to Explain.

—Parol evidence is admissible in equity to show that a new certificate of stock, issued to a party as owner after transfer to him on the books of the corporation by direction of the original owner, was delivered to him as security for a loan of money.¹⁹

D. Estoppel of Corporation to Deny Validity.—Wrongful Issue by Officer.—A certificate of stock in a corporation, under the corporate seal, and signed by the officers authorized to issue certificates, estops the corporation to deny its validity, as against one who takes it for value and with no knowledge or notice of any fact tending to show that it has been irregularly issued.²⁰

E. Stock Issued without Consideration.—The invalidity of a claim for services against a corporation was substantially established by the decree in a former suit that the stock issued therefor was invalid, because issued without anything having been paid for it.²¹

F. Preferred Stock.—It hardly lies in the mouth of those who received preferred stock, and who for several years accepted the interest guaranteed to be paid thereon, to make the objection that the company had no power to issue such stock, especially as no other parties, either the state or the holders of the common stock, have ever objected to the issue of this preferred stock.²²

18. Liability to owner for issue upon forged power of attorney.—*Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 165, 28 L. Ed. 385, citing *Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 173; *Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047.

"And the corporation is obliged, if not to recognize the last purchase as a stockholder also, at least to respond to him in damages for the value of the stock, because he has taken it for value without notice of any defect, and on the faith of the new certificate issued by the corporation." *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 166, 28 L. Ed. 385.

"Whether, before the last sale has taken place, the corporation is liable to the holder of the new certificate, is a question upon which there appears to have been a difference of opinion in England. * * * However that may be, it is clear that the corporation is not liable to any one taking with notice of the forgery in the transfer, or of any other fact tending to show that the new certificate has been irregularly issued, unless the corporation has ratified, or received some benefit from, the transaction." *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 166, 28 L. Ed. 385. See, also, the title *CORPORATIONS*, vol. 4, p. 748, as to estoppel to set up want of authority.

Wrongful issue by officer and liability of corporation.—See the title *BANKS AND BANKING*, vol. 3, p. 94.

19. Parol evidence to explain new certificate to pledgee.—*Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256. See, generally, the title *PAROL EVIDENCE*, vol. 9, p. 12.

20. *Moores v. Citizens' Nat. Bank*, 111 U. S. 156, 165, 28 L. Ed. 385. See, also, post, "Estoppel to Allege Invalidity," III, G, 5.

21. *Townsend v. St. Louis, etc., Min. Co.*, 159 U. S. 21, 35, 40 L. Ed. 61. See post, "Payment in Money or Money's Worth," VII, D, 8, b.

22. *Branch v. Jesup*, 106 U. S. 468, 481, 27 L. Ed. 279.

Fraudulent statements as to facts of which notice is chargeable to complainants.—*Coddington v. Railroad Co.*, 103 U. S. 409, 410, 26 L. Ed. 400. See the title *FRAUD AND DECEIT*, vol. 6, pp. 403, 405, 406. See, also, the title *LACHES*, vol. 7, p. 820.

Recovery of payments.—Where a corporate officer, who was a controlling spirit in the company, was active in passing the resolution which authorized the issue of preferred stock and inducing other persons to take it, and in giving credit to the corporation on the ground that such stock had been taken and that he had actually paid his money in to the company, which its creditors had a right to consider as so much of its paid-up capital, and he held this stock for over two years, when the corporation was in struggling circumstances, and voted upon it at two elections; held, that he cannot now be permitted to recover back the money paid by him, from the effects of the insolvent corporation, which by law are devoted to the bona fide creditors of the institution, on the ground that the issue of preferred stock was not authorized by law but only common stock. *Banigan v. Bard*, 134 U. S. 291, 296, 33 L. Ed. 932. See *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. See post, "Recovery of Money Paid on Illegal Issue," III, G, 7. See, also, post, "Estoppel to Allege Invalidity," III, G, 5.

Validity a question of law.—As its validity was a question of law, he must

G. Increase or Reduction of Stock—1. **AUTHORITY IN GENERAL.**—It is well settled that a corporation has no implied power to change the amount of its capital as prescribed in its charter, and that all attempts to do so are void.²³

2. **STOCKHOLDERS' AND DIRECTORS' POWERS.**—If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made would be equally effective. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.²⁴

Authority Conferred by Law Subsequent to Charter.—The authority may be conferred by law subsequently, but the assent of the stockholders thereto, either express or implied, is essential.²⁵

3. **AUTHORIZATION AT MEETING OUT OF STATE.**—The issue is not necessarily invalid because the stockholders meeting at which it was authorized was held outside of the home state, in the absence of statutory restrictions and inhibitions.²⁶

4. **FAILURE TO COMPLY WITH STATUTE AND EFFECT.**—**As to Record.**—Where the power existed to increase the capital stock to the precise amount fixed by the stockholders, at their meeting, and the defect was merely in the failure to record in the proper office and publish such change, as required by a state statute, the issue was not invalid.²⁷

Entry of Resolution on Minutes.—The failure to enter the resolution on the minutes when adopted does not invalidate the issue, it being subsequently formally entered from a pencil memorandum.²⁸

5. **ESTOPPEL TO ALLEGE INVALIDITY.**—One who accepts a certificate for a part of the increased capital, is estopped by his acceptance of the certificate from

be presumed to have known it as well as anybody else. *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779; *Banigan v. Bard*, 134 U. S. 291, 295, 33 L. Ed. 932.

23. **Authority in general.**—*Scovill v. Thayer*, 105 U. S. 143, 148, 26 L. Ed. 968.

The number of shares and the amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. *Railway Co. v. Allerton*, 18 Wall. 233, 235, 21 L. Ed. 902; *Spring Co. v. Knowlton*, 103 U. S. 49, 57, 26 L. Ed. 347.

The amount authorized cannot be increased without proper legal authority. If there be losses which impair it, there can be no formal reduction without the like sanction. No power to increase or diminish it belongs inherently to the corporation. *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558.

By issue of preferred stock.—See ante, "Preferred or Interest Bearing Stock," II, K.

24. **Stockholders' and directors' authority.**—*Railway Co. v. Allerton*, 18 Wall. 233, 236, 21 L. Ed. 902; *Spring Co. v. Knowlton*, 103 U. S. 49, 57, 26 L. Ed. 347; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529. See the titles **CORPORATIONS**, vol. 4, p. 723; **OFFICERS**

AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, pp. 965, 966.

Issue of stock already authorized.—

"Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts." *Railway Co. v. Allerton*, 18 Wall. 233, 236, 21 L. Ed. 902.

25. *Railway Co. v. Allerton*, 18 Wall. 233, 235, 21 L. Ed. 902.

26. *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Handley v. Stutz*, 139 U. S. 417, 422, 35 L. Ed. 227. See post, "Stockholders' Meetings and Formality of Action," VIII, B.

27. **As to record.**—*Handley v. Stutz*, 139 U. S. 417, 424, 35 L. Ed. 227, distinguishing *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, as a case involving an ultra vires and void issue. See, also, *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523, where the objection was irregularity and informality in the papers filed in the public offices. It was held that the purchaser of the stock was estopped to set up the illegality of the organization. See the title **CORPORATIONS**, vol. 4, p. 674.

Compliance with requirements of law essential.—*Spring Co. v. Knowlton*, 103 U. S. 49, 57, 26 L. Ed. 347.

28. **Entry of resolution on minutes.**—*Handley v. Stutz*, 139 U. S. 417, 422, 35 L. Ed. 227.

denying the regularity of the proceedings under which the increase was effected.²⁹ But where the corporation is absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation. The stock was void and gave rise to neither rights nor liabilities.³⁰

Liability for Misrepresentations.—A creditor, who has been defrauded by misrepresentation of the real capital of the company, has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the alleged fraud, to recover of the entire body of stockholders, who have taken no part in it.³¹

6. INCREASE OF STOCK AFTERWARDS RECALLED.—Where the capital stock was largely increased, an existing creditor, who was fully aware, at the time, of the increase in the stock of the company, and of its object, six months afterwards, the increase being canceled, the outstanding shares called in, and the capital stock reduced to its original limit, nothing being done after the increase to enlarge the liabilities of the company, cannot claim a liability on the stockholders for unpaid stock. He did not rely thereon.^{31a}

7. RECOVERY OF MONEY PAID ON ILLEGAL ISSUE.—Where a corporation received subscriptions for a new issue of stock, upon condition that a failure to pay any installment thereon should forfeit all right thereto, together with any previous payments, and the issue was found illegal and abandoned, after a subscriber had refused to pay further assessments after paying one, there was only

29. Estoppel to allege invalidity.—*Herhold v. Upton*, 154 U. S. 624, 23 L. Ed. 892; *Banigan v. Bard*, 134 U. S. 291, 295, 33 L. Ed. 932; *Handley v. Stutz*, 139 U. S. 417, 426, 35 L. Ed. 227; *Sanger v. Upton*, 91 U. S. 56, 64, 23 L. Ed. 220; *Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. Ed. 968.

30. Want of power absolute.—*Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. Ed. 968, quoting from 2 *Lindley, Partnership*, 138: "Distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company has no power to issue, in truth had nothing at all, and are not contributors."

The defendant having attended by proxy the meetings at which the increase of the stock beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company by its agents having held itself out as possessing a capital of \$400,000, and invited and obtained credit on the faith of such representations, is not estopped from denying the validity of the stock and his obligation to pay for it in full. *Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. Ed. 968.

"It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Pullman v. Upton*, 96 U. S. 328,

24 L. Ed. 818. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant." *Scovill v. Thayer*, 105 U. S. 143, 149, 26 L. Ed. 968. See ante, "Estoppel of Corporation to Deny Validity," III, D.

31. Liability for misrepresentations.—*Scovill v. Thayer*, 105 U. S. 143, 151, 26 L. Ed. 968.

If he is not estopped by his own acts, he is not by the acts of the agents of the company, in representing the company, by advertisements and otherwise, as having a capital of \$400,000. *Scovill v. Thayer*, 105 U. S. 143, 151, 26 L. Ed. 968.

The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that representation that it had been made was false. *Scovill v. Thayer*, 105 U. S. 143, 151, 26 L. Ed. 968. See, also, *Banigan v. Bard*, 134 U. S. 291, 295, 33 L. Ed. 932.

Liability to assessment thereon.—See post, "Estoppel to Deny Liability on Stock Subscription," VII, D, 7; "Increase of Stock," VII, D, 8, b, (2), (b).

31a. Increase of stock afterwards recalled.—*Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 347, 30 L. Ed. 420.

a part performance of the illegal contract between the company and the subscriber in reference to the new stock, and the subscriber could recover what he had paid. The company, in fact, created no new stock. It only proposed to do so.³²

8. DISTRIBUTION ON REDUCTION.—As a general rule, where capital stock has been impaired and a reduction is made merely to meet that impairment, there can be no distribution.³³

H. Stock Issued beyond Charter Limit.—All such stock is void absolutely.³⁴

IV. Dividends.

A. Definition.—A dividend is a division, of the net profits of the business of a corporation, among the stockholders in proportion to the value of their contributions.³⁵

B. Right to Dividends—1. IN GENERAL—*a. From Profits or Net Earnings Alone.*—Dividends can be rightfully paid only out of profits or net earnings derived from the operations of the company. Corporations are liable to be enjoined by shareholders or creditors from making a distribution, in dividends, of capital.³⁶ But when declared they belong to the then owner

32. Recovery of money paid on illegal issue.—*Spring Co. v. Knowlton*, 103 U. S. 49, 57, 26 L. Ed. 347. See, also, the titles ASSUMPSIT, vol. 2, p. 644; PAYMENT, vol. 9, p. 348. And see post, "Contract Exempting from Assessment," VII, D, 8, b, (3), (c).

Of preferred stock.—See ante, "Preferred Stock," III, F.

33. Jerome v. Cogswell, 204 U. S. 1, 7, 51 L. Ed. 343. See the title BANKS AND BANKING, vol. 3, p. 128.

34. Stock issued beyond charter limit. *Scovill v. Thayer*, 105 U. S. 143, 152, 26 L. Ed. 968.

35. Cary v. Savings Union, 22 Wall. 38, 41, 22 L. Ed. 779. See *Gibbons v. Mahon*, 136 U. S. 549, 569, 34 L. Ed. 525.

The word "dividend" has reference to dividends on the capital stock of the company held and owned by its shareholders. The term "dividend" in its technical as well as in its ordinary acceptance means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders. *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 496, 38 L. Ed. 793.

36. From profits or net earnings alone.—*Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 497, 38 L. Ed. 793, citing *Taylor on Corporations*, § 565, and authorities. See, also, *New York, etc., Railroad v. Nickals*, 119 U. S. 296, 308, 30 L. Ed. 363; *Sinking Fund Cases*, 99 U. S. 700, 722, 25 L. Ed. 496; *Railroad Co. v. Howard*, 7 Wall. 392, 416, 19 L. Ed. 117; *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483. As to preference of creditors over stockholders, see the title CORPORATIONS, vol. 4, p. 641.

The amount of stock being fixed, it is a matter of mere calculation as to when the profits from net earnings will be sufficient to meet the designated dividend.

Mobile, etc., R. Co. v. Tennessee, 153 U. S. 486, 496, 38 L. Ed. 793.

Profits.—"The term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans." *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 497, 38 L. Ed. 793.

Net earnings.—"The net earnings of corporations out of which profits are distributable in dividends are thus defined in *St. John v. Erie Railway Co.*, 10 Blatchford 279: 'Net earning are properly the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which, in that way, are paid out of the net earnings.' This case was affirmed by this court. *St. John v. Erie R. Co.*, 22 Wall. 136, 22 L. Ed. 743." *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 497, 38 L. Ed. 793. See, also, *Union Pac. R. Co. v. United States*, 99 U. S. 402, 422, 25 L. Ed. 274.

While the funded indebtedness of a corporation was not properly payable out of profits before there could be a division thereof, any and all debts which had been incurred, and which were due from the company and ought to have been paid, and would have been paid at the time had the corporation possessed the necessary funds for that purpose, constituted proper deductions from the earnings before the profits properly distributable could be ascertained. *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 498, 38 L. Ed. 793.

of the stock.³⁷

Directors' Discretion.—Money earned by a corporation remain the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property.³⁸

b. *As between Tenant for Life and Remainderman.*—**Reserved and Accumulated Earnings.**—Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainderman, legal or equitable, thereof.³⁹ And whether profits are to be accumulated and invested, to increase the value of the shares or distributed as income, to those entitled thereto is for the corporation to decide in the fair and honest exercise of its discretion, uncontrolled by the courts.⁴⁰

c. *As Passing with Bequest of the Stock.*—Unless otherwise provided by the charter or by-laws of a corporation, the profits and surplus funds of a corporation, whenever they have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself and will pass with the stock under this name in a transfer or bequest.⁴¹

d. *Right of Purchaser of Stock.*—Purchasers of stock have a right to claim and receive all dividends subsequently declared, no matter when the fund appropriated for the purpose was earned, whether before or after the transfer and delivery of the certificates constituting the evidence of ownership.⁴²

e. *As Affected by Regulation of Rates.*—It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to

Disposition of profits.—In every well-conducted corporation engaged in furnishing roadways and waterways for the transportation of persons and property, the profits were disposed of in one of four methods; namely, distributed to its stockholders as dividends; used in construction of its roads or canals, paid out for interest on its funded debts, or carried to a reserve or other fund remaining in its hands. *Bailey v. Railroad Co.*, 106 U. S. 109, 115, 27 L. Ed. 81; *Railroad Co. v. Collector*, 100 U. S. 595, 598, 25 L. Ed. 647.

Directors' action necessary.—*New York, etc., Railroad v. Nickals*, 119 U. S. 296, 306, 30 L. Ed. 363.

37. **Belong to owner at time declared.**—*The Collector v. Hubbard*, 12 Wall. 1, 18, 20 L. Ed. 272.

38. **Directors' discretion.**—*Gibbons v. Mahon*, 136 U. S. 549, 558, 34 L. Ed. 525. See, generally, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

Provisions for sinking fund by law as proper regulation not unduly impairing right to dividends.—*Sinking Fund Cases*, 99 U. S. 700, 722, 25 L. Ed. 496. See the title CORPORATIONS, vol. 4, pp. 709, 710.

Recovery back of dividend out of profits.—See the title BANKS AND BANKING, vol. 3, pp. 164, 185.

Assignment after dissolution.—See post, "Transferability," VI, A.

39. *Gibbons v. Mahon*, 136 U. S. 549, 558, 34 L. Ed. 525.

40. *Gibbons v. Mahon*, 136 U. S. 549, 558, 34 L. Ed. 525; *Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840. As to stock dividends, see post, "Stock Dividends," IV, B, 3.

Under terms of bequest.—"In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares." *Gibbons v. Mahon*, 136 U. S. 549, 559, 34 L. Ed. 525.

41. *Bailey v. Railroad Co.*, 22 Wall. 604, 637, 22 L. Ed. 840.

42. *Bailey v. Railroad Co.*, 22 Wall. 604.

realize a given per cent upon its capital stock. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.⁴³

f. *Injunction against Payment.*—The payment of a dividend by a railroad corporation, upon stock transferred to a holding company in violation of the anti-trust act of July 2, 1890, to such holding company, may be enjoined in equity.⁴⁴

g. *Railroad Charter Provision Limiting Dividends.*—A provision in the charter of a railroad company that the legislature "may so" regulate tolls that not more than fifteen per cent shall be divided, is permissive and not mandatory, and until the legislature so acts the corporation is untrammelled in the making and distribution of dividends.⁴⁵ •

2. **DIVIDENDS ON PREFERRED STOCK.**—While preferred stock is entitled to dividends on its face before any can be made to common stock, such dividends are not a debt, until they have been declared.⁴⁶ And where preferred stockholders are entitled to a noncumulative dividend in preference to the payment of any dividend on the common stock, "dependent on the profits of each particular year as declared by the board of directors," this did not require the declaration and payment of a dividend in every year when it should be officially declared that there were net profits from that year's operations, but its declaration was in the fair discretion of the directors, and it might be properly applied to improvements, and a reasonable amount kept to meet unexpected contingencies.⁴⁷

Cumulative or Noncumulative.—Dividends on preferred stock are cumulative, where arrears must be paid out of earnings as well as the dividends for the current year, which seems to be the case where they are not expressly de-

637, 22 L. Ed. 840. See, also, *Gibbons v. Mahon*, 136 U. S. 549, 560, 34 L. Ed. 525.

43. *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 596, 41 L. Ed. 560. See, also, the title **CORPORATIONS**, vol. 4, p. 634.

44. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679. See the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 447.

45. *Terre Haute, etc., R. Co. v. Indiana*, 194 U. S. 579, 48 L. Ed. 1124. See the title **RAILROADS**, vol. 10, p. 466.

46. **Nature of right to dividends on preferred stock.**—*Branch v. Jesup*, 106 U. S. 468, 475, 27 L. Ed. 279; *Warren v. King*, 108 U. S. 389, 399, 27 L. Ed. 769; *New York, etc., Railroad v. Nickals*, 119 U. S. 296, 30 L. Ed. 363.

Where creditors of a corporation surrendered their debts and received in return stock of the same amount in the re-organized corporation, which gave them a chance for annual dividends of seven per cent, and a voice by voting in the choice of those by whom the affairs of the company were to be administered, what they were to receive was not interest, but dividends; and they were to receive them in priority to the holders of the common stock. The latter could receive nothing until the former were satisfied. The maximum payable on the preferred stock was specified. It might be less, or nothing. It could not be more. The amount, subject to limit prescribed, depended wholly upon the residue of the

net earnings applicable in that way. *St. John v. Erie R. Co.*, 22 Wall. 136, 147, 22 L. Ed. 743; *New York, etc., Railroad v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Warren v. King*, 108 U. S. 389, 400, 27 L. Ed. 769. See ante, "Preferred or Interest Bearing Stock," II, K. See, also, the title **RAILROADS**, vol. 10, p. 455.

New York, etc., Railroad v. Nickals, 119 U. S. 296, 297, 30 L. Ed. 363, approved what was said in *St. John v. Erie R. Co.*, 22 Wall. 136, 146, 22 L. Ed. 743, that a preferred stockholder could not by suit enforce full payment of his dividends from the net earnings, prior to any payment on account of new leases of roads, or of debts subsequently contracted for borrowed money used in the repair and equipment of the road, in paying rent on leased lines, and interest on the money so borrowed. These principles were again applied in the analogous case of *Warren v. King*, 108 U. S. 389, 27 L. Ed. 769. See, also, *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.

47. **Directors' discretion as to declaration.**—*New York, etc., Railroad v. Nickals*, 119 U. S. 296, 302, 30 L. Ed. 363. See, also, *Gibbons v. Mahon*, 136 U. S. 549, 558, 34 L. Ed. 525.

In other words, there must be such pecuniary ability as would, but for the obligation to pay this interest, justify the payment of a dividend to stockholders. *New York, etc., Railroad v. Nickals*, 119 U. S. 296, 310, 30 L. Ed. 363.

Right unaffected by improper payments to common stockholders.—*New York,*

clared cumulative, or noncumulative, i. e. payable only out of the earnings of the current year as declared by the corporation. They are noncumulative when declared to be dependent on the profits of each particular year.⁴⁸

3. **Stock Dividends**—a. *Nature and Effect*.—A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones.⁴⁹

Stock Dividends as Part of Capital.—As a general rule stock dividends, even when they represent net earnings, become at once a part of the capital of the company, and, of course, entitle the holder to vote, unless it is otherwise provided in the charter or by-laws. Such a dividend, if earned and declared, necessarily increases the value of the old stock if new stock is not issued, and in that mode reaches substantially the same result.⁵⁰

etc., *Railroad v. Nickals*, 119 U. S. 296, 310, 30 L. Ed. 363.

48. **Cumulative and noncumulative dividends**.—*New York, etc., Railroad v. Nickals*, 119 U. S. 296, 30 L. Ed. 363; *Bailey v. Railroad Co.*, 17 Wall. 96, 21 L. Ed. 611.

49. *Gibbons v. Mahon*, 136 U. S. 549, 559, 34 L. Ed. 525; *Logan County v. United States*, 169 U. S. 255, 263, 42 L. Ed. 737.

50. *Bailey v. Railroad Co.*, 22 Wall. 604, 637, 22 L. Ed. 840; reaffirmed in 106 U. S. 109, 27 L. Ed. 81; *Gibbons v. Mahon*, 136 U. S. 549, 560, 34 L. Ed. 525.

"When a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share." *Gibbons v. Mahon*, 136 U. S. 549, 559, 34 L. Ed. 525. In this case it was held that a resolution "that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868," was clearly an apportionment of the new shares as representing capital, and not a distribution or division of income.

English rule.—Such is the English rule, and the same principle prevails in Massachusetts and in Connecticut, Rhode Island and Maine, that a dividend of new shares, representing accumulated earnings, is held to be capital and not income. In New York, the recent judgments of the court of appeals appear to have settled the law of that state in accordance with that of England and of Massachusetts.

Gibbons v. Mahon, 136 U. S. 549, 564, 34 L. Ed. 525.

Pennsylvania, New Jersey and New Hampshire.—"But the supreme court of Pennsylvania has declined to follow the early English cases, and adopted the rule that where a corporation, after having accumulated large surplus profits for many years before and since the death of the testator, increased its capital stock, and issued additional shares to the stockholders, so much of the surplus profits as had accumulated in the lifetime of the testator should be deemed capital, and so much as had accumulated since his death should be deemed income. * * * The only other states, so far as we are informed, in which the Pennsylvania rule prevails, are New Jersey and New Hampshire. * * * Upon the grounds already stated, that rule appears to us to be open to grave objections, both in principle and in application, as well as opposed to the weight of authority." *Gibbons v. Mahon*, 136 U. S. 549, 566, 34 L. Ed. 525.

Scrip dividends or interest certificates.—As to the nature and character of "scrip dividends" and "interest certificates," see *Bailey v. Railroad Co.*, 106 U. S. 109, 112, 27 L. Ed. 81, following and quoting from same case in 22 Wall. 604, 633, 22 L. Ed. 840. See, also, *Logan County v. United States*, 169 U. S. 255, 42 L. Ed. 737.

Voting power and transferability of such paper.—"The certificates possessed every quality of stock except that they conferred no power to vote and may be redeemed by payment out of the future earnings of the company. Like stock certificates they are made conveniently transferable, as they may be transferred upon the books of the company, and possess an equal value with stock when used as collateral security or as the basis of credit in any moneyed transaction." *Bai-*

b. *Right Thereto*.—As between Life Tenant and Reversioner.—“In Great Britain, it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of its earnings, and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share the income of which only is payable to a tenant for life.”⁵¹

V. Voting Privilege.

See post, “Stockholders’ Meetings and Formality of Action,” VIII, B.

Right to Vote.—Usually a stockholder is a member of the company and as such has a right to vote, but it does not necessarily follow that the right increases with the increase of stock, or that the right is lessened in case the number of shares owned by the stockholder should be diminished.⁵²

Right of Corporation Holding Stock.—The corporation, though holding and owning the capital stock, cannot vote upon it. It is the right and duty of the shareholders to vote.⁵³

Stock Held in Pledge or Fiduciary Capacity.—Executors, administrators, guardians, or trustees, and also, it seems, pledgees, or holders for collateral security, may vote stock held by them.⁵⁴

Injunction against Illegal Voting.—Where an arrangement by which the majority of the stock of several corporations was placed in the hands of a holding company, has been declared illegal under the antitrust act of July 2, 1890, the decree in the suit to break up such combination may enjoin the holding company from voting on said stock in its hands, or exercising any control thereby.⁵⁵

Right of Municipality Subscribing to Stock.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 649.

On Stock Dividend Certificates.—See ante, “Nature and Effect,” IV, B, 3, a.

VI. Assignment, Transfer, Sale and Pledge.

A. Transferability—1. IN GENERAL.—Although stock certificates are neither in form nor character negotiable paper,⁵⁶ and the transferee takes them

ley v. Railroad Co., 22 Wall. 604, 634, 636, 22 L. Ed. 840. See post, “Transferability,” VI, A.

Contract with holders of certificates.—“The court is of the opinion that the vote of the company issuing these certificates is a valid contract of the company with the holders of the certificates that the same shall be paid, at some convenient period, out of the future earnings of the company, unless the company, when thereto authorized, elect to convert the same into capital stock.” Bailey v. Railroad Co., 22 Wall. 604, 638, 22 L. Ed. 840, reaffirmed in 106 U. S. 109, 27 L. Ed. 81.

Taxation of stock dividends or “scrip,” under income tax law.—See the title TAXATION.

51. As between life tenant and reversioner.—Gibbons v. Mahon, 136 U. S. 549, 561, 34 L. Ed. 525. See ante, “Nature and Effect,” IV, B, 3, a. See, also, ante, “As Between Tenant for Life and Remainderman,” IV, B, 1, b.

52. Bailey v. Railroad Co., 22 Wall. 604, 635, 22 L. Ed. 840. See, also, Warren v. King, 108 U. S. 389, 397, 27 L. Ed. 769.

Charter amendment as impairing right.—See the title CORPORATIONS, vol. 4, p. 709.

53. Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558.

54. Burgess v. Seligman, 107 U. S. 20, 29, 27 L. Ed. 359.

But if the pledgee in voting the stock exceeds his rights as such pledgee, it cannot have the effect of making the stock his own. No one is injured, and no one can complain except the other stockholders whose rights are invaded. Burgess v. Seligman, 107 U. S. 20, 29, 27 L. Ed. 359. See, also, post, “Liability on Stock Held as Security or in Trust,” VIII, D, 4, d, (3).

55. Injunction against illegal voting.—Northern Securities Co. v. United States, 193 U. S. 197, 48 L. Ed. 679. See, also, the titles MONOPOLIES AND CORPORATE TRUSTS, vol. 8, p. 446.

56. Not negotiable.—Earle v. Carson, 188 U. S. 42, 46, 47 L. Ed. 373; Railroad Co. v. Howard, 7 Wall. 392, 415, 19 L. Ed. 117; Bank v. Lanier, 11 Wall. 369, 377, 20 L. Ed. 173; Bailey v. Railroad Co., 22 Wall. 604, 636, 22 L. Ed. 840; Dewing v. Perdicaries, 96 U. S. 193, 196, 24 L. Ed. 654; Hammond v. Hastings, 134 U. S. 401, 404, 33 L. Ed. 960.

Compared to scrip dividends and corporate bonds.—Bailey v. Railroad Co., 22

subject to equities existing against them in transferor's hands, although he may be ignorant of them,⁵⁷ yet that the transfer of stock in corporations, even when in failing circumstances, should not be unduly impeded, is essential not only to the prosperity of such corporations and the value of their stock, but to the interest of stockholders who may desire for legitimate reasons to change their investments or to raise money for debts incurred outside the business of such corporation.⁵⁸

Limitations—Transfer to Avoid Liability.—See post, "Effect of Transfer," VIII, D, 4, d, (4).

2. ENFORCEMENT OF RIGHT BY SUIT.—The fact that the grantee may be compelled to bring a suit to enforce his right to the property, does not render the conveyance void.⁵⁹

B. Essentials of Valid Transfer—1. **LAW APPLICABLE.**—The validity of the assignment is governed by the law of the incorporating state.⁶⁰

2. ASSIGNMENT AND DELIVERY OF CERTIFICATES.—Shares of stock may be transferred by assignment and delivery of certificates, and a blank indorsement may be afterwards filled in by writing over it an assignment and power of attorney, and so actual transfer perfected. A wrongful use of such endorsed

Wall. 604, 636, 22 L. Ed. 840. See ante, "Nature and Effect," IV, B, 3, a.

Sales of stock on margin.—See the titles CONSTITUTIONAL LAW, vol. 4, pp. 378, 379; DUE PROCESS OF LAW, vol. 5, p. 563.

57. Transfer subject to equities.—*Dewing v. Pedicaries*, 96 U. S. 193, 196, 24 L. Ed. 654; *Hammond v. Hastings*, 134 U. S. 401, 404, 33 L. Ed. 960; *Railroad Co. v. Howard*, 7 Wall. 392, 415, 19 L. Ed. 117.

Certificates issued by a trust company to stockholders in lieu of stock, by which the trust company acknowledges that it has received from another named so many shares of stock in a specified corporation, entitling the bearer to so many dollars in certain bonds to be issued, is not free, in the hands of a transferee, from equities which would have affected it in the hands of the original recipient. *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117.

Stock subject to trust.—The legal holder of stock, free from all obligations to the company, and subject only to the trust in favor of a third party, has the legal right with the assent of such third party, to dispose of this stock to whomsoever he sees fit, and at any price he can obtain, where, for aught that the records disclose, he has the same right and control over this stock, subject only to his trust in favor of the third party, that any stockholder in any corporation has over his. *Farmers' Loan, etc., Co. v. Chicago, etc., R. Co.*, 163 U. S. 31, 41, 41 L. Ed. 60.

Purchase of stock with embezzled funds.—*Railroad Companies v. Schutte*, 103 U. S. 118, 136, 26 L. Ed. 327. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 998.

58. Free transferability.—*McDonald v. Dewey*, 202 U. S. 510, 520, 50 L. Ed. 1128; *Railroad Co. v. Howard*, 7 Wall. 392, 415, 19 L. Ed. 117; *Bank v. Lanier*, 11 Wall. 369, 377, 20 L. Ed. 173; *Farrington v.*

Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558; *McAllister v. Kuhn*, 96 U. S. 87, 89, 24 L. Ed. 615; *National Bank v. Case*, 99 U. S. 628, 631, 25 L. Ed. 448; *Tennessee v. Whitworth*, 117 U. S. 129, 138, 29 L. Ed. 830; *Morgan v. Struthers*, 131 U. S. 246, 252, 33 L. Ed. 132; *Farmers' Loan, etc., Co. v. Chicago, etc., R. Co.*, 163 U. S. 31, 43, 41 L. Ed. 60; *Earle v. Carson*, 188 U. S. 42, 50, 47 L. Ed. 373.

Power to regulate.—Even where the charter gives the corporation the power to regulate transfer of stocks, it has been held that this power does not include the authority to restrain transfers. *Morgan v. Struthers*, 131 U. S. 246, 253, 33 L. Ed. 132. See, also, *Johnston v. Laffin*, 103 U. S. 800, 804, 26 L. Ed. 532.

Assignment after dissolution—Right to unpaid dividends and assets.—An assignment of all interest in stock, after corporate dissolution, while its affairs were being liquidated, did not transfer a mere right to sue for such dividends which had been fraudulently withheld and diverted by an officer of the corporation. That right was simply an incident to the transfer of substantial and tangible property. It conveyed only a right to dividends and a proportionate interest. *Traer v. Clews*, 115 U. S. 528, 539, 29 L. Ed. 467.

Under general assignment.—See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 626.

Bank shares.—See the title BANKS AND BANKING, vol. 3, p. 164, et seq.

Capacity of married woman.—See the title BANKS AND BANKING, vol. 3, p. 124.

59. Traer v. Clews, 115 U. S. 528, 539, 29 L. Ed. 467.

60. Conflict of laws.—*Black v. Zacharie & Co.*, 3 How. 483, 511, 11 L. Ed. 690.

Stamp tax on transfer.—See the title REVENUE LAWS, vol. 10, p. 838.

State transfer tax as no denial of equal protection.—*Hatch v. Reardon*, 204 U. S.

certificate for such a purpose may operate as a conversion of the stock.⁶¹ The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.⁶²

3. TRANSFER ON BOOKS OF CORPORATION.—See the title **BANKS AND BANKING**, vol. 3, p. 165. All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of the law.⁶³

Authority.—A purchase of stock is of itself authority to the vendor to make a legal transfer thereof to the vendee on the books of the company.⁶⁴

Validity of Transfer against Attaching Creditor with Notice.—Courts of law, as well as courts of equity, are constantly, in all states where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with full knowledge of the assignment.⁶⁵

C. Right to Transfer on Books and Remedy for Refusal.—1. **RIGHT TO TRANSFER ON PRODUCTION OF CERTIFICATE.**—By the form of certificate in general use by corporations, a purchaser is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, regularly assigned, with power to transfer, but not otherwise.⁶⁶

Officers' Duties.—The officers of a corporation are the custodians of its books, and it is their duty to see that a transfer of its shares is properly made, either by the owner himself or his agent.⁶⁷

2. **LIABILITY FOR REFUSAL.**—A corporation is liable in damages for the refusal of its proper officer to transfer its stock, when so requested, and if the officer refused to allow the transfer, upon the ground that the owner was in-

152, 51 L. Ed. 415. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 394.

As no restraint on commerce.—See the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 463.

61. Assignment and delivery of certificates.—*McAllister v. Kuhn*, 96 U. S. 87, 89, 24 L. Ed. 615. See post, "Conversion of Stock," VI, H.

Delivery with blank power of attorney.—*Johnston v. Laffin*, 103 U. S. 800, 804, 26 L. Ed. 532; *Bank v. Lanier*, 11 Wall. 369, 20 L. Ed. 173; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384. See the title **BANKS AND BANKING**, vol. 3, p. 171.

But where such stock is delivered to an agent upon a trust to sell, and he fills in the blank power and has the certificates conveyed to himself and obtains new ones in his own name, the agent has no lien thereon for alleged claims due him, as such lien cannot arise from a fraud or breach of duty. *Randel v. Brown*, 2 How. 406, 11 L. Ed. 318.

62. Name with which filled up immaterial.—*Johnston v. Laffin*, 103 U. S. 800, 804, 26 L. Ed. 532. See the title **BANKS AND BANKING**, vol. 3, p. 171, et seq.

63. National Bank v. Watsontown Bank, 105 U. S. 217, 222, 26 L. Ed. 1039. See, also, *Union Bank v. Laird*, 2 Wheat. 390, 4 L. Ed. 269.

64. Webster v. Upton, 91 U. S. 65, 234 L. Ed. 384.

65. Validity of transfer as dependent on notice to creditors.—*Black v. Zacharie & Co.*, 3 How. 483, 512, 11 L. Ed. 690; *Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8, 9, 29 L. Ed. 557.

A transfer for valuable consideration of shares in a Massachusetts manufacturing corporation, not recorded as required by the statute of Massachusetts of 1870, ch. 224, § 26, is valid against a subsequent attachment by a creditor having knowledge or notice of the transfer. *Bridgewater Iron Co. v. Lissberger*, 116 U. S. 8, 9, 29 L. Ed. 557. See, also, ante, "Liability to Attachment or Execution," II, H.

And the same is true in Louisiana.—*Black v. Zacharie & Co.*, 3 How. 483, 513, 514, 11 L. Ed. 690.

66. Bank v. Lanier, 11 Wall. 369, 378, 20 L. Ed. 173.

67. Telegraph Co. v. Davenport, 97 U. S. 369, 24 L. Ed. 1047.

debted to the corporation, such a refusal was a refusal of the corporation.⁶⁸

3. REMEDY FOR REFUSAL.—a. *Jurisdiction*.—The jurisdiction to compel a transfer is in equity.⁶⁹

b. *Assumpsit*.—Assumpsit, in the form of a special action on the case, will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal.⁷⁰

c. *Parties*.—There is no necessity for making the trustee of the legal title a party to the bill, where no relief is sought against him.⁷¹ The corporation is of course a necessary party to a proceeding to compel a transfer on its books.⁷²

d. *Decree for Transfer and Effect*.—A decree which directs the transfer of stock by the holder thereof and requires that it be done forthwith, has the effect, when done, to invest the transferees with all the rights of ownership.⁷³

4. LIMITATION OR PRESCRIPTION.—It was held in Louisiana that the ten-year period of prescription applied to such actions and that an uninterrupted period of ten years alone could bar the remedy.⁷⁴

D. Wrongful Transfer and Liability Therefor—1. **LIABILITY OF CORPORATION**.—The officers of a corporation are the custodians of its books; and it is their duty to see that a transfer of shares of its capital stock is properly made, either by the owner himself or by a person having authority from him. In either case, they must act upon their own responsibility. Accordingly, when the name of the owner of a certificate of stock had been forged to a blank form of transfer, and to a power of attorney indorsed on it, and the purchaser of the certificate in this form, using the forged power of attorney, obtained a transfer of the stock on the books of the corporation, it was held, in a suit by such owner against the corporation, that he was entitled to a decree compelling it to replace the stock on its books in his name, issue a proper certificate to him, and pay him the dividends received on the stock after its unauthorized transfer, or to an alternative decree for the value of the stock, with the amount of the dividends. Neither absence of blame on the part of the officers in allowing the unauthorized transfer, nor the good faith of the purchaser of the stolen property will be a defense.⁷⁵

2. **COMPELLING RESTORATION TO TRUE OWNER'S NAME**.—If a corporation has by negligence canceled a person's stock, and issued certificates therefor to a third party who has purchased it from one authorized to sell it, the true owner is not bound to pursue such purchaser, but he may directly call upon the cor-

68. *Case v. Bank*, 100 U. S. 446, 453, 25 L. Ed. 695. See, also, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 995.

69. *Mechanics' Bank v. Seton*, 1 Pet. 299, 305, 7 L. Ed. 152.

Although it might be the duty of the corporation to permit such transfer, it would be difficult to sustain any action at law, for refusing to open its books, and permit the transfer, and equity has jurisdiction to compel such transfer, at the instance of a party entitled thereto. *Mechanics' Bank v. Seton*, 1 Pet. 299, 305, 7 L. Ed. 152. See the title BANKS AND BANKING, vol. 3, p. 171.

Unconscionable bargain.—But a court of equity is not bound to shut its eyes to the evident character of a transaction by which the title to corporate stock was acquired, where its aid is sought to carry into effect an unconscionable bargain by compelling the transfer of such stock to the purchaser for a nominal price, but will leave the party to his remedy at law. *Mississippi,*

etc., R. Co. v. Cromwell, 91 U. S. 643, 23 L. Ed. 367.

70. *Case v. Bank*, 100 U. S. 446, 455, 25 L. Ed. 695. See, generally, the title ASSUMPSIT, vol. 2, p. 636.

71. *Mechanics' Bank v. Seton*, 1 Pet. 299, 306, 7 L. Ed. 152. See the title BANKS AND BANKING, vol. 3, p. 172.

72. *St. Louis, etc., R. Co. v. Wilson*, 114 U. S. 60, 62, 29 L. Ed. 66.

73. *Decree for transfer and effect*.—*Thomson v. Dean*, 7 Wall. 342, 345, 19 L. Ed. 94.

74. *Limitation or prescription*.—*St. Romes v. Levee, etc., Cotton Press Co.*, 127 U. S. 614, 621, 32 L. Ed. 289; *Case v. Bank*, 100 U. S. 446, 25 L. Ed. 695.

75. *Liability of corporation*.—*Telegraph Co. v. Davenport*, 97 U. S. 369, 372, 24 L. Ed. 1047; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061.

"To create an estoppel against the plaintiffs, there must have been some act or declaration indicating an authorization of the use of their names, by which the com-

poration to do him right and justice by replacing his stock, or paying him for its value. The weight of authority would seem to be in favor of this rule.⁷⁶

Corporation Necessary Party to Proceeding.—The corporation is a necessary party defendant to a bill to compel the retransfer.⁷⁷

3. **INJUNCTION AGAINST TRANSFER BY APPARENT OWNER.**—An injunction issues to restrain a person having the apparent ownership of stock really belonging to another, from transferring it.⁷⁸

4. **LIMITATIONS AND LACHES.**—Right to relief may be barred by laches.⁷⁹

E. Sale of Stock.—1. **WHAT CONSTITUTES.**—Where stock has been actually sold and transferred to the purchaser, and became the property of the purchaser, it was an executed contract and could not afterwards be impeached, in the absence of fraud, for any cause known to and acquiesced in by the vendor or person claiming under him.⁸⁰ A contract for the transfer of stock in irrigation companies, although it is stated that such stock represented so many inches of water, is nevertheless a sale of stock, not water rights.⁸¹

pany was misled, or a subsequent approval of their use by acceptance of the moneys received with knowledge of the transfer." *Telegraph Co. v. Davenport*, 97 U. S. 369, 373, 24 L. Ed. 1047.

76. Compelling restoration to true owner's name.—*St. Romes v. Levee*, etc., Cotton Press Co., 127 U. S. 614, 620, 32 L. Ed. 289. See *Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047.

It was held, upon the question of the presumptive proofs of the transfer of the stock being made by the stockholder's agent with the knowledge and authority of the stockholder, that the proofs referred to fail to satisfy that any authority was given or that the transfer was acquiesced in. *St. Romes v. Levee*, etc., Cotton Press Co., 127 U. S. 614, 621, 32 L. Ed. 289. See ante, "Liability of Corporation," VI, D, 1.

Estoppel by negligence of guardian.—The negligence of their guardian cannot preclude minors from asserting, by suit, their right to stock belonging to them, which was so sold and transferred. *Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047. See the title **ESTOPPEL**, vol. 5, p. 999.

Cancellation of illegal stock issued in place of illegally sequestered stock.—Where pursuant to a statute of the Confederate States, and to an order of the Confederate district court for the district of South Carolina, certain shares of the stock of a corporation of that state were, upon the ground that the owners of them were alien enemies, sequestered and sold in 1862 at public auction; and the company was required to erase from its stock books the names of such owners, insert those of the purchasers, and issue stock certificates to them, and all dividends thereafter from time to time declared were paid to the purchasers, a bill was properly filed against them, or their assignees, and the company, by an original stockholder, praying for a decree that the certificates so issued be canceled as null and void, and the defendants enjoined from selling them, bringing suits to ef-

fect the transfer thereof, or collect dividends thereon, and the company from allowing such transfers, issuing new certificates for the same, or paying such dividends. The court decreed accordingly. *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654. See the title **WAR**.

Recovery back of stock transferred to illegal combination.—See the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 448.

77. Corporation as necessary party.—*Kendig v. Dean*, 97 U. S. 423, 424, 425, 24 L. Ed. 1061.

So, when stockholders in a corporation, whose stock was sequestered and sold under authority of the Confederate States, filed a bill afterwards for the cancellation of the new stock then issued, and an injunction against its sale, transfer, or sharing in dividends, the corporation, as trustee of the funds, should be brought before the court, as well as in right of its own interest. *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654.

So far as the prior and the latter holders of the stock were concerned, it might have made them parties, and had their rights settled by a bill of interpleader. There were also questions affecting all the stockholders alike. *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654.

78. Osborn v. United States Bank, 9 Wheat. 738, 869, 6 L. Ed. 204; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654.

79. Liability of company for illegal transfer of stock—Laches.—*Ware v. Galveston City Co.*, 146 U. S. 102, 36 L. Ed. 904. See the title **LACHES**, vol. 7, p. 790.

80. Executed sale.—*Dean v. Nelson*, 10 Wall. 158, 170, 19 L. Ed. 926.

81. Sale of shares in irrigation company construed.—*Loud v. Pomona Land, etc., Co.*, 153 U. S. 564, 581, 38 L. Ed. 822.

Sale and surrender to corporation distinguished.—*Eldred v. Bell Tel. Co.*, 119 U. S. 513, 39 L. Ed. 496.

Sale of stock and of joint interest in enterprise distinguished.—*In Beardsley v.*

2. **CONSTRUCTION AND OPERATION.**—One who has sold corporate stock held by him, is not liable to the vendee, in the absence of a guaranty, for depreciation in its value, even though caused by the foreclosure and sale of the corporate property under a mortgage held by him, he becoming the purchaser.⁸²

Market Price.—The market price of the shares of stock in a manufacturing company includes more than the mere value of the property owned by it.⁸³

Sale Subject to Pledge.—See note.⁸⁴

As Affecting Relation to Corporation.—The sale and transfer, when complete, destroys the relation of membership between the corporation and the old stockholder, with all its incidents, and creates an original relation with the new member, free from all antecedent obligations.⁸⁵

3. **EFFECT OF FRAUD OR MISTAKE**—a. *In General.*—If any fraud or deception is practiced upon the stockholder which induces him to transfer his shares for less than they are worth, he may be relieved in a court of equity. But the burden of proving the charge of fraud is upon him who makes it, since fraud cannot be presumed in a court of equity any more than in a court of law.⁸⁶

Beardsley, 138 U. S. 262, 34 L. Ed. 928, it was held that the transaction by which a block of railroad stock was sold, established a joint interest in the parties in the railroad enterprises forming the subject of the controversies, and was not a mere stock transaction, although ownership of stock does not of right give a proportional interest with every contractor in the contracts made by him with the corporation.

Sale of stock and contract therefor distinguished.—Beardsley *v.* Beardsley, 138 U. S. 262, 34 L. Ed. 928. See the title SALES, vol. 10, p. 1022.

Sale of joint interest or in severalty.—Davison *v.* Davis, 125 U. S. 90, 96, 31 L. Ed. 635.

An agreement between parties to co-operate in securing a franchise for a corporation to be formed in the future, under which each is to have an equal interest, is not one for the transfer of shares of stock in a corporation. Hyer *v.* Richmond Traction Co., 168 U. S. 471, 483, 42 L. Ed. 547. See the title CORPORATIONS, vol. 4, pp. 659, et seq., 670.

82. Liability of vendors for depreciation caused by foreclosing mortgage.—McLane *v.* King, 144 U. S. 260, 261, 36 L. Ed. 428. The allegation that it was done with a fraudulent intent and purpose amounts to nothing. If the act was legal, it is not made illegal by a mere epithet. McLane *v.* King, 144 U. S. 260, 261, 262, 263, 36 L. Ed. 428.

83. Market price.—Pullman's Palace Car Co. *v.* Central Transp. Co., 171 U. S. 138, 154, 43 L. Ed. 108. See the title EVIDENCE, vol. 5, p. 1026. See MARKET VALUE, vol. 8, p. 246. See, also, post, "Damages," VI, E, 4, d.

84. Minneapolis Ass'n *v.* Canfield, 121 U. S. 295, 308, 30 L. Ed. 962.

Sale or pledge.—Minneapolis Ass'n *v.* Canfield, 121 U. S. 295, 308, 30 L. Ed. 962.

Lien not released by unexecuted agreement to receive bonds.—Minneapolis Ass'n *v.* Canfield, 121 U. S. 295, 308, 30 L. Ed. 962.

85. As affecting relation to a corporation.—National Bank *v.* Watsontown Bank, 105 U. S. 217, 222, 26 L. Ed. 1039.

Condition hastening maturity of note for price.—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 282.

Effect of war on foreclosure of mortgage of stockholder's interest.—See the title CHATTEL MORTGAGES, vol. 3, p. 765.

86. Effect of fraud.—Hager *v.* Thomson, 1 Black 80, 17 L. Ed. 41.

If one of the stockholders of a corporation agrees to sell out his shares to the others for such price as a fair examination into the condition of the company may show the stock to be worth, he is entitled to have the investigation which he has bargained for. Hager *v.* Thomson, 1 Black 80, 17 L. Ed. 41.

But, the case being between vendor and vendee, the rights of the parties must be measured by the terms of the agreement under which the sale and purchase were made. Assuming this to be as alleged, all the complainant could claim was such a price for his stock as it should appear to be worth upon such examination, and this having been had, the estimate made thereon was binding. Hager *v.* Thomson, 1 Black 80, 94, 17 L. Ed. 41.

Here it was held that, looking at the whole evidence, it was obvious that the charge of fraud and deception was wholly unsustained by proof, and the allegations of mistake, so far as the complainant is concerned, were equally unfounded. Hager *v.* Thomson, 1 Black 80, 92, 17 L. Ed. 41. As to mutual settlement, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 72.

Advantage taken of drunkenness.—This is ground for cancellation in equity of a transfer of stock so obtained for an inadequate consideration. Thackrah *v.* Haas, 119 U. S. 499, 501, 30 L. Ed. 486. See the title DRUNKENNESS, vol. 5, p. 496.

Damages for fraud in sale of stock.—See the title DAMAGES, vol. 5, pp. 183,

b. *Rescission*.—The vendee of stock in a company, who, on the ground of fraud, rescinded his contract of purchase, is not bound to receive the stock certificate left on deposit for him by the vendor, and tender it to the latter before bringing his action for the purchase money.⁸⁷

4. BREACH OF CONTRACT AND ACTION THEREFOR—*a. Conditional Contract*.—An action cannot be supported as an action seeking damages for breach of contract to deliver stock, where there was no engagement to deliver any, except on a condition which has not happened.⁸⁸

b. *Demand*.—Unless the contract for the delivery of stock so provides, the demand of one of the parties thereto that the other shall perform his agreement need not be in writing.⁸⁹ And where the amount to which the plaintiff is entitled is clear, an action by him for a breach of the contract for the delivery of stock will not be defeated solely on the ground that his demand upon the defendant was in excess of that amount.⁹⁰

c. *Form of Action and Declaration*.—An action was well brought in the name of the assignee of a stock contract, promising to receive a transfer from "J. B. or order," it being negotiable.⁹¹

Declaration in Assumpsit on Contract for Sale of Stock.—See the title ASSUMPSIT, vol. 2, p. 654.

d. *Damages*.—The market value of stock at the date of the contract has been held to be the proper measure of damages for refusal to make the transfer according to a contract, which was to deliver stock for property.⁹² But if the action is in tort, the measure of damages was not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it, nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plain-

185; FRAUD AND DECEIT, vol. 6, p. 431.

87. *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420.

Burden of proof.—Where the plaintiff's knowledge of the fraud and his neglect promptly to rescind the contract are relied on to defeat the action, the burden of proving the fact of such knowledge and the time when it was acquired rests upon the defendant. *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420.

Weight of evidence—Jury's findings.—The court submitted to the jury to determine whether from certain letters and telegrams, when considered in connection with the other evidence in the case, the defendant undertook to act as the agent of the plaintiff in the purchase of stock from other parties. The jury found, and the letters clearly showed, that he did undertake so to act. Held, that the omission of the court to construe the written evidence, if erroneous, affords him no just cause of complaint. *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420.

88. *Humaston v. Telegraph Co.*, 20 Wall. 20, 28, 22 L. Ed. 279.

89. *Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484.

90. *Colby v. Reed*, 99 U. S. 560, 25 L. Ed. 484.

91. *Reed v. Ingraham*, 4 Dall. 169, 1 L. Ed. 786.

"On general principles of law, stock contracts cannot be regarded as negoti-

able; but a contractor may certainly make himself liable, as if they were so; and the maxim, *modus et conventio vincunt leges*, applies forcibly to the case." *Reed v. Ingraham*, 3 Dall. 505, 1 L. Ed. 697.

92. "If there had been an agreement to deliver a certain quantity of stock, and an action had been brought for the conversion of it, on the ground that the defendant by the sale to another company had put it out of its power to comply with the terms of its agreement, evidence of the value of the stock at the time the sale occurred would be competent. And so would evidence of its value at the date of the revocation, if the plaintiff was in a position to support an action for damages for breach of contract to deliver stock." *Humaston v. Telegraph Co.*, 20 Wall. 20, 29, 30, 22 L. Ed. 279. See, also, ante, "Construction and Operation," VI, E, 2.

Sales for future delivery.—In the case of sales for future delivery the measure is the market price on the day for delivery, and when the exchange, with reference to which the sale was made, was closed at that time, it was proper, after a tender of the stock and refusal thereof, to put the stock up for sale after due notice. The price brought at this sale would determine its value and the damages. *Clews v. Jamieson*, 182 U. S. 461, 496, 45 L. Ed. 1183.

Acceptance of stock in mitigation of damages not compellable.—*Colby v. Reed*,

tiff might have gained is not the question, but what he had lost by being deceived into the purchase.⁹³

e. *Specific Performance*.—See ante, "Right to Transfer on Books and Remedy for Refusal," VI, C. While it is true that courts will sometimes decree the specific performance of a contract for the transfer of stock,⁹⁴ undue delay in asking specific performance, where the value of the stock has increased, bars right to specific performance of contract for sale of stock, although the delay was due to pecuniary inability to pay therefor.⁹⁵

F. Lien of Corporation.—1. **UNDER GENERAL LAW**.—The rule is clear and unquestioned, that where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world.⁹⁶

2. **UNDER ACT OF INCORPORATION**.—The lien may be by the act of incorporation, of which every one taking an assignment is bound to take notice.⁹⁷

Stock Held in Trust.—Notice to the board of directors of a corporation when stock was transferred to a person, that he held it as trustee only, was notice to the corporation; and no subsequent change of directors could require a new notice of this fact, and the corporation could acquire no lien or title, discharged of the trust, from such trustee.⁹⁸

3. **WAIVER**.—The lien, however, may be waived.⁹⁹

G. Pledge of Stock.—1. **WHAT CONSTITUTES**.—Formal transfer on the corporate books is unnecessary to pass the property between the parties.¹

99 U. S. 560, 25 L. Ed. 484. See the title DAMAGES, vol. 5, p. 193.

93. *Sigafus v. Porter*, 179 U. S. 116, 122, 45 L. Ed. 113; *Smith v. Bolles*, 132 U. S. 125, 129, 33 L. Ed. 270. See the title DAMAGES, vol. 5, p. 183.

Expected fruits of unrealized speculation.—See the title DAMAGES, vol. 5, p. 184.

94. **Specific performance**.—*Hyer v. Richmond Traction Co.*, 168 U. S. 471, 483, 42 L. Ed. 547.

95. **Right to specific performance as affected by delay**.—*Davison v. Davis*, 125 U. S. 90, 94, 31 L. Ed. 635.

If the transaction relating to the stock was a sale upon condition of payment of the note given therefor at maturity, the nonperformance of the condition for over five years defeated it, if the vendor saw fit to avail himself of the breach, which he did. If it had been only an agreement for a sale, the delay of the complainants in offering to pay the note and demanding a delivery of the stock would preclude them from asking for a specific performance of the agreement, even if the frame of the bill were adapted to such a decree—which is very doubtful, although it contains a prayer for specific and other relief. The delay was upwards of five years after the note became due; and the circumstances which occurred enhance the right of the defendant to rely on that defense against any claim for specific performance, there having been appreciation of the value of the stock during that time. *Davison v. Davis*, 125 U. S. 90, 94, 31 L. Ed. 635.

Enforcement of unconscionable bargain.—See ante, "Jurisdiction," VI, C, 3, a.

96. **Lien under general law**.—*Union Bank*

v. Laird, 2 Wheat. 390, 4 L. Ed. 269; *Brent v. Bank*, 10 Pet. 596, 9 L. Ed. 547; *National Bank v. Watontown Bank*, 105 U. S. 217, 221, 26 L. Ed. 1039; *Hammond v. Hastings*, 134 U. S. 401, 403, 33 L. Ed. 960.

Priority.—Where the lien of a corporation attaches to an actual transfer of the stock, so as to make it subject to all their equitable demands upon it; a fortiori, it must remain on it, when a preferred creditor can claim payment only out of the proceeds in the hands of the assignees, or personal representatives of the debtor. And the stock may be sold to pay said lien, the balance to go to such preferred creditor. *Brent v. Bank*, 10 Pet. 596, 617, 9 L. Ed. 547.

Bank's lien.—See the title BANKS AND BANKING, vol. 3, p. 166.

97. *Union Bank v. Laird*, 2 Wheat. 390, 4 L. Ed. 269. See *Brent v. Bank*, 10 Pet. 596, 9 L. Ed. 547. See the title BANKS AND BANKING, vol. 3, p. 166, et seq.

98. **Stock held in trust**.—*Mechanics' Bank v. Seton*, 1 Pet. 299, 309, 7 L. Ed. 152. See the title BANKS AND BANKING, vol. 3, p. 167.

99. **Waiver**.—*Hammond v. Hastings*, 134 U. S. 401, 405, 33 L. Ed. 960; *National Bank v. Watontown Bank*, 105 U. S. 217, 221, 26 L. Ed. 1039.

"But mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it. It constitutes no waiver on the part of the corporation." *Hammond v. Hastings*, 134 U. S. 401, 405, 33 L. Ed. 960. See the title BANKS AND BANKING, vol. 3, p. 167.

1. *National Bank v. Watontown Bank*, 105 U. S. 217, 220, 26 L. Ed. 1039; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed.

Deposit for Special Purpose Which Has Failed.—Such a deposit does not constitute a pledge.²

2. **PLEDGE BY TRUSTEE WITH NOTICE OF TRUST TO PLEDGEE.**—A person lending money to a trustee on a pledge of trust stocks, whether the pledge be for an antecedent debt or a contemporaneous loan, and selling the stocks for repayment of the loan, will be compelled to account for them, if he have either actual or constructive notice that the trustee was abusing his trust, and applying the money lent to his own purposes.³

3. **LIABILITY ON STOCK.**—See post, "Liability of Persons Holding Stock in Fiduciary Capacity or as Security," VII, D, 5; "Liability on Stock Held as Security or in Trust," VIII, D, 4, d, (3).

4. **RIGHT TO VOTE.**—See ante, "Voting Privilege," V.

5. **AS NOT CREATING IMPLIED LIEN ON CORPORATE PROPERTY.**—See note.⁴

H. Conversion of Stock.—Where a wrongful conversion is sufficiently charged in an action, and no defense made, the plaintiff is entitled to his damages.⁵

VII. Subscriptions to Stock.

A. Requisites and Validity—1. **IN GENERAL.**—Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer, and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit.⁶ Or he may become so by assignment, or direct purchase from the com-

532. See the title **BANKS AND BANKING**, vol. 3, pp. 164, 165, et seq.

2. **Deposit for special purpose which has failed.**—*Randel v. Brown*, 2 How. 406, 11 L. Ed. 318. See the title **LIENS**, vol. 7, p. 891. See, also, the title **FRAUD AND DECEIT**, vol. 6, p. 415.

Compared to sale.—See ante, "Construction and Operation," VI, E, 2.

Parol evidence to show intention of parties.—*Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256. See the title **PAROL EVIDENCE**, vol. 9, pp. 29, 30.

3. **Pledge by trustee with notice of trust to pledgee.**—*Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

The lender will be held to have had this notice when the certificates of the stocks pledged show on their face that the stock is held in trust, and when, apparently, the loan was for a private purpose of the trustee, and this fact would have been revealed by an inquiry. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

Although the stocks pledged may be such as the trustee under the instrument creating his trust had no right to invest in; as ex gr., stock of a canal company, when he was bound to invest in state or federal loans. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

Notice to bank cashier.—See the title **BANKS AND BANKING**, vol. 3, p. 122.

4. **As not creating implied lien on corporate property.**—*Cincinnati City v. Morgan*, 3 Wall. 275, 18 L. Ed. 146. See the title **CORPORATIONS**, vol. 4, p. 739.

5. *McAllister v. Kuhn*, 96 U. S. 87, 89, 24 L. Ed. 615. See ante, "Assignment and Delivery of Certificates," VI, B, 2. See the titles **PLEADING**, vol. 9, p. 433; **TROVER AND CONVERSION**.

By corporation or officer.—See ante, "Right Thereto and Liability for Failure to Issue," III, A.

6. *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 234, 35 L. Ed. 702; *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713; *Potts v. Wallace*, 146 U. S. 689, 703, 36 L. Ed. 1135; *Scott v. Deweese*, 181 U. S. 202, 216, 45 L. Ed. 822; *Webster v. Upton*, 91 U. S. 65, 67, 23 L. Ed. 384.

Where the subscription of the stock was in form for a given number of shares, but as each share was fixed by the charter at one hundred dollars, the amount each was liable for to the company was readily ascertained, it is well settled that a subscription in this form is as obligatory as if it had been in money. *Frost v. Frostburg Coal Co.*, 24 How. 278, 283, 16 L. Ed. 637.

And an actual subscription is not necessary.—There may be a virtual subscription, deducible from the acts and conduct of party. *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 234, 35 L. Ed. 702; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711; *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713; *Scott v. Deweese*, 181 U. S. 202, 216, 45 L. Ed. 822; *Webster v. Upton*, 91 U. S. 65, 67, 23 L. Ed. 384.

Where a person applied to become a stockholder in a corporation, executed a paper by which he acknowledged the receipt from the company of ten shares of its stock, and agreed within a time named to pay to the company \$200, or twenty per cent of its par value, as the company could not sell its stock at less than par, what was done amounted in law to a subscription for the stock, and nothing else.

pany.⁷

Subscription by Agent.—If a power to subscribe for stock in a corporation was given to an agent, the agent could not have made the subscription after the consolidation of that corporation with another, without consulting his principals. Such a material change of circumstances would have rendered the subscription an excess of the power given to them.⁸

2. **NECESSITY FOR WRITING.**—To constitute a "subscription" to stock in a corporation, it is not necessary that there be an act of chirographical subscribing.⁹

3. **NECESSITY FOR SUBSCRIPTION AND PAYMENT OF CERTAIN AMOUNT.**—The fact that some of the stock authorized remains unsubscribed is not sufficient ground ordinarily for the withdrawal of a subscription.¹⁰

4. **EFFECT OF FRAUD AND MISREPRESENTATION**—a. *In General.*—Fraudulent representations as to the solvency of the corporation will invalidate a subscription induced thereby and change the stockholder's relation to that of creditor for the amount that he has paid.¹¹

b. *As Defense to Action for Unpaid Subscriptions.*—**Action by Assignee in Bankruptcy.**—See the title **BANKRUPTCY**, vol. 2, pp. 886, 887.

Misrepresentations of Corporate Agent.—Representations by the agent of a corporation as to the nonassessability of its stock, beyond a certain percentage of its value, constitute no defense to an action by the assignee in bankruptcy of the corporation against the holder of the stock to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations.¹²

Diligence and Promptness Essential.—Parties who are shareholders, and

Hawley v. Upton, 102 U. S. 314, 316, 26 L. Ed. 179; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

Acceptance by the company as a subscription is shown conclusively by the fact that his name was entered on the books as a stockholder and publication made accordingly, and it matters not that he had no knowledge of such a publication. *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179.

7. "An express promise is almost unknown, except in the case of an original subscription; and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it." *Webster v. Upton*, 91 U. S. 65, 67, 23 L. Ed. 384. See, also, as to what constitutes a stockholder, post, "Definitions and General Considerations," VIII, A.

8. **Subscription by agent.**—*County of Scotland v. Thomas*, 94 U. S. 682, 692, 24 L. Ed. 219.

Municipal and state subscriptions to stock and payment in bonds.—See the titles **MUNICIPAL**, **COUNTY**, **STATE AND FEDERAL AID**, vol. 8, p. 618; **MUNICIPAL**, **COUNTY**, **STATE AND FEDERAL SECURITIES**, vol. 8, p. 650.

9. *Nugent v. Supervisors*, 19 Wall. 241, 22 L. Ed. 83.

Necessity for certificate.—See ante, "Certificate of Stock," II, E.

10. **Necessity for subscription and payment of certain amount.**—*Aspinwall v. Butler*, 133 U. S. 595, 607, 609, 33 L. Ed. 779.

In *Minor v. Mechanics' Bank*, 1 Pet.

46, 7 L. Ed. 47, only \$320,000 out of \$500,000 of capital authorized by the charter was subscribed in good faith, but the court did not regard this deficiency in the subscriptions as at all affecting the status of the corporation, or the validity of its operations. *Scott v. Deweese*, 181 U. S. 202, 214, 45 L. Ed. 822. See, also, *Chubb v. Upton*, 95 U. S. 665, 668, 24 L. Ed. 523. See post, "Capital Stock Not All Subscribed," VIII, D, 4, g, (1). And see the title **CORPORATIONS**, vol. 4, p. 671.

11. **Effect of fraud.**—*Tyler v. Savage*, 143 U. S. 79, 99, 36 L. Ed. 82.

Misrepresentations of corporate agent.—*Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

Such a false representation must be of an existing or nonexisting fact, not a mere opinion. *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105. See the title **FRAUD AND DECEIT**, vol. 6, p. 405, et seq.

12. **Misrepresentations of corporate agent.**—*Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

To make an alleged misrepresentation a defense to a mortgage to secure a note given for stock, it must have been actually made, and made by the agent of the company by whose acts or declarations the company would be bound, and lastly, it must be believed that the subscriber relied upon the statement, that it was an inducement to him to become a subscriber. *Sawyer v. Prickett*, 19 Wall. 146, 165, 22 L. Ed. 105. See, also, the title **FRAUD AND DECEIT**, vol. 6, pp. 426, 427.

claim to be relieved on the ground of fraud, must act with the utmost diligence and promptitude.¹³

Fraudulent Purpose to Evade Charter Provisions.—This will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same.¹⁴

5. **EFFECT OF ALTERATION OF ORGANIZATION OR PURPOSES.**—Although a subscriber for stock in a company is released from his subscription by a subsequent alteration of the organization or purposes of the company, this is only when such alteration is a fundamental one, and when, in addition, it is not provided for or contemplated by either the charter itself or the general laws of the state.¹⁵

6. **EFFECT OF FAILURE OR ABANDONMENT OF OBJECT.**—The fact that the corporate undertaking is unprofitable, or that it has never been completed, does not entitle one who has paid in his subscription to the capital stock to recover it back, nor does it furnish a justification for a refusal to pay, when the subscription has not, in fact, been paid. Moneys so paid or subscribed belong to the creditors of the corporation.¹⁶

7. **CONDITIONAL SUBSCRIPTIONS.**—Subscriptions made upon a stipulation that all stock over a certain amount was to be taken over by a city in the event of its subscribing to the stock at all, may be so transferred as to free the original subscribers from liability thereon.¹⁷

B. Release of Subscriptions—1. **POWER OF DIRECTORS OR OFFICERS TO RELEASE.**—The stock subscribed is the capital of the company, its means for performing its duty to the commonwealth, and to those who deal with it. Accordingly, it has been settled by very numerous decisions that the directors or trustees or other governing officers of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as ultra vires, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company.¹⁸

13. Diligence and promptness essential.—Upton *v.* Tribilcock, 91 U. S. 45, 55, 23 L. Ed. 203; Twin-Lick Oil Co. *v.* Marbury, 91 U. S. 587, 592, 23 L. Ed. 328. See the title **RESCISSION, CANCELLATION AND REFORMATION**, vol. 10, pp. 808, 809.

Diligence as question for jury.—Upton *v.* Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

14. Fraudulent purpose to evade charter provisions.—Minor *v.* Mechanics' Bank, 1 Pet. 46, 66, 7 L. Ed. 47.

15. Alteration of organization or purposes.—Nugent *v.* Supervisors, 19 Wall. 241, 22 L. Ed. 83; Clearwater *v.* Meredith, 1 Wall. 25, 40, 17 L. Ed. 604; East Lincoln *v.* Davenport, 94 U. S. 801, 806, 24 L. Ed. 322.

But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking. Clearwater *v.* Meredith, 1 Wall. 25, 40, 17 L. Ed. 604.

16. Sawyer v. Prickett, 19 Wall. 146, 165, 22 L. Ed. 105.

17. Conditional subscriptions.—Burke *v.* Smith, 16 Wall. 390, 21 L. Ed. 361.

The original subscriptions being valid as made, and the stipulation in the articles of association not prohibited by the law, it needed no order of the board of directors

to validate the substitution of the city for the original subscribers. It matters not then that the directors were interested. Equity would have enjoined them against interference to prevent a transfer, with all its stipulated consequences. The substitution of the city was a matter over which they had no discretionary power. Burke *v.* Smith, 16 Wall. 390, 400, 21 L. Ed. 361.

The proceeding being one in equity and not at law, an "agreement of record," by which complainants admitted that such transfer had been made, though not made part of the record by the pleadings, would be regarded as evidence, and it proved the transfer and acceptance of the stock by the city. Burke *v.* Smith, 16 Wall. 390, 21 L. Ed. 361.

Laches.—Burke *v.* Smith, 16 Wall. 390, 21 L. Ed. 361.

Action on note and defense of agreement to release.—Lancaster *v.* Collins, 115 U. S. 222, 29 L. Ed. 373, where it was held that the defense adequately alleged such an agreement, and its existence was a jury question under the charge of the court on the conflicting evidence.

18. Power of directors or trustees to release.—Burke *v.* Smith, 16 Wall. 390, 395, 21 L. Ed. 361; Sawyer *v.* Hoag, 17 Wall. 610, 21 L. Ed. 731; Upton *v.* Tribilcock,

2. **POWER OF CORPORATION.**—Nor can the company itself do so when insolvent, either by releasing the subscription, or declining to accept payment thereof,¹⁹ although while solvent it might be done, if the subscriber acquiesced and claimed the benefit of the company's refusal before insolvency had supervened.²⁰

C. Contract to Secure Subscriber against Loss.—See the title **CORPORATIONS**, vol. 4, p. 659.

D. Nature of Obligation and Payment and Enforcement Thereof—1. CHARACTER AS DEBT AND PASSAGE UNDER ASSIGNMENT.—The liability of stockholders upon their unpaid subscriptions is that of debtors to the corporation, and passes to the assignees under a general assignment.²¹

2. **LIABILITY SEVERAL.**—The liability of a subscriber for capital stock is several, and not joint, and may be enforced against him at law without joinder of other subscribers.²²

3. **LIABILITY CONTRACTUAL IN NATURE.**—The liability is contractual in its nature, being engendered by and relating to the contract from which it arises, and survives against the estate of the subscriber.²³

4. **LIABILITY OF EQUITABLE OWNERS.**—The equitable owners of stock standing on the corporate books in the names of others, are, by some statutes, made liable on such stock.²⁴

91 U. S. 45, 48, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 71, 23 L. Ed. 384; *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179; *County of Morgan v. Allen*, 103 U. S. 498, 508, 26 L. Ed. 498; *Morgan v. Struthers*, 131 U. S. 246, 254, 33 L. Ed. 132; *Clark v. Bever*, 139 U. S. 96, 112, 35 L. Ed. 88; *Potts v. Wallace*, 146 U. S. 689, 704, 36 L. Ed. 1135; *Herhold v. Upton*, 154 U. S. 624, 23 L. Ed. 892. See, also, *Curran v. Arkansas*, 15 How. 304, 305, 14 L. Ed. 705. See, however, the title **CORPORATIONS**, vol. 4, p. 659, as to contract for transfer of shares.

Simulated payment.—See post, "Capital Stock and Unpaid Subscriptions as Trust Fund," VII, D, 8, a.

The president has no legal power or authority to deplete the coffers of the company, by instructing the treasurer to refuse to accept subscription money when tendered. *Potts v. Wallace*, 146 U. S. 689, 705, 36 L. Ed. 1135.

Who may attack release.—The assignee of the bankrupt corporation in the interest of the creditors, has a right to inquire into this conventional payment of his stock by one of the shareholders of the company. *Sawyer v. Hoag*, 17 Wall. 610, 621, 21 L. Ed. 731.

19. *Potts v. Wallace*, 146 U. S. 689, 705, 36 L. Ed. 1135. See, also, *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179; *Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696; *New Albany v. Burke*, 11 Wall. 96, 106, 20 Wall. 155; *Clark v. Bever*, 139 U. S. 96, 112, 35 L. Ed. 88; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384.

20. *Potts v. Wallace*, 146 U. S. 689, 702, 36 L. Ed. 1135. See, also, post, "Capital Stock and Unpaid Subscriptions as Trust Fund," VII, D, 8, a; "Contract Exempting from Assessment," VII, D, 8, b, (3), (c).

21. **Character as debt and passage under assignment.**—*Terry v. Anderson*, 95 U. S. 628, 636, 24 L. Ed. 365; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135. See, also, post, "Who May Enforce and When," VII, D, 8, c, (2); "Failure to Execute Illegal Preference as Directed," VII, D, 8, c, (7), (b).

Compared to statutory individual liability.—See the title **BANKS AND BANKING**, vol. 3, p. 130.

22. **Liability several not joint.**—*Hatch v. Dana*, 101 U. S. 205, 210, 25 L. Ed. 885. See, also, post, "Parties," VII, D, 8, c, (6).

South Carolina.—*Manufacturing Co. v. Bradley*, 105 U. S. 175, 181, 26 L. Ed. 1034.

23. **Liability contractual.**—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 567, 44 L. Ed. 587; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Matteson v. Dent*, 176 U. S. 521, 525, 44 L. Ed. 571.

An express promise need not be proved.—So held in the case of an English corporation, where the statute under which corporation was organized provided for the liability. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 47 L. Ed. 782. See, also, *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220.

24. **Equitable owners—Ohio statute.**—*Lloyd v. Preston*, 146 U. S. 630, 644, 36 L. Ed. 1111.

Stock taken in name of irresponsible party.—"The owner of stock cannot escape liability by taking it in the name of his infant children. *Roman v. Fry*, 6 J. J. Mar. 634. Nor is it any defence to

5. **LIABILITY OF PERSONS HOLDING STOCK IN FIDUCIARY CAPACITY, OR AS SECURITY.—Unpaid Subscriptions.**—"The courts in England, and some in this country, have gone very far in sustaining a liability for unpaid subscriptions to stock against persons holding the same in any capacity whatever, whether as trustees, guardians, or executors, or merely as collateral security. It cannot be denied that, in some cases, the extreme length to which the doctrine has been pushed has operated very harshly; and in cases in which the corporation itself has no just right to enforce payment, and where no bad faith or fraudulent intent has intervened, it may be doubted whether creditors have any better right, unless by force or some express provision of a statute. The Missouri statute recognizes the justice of making a discrimination between those who hold stock in their own right, and those who hold it merely in a representative capacity, or as trustees, or by way of collateral security."²⁵

6. **LIABILITY AS AFFECTED BY SALE OR TRANSFER.—Liability of Registered Shareholder.**—The shareholder cannot transfer his shares when the corporation is failing, for the purpose of escaping his liability.²⁶ And no transfer is complete, so as to release the shareholder, until entered on the stock transfer book.²⁷

Liability of Purchaser or Transferee of Stock.—The transferee of stock is liable for calls made after he has been accepted by the company as a stockholder, and his name registered on the stock books as a corporator; and, being thus liable, there is an implied promise that he will pay calls made upon such stock while he continues its owner.²⁸

Purchaser's Duty and Vendor's Rights.—Still further it was purchaser's duty to have the legal transfer made to relieve the vendor from liability to future calls. A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer.²⁹

show that the holder took and held the stock as the agent of the corporation, to sell for its benefit." *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. Ed. 220.

25. **Stock held in fiduciary capacity, or as security.**—*Burgess v. Seligman*, 107 U. S. 20, 26, 27 L. Ed. 359.

Liability where stock is transferred on books.—The transferee of stock, who caused the transfer to be made to himself on the books of the corporation, although he holds it as collateral security for a debt of his transferrer, is liable for an unpaid balance to the company, its creditors or the assignee in bankruptcy thereof. *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818. See, also, *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384. As to statutory liability, see post, "Liability on Stock Held as Security or in Trust," VIII, D, 4, d, (3).

26. **Liability of registered shareholder.**—*Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696.

27. **Registration of transfer essential.**—*Matteson v. Dent*, 176 U. S. 521, 531, 44 L. Ed. 571; *Hawkins v. Glenn*, 131 U. S. 319, 335, 33 L. Ed. 184. See, also, *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Pullman v. Upton*, 96 U. S. 328, 330, 24 L. Ed. 818.

Under Virginia statute.—Particularly where the statute declares that the person in whose name the stock stands shall be deemed the owner thereof as it regards the company. Code of 1873, Tit. 18, c. 57, § 27. *Hawkins v. Glenn*, 131 U. S. 319, 335, 33 L. Ed. 184, citing *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

28. **Liability of transferee.**—*Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384.

That the original holders and the transferees of the stock are thus liable was held in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, and *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384, and the reasons that controlled the court's judgment in those cases are of equal force in the present. *Pullman v. Upton*, 96 U. S. 328, 330, 24 L. Ed. 818.

29. **Purchaser's duty and vendor's rights.**—*Webster v. Upton*, 91 U. S. 65, 72, 23 L. Ed. 384.

If so, it is clear that the vendor may himself request the transfer to be made; and that, when it is made at his request, the buyer becomes responsible for subsequent calls. This, however, does not interfere with the right of one who appears to be a stockholder on the books of a company to show that his name appears on the books without right and

7. **ESTOPPEL TO DENY LIABILITY ON STOCK SUBSCRIPTION.**—It appearing in evidence that two certificates of stock in blank as to the stockholder's name were issued and delivered to the plaintiff in error, that she had paid to the company all that was then payable, and received a dividend, and that her name was placed upon the stock list, she was estopped from denying her ownership.³⁰

8. **PAYMENT AND ENFORCEMENT.**—a. *Capital Stock and Unpaid Subscriptions as Trust Fund.*—The capital stock,³¹ and especially unpaid subscriptions to the stock of a corporation, constitute a trust fund for the benefit of its creditors, which may not be given away or disposed of by it, without consideration or fraudulently, to the prejudice of such creditors.³²

without his authority. *Webster v. Upton*, 91 U. S. 65, 72, 23 L. Ed. 384.

Oregon statute.—*Patterson v. Lynde*, 106 U. S. 519, 520, 27 L. Ed. 265.

30. **Estoppel to deny liability on subscriptions.**—*Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220.

In assumpsit by an assignee in bankruptcy of an insurance company against the holder of shares of its stock, to enforce the collection of the balance due thereon, the same not having been paid pursuant to the order of the court sitting in bankruptcy, where plea was non assumpsit, held, that the plea admits the existence of the corporation, and that the state alone can raise the question whether the corporate stock had been properly increased. *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818.

Estoppel to deny validity of incorporation.—*Sanger v. Upton*, 91 U. S. 56, 64, 23 L. Ed. 220. See the title CORPORATIONS, vol. 4, pp. 674, 675.

31. **Capital stock.**—The capital stock of an incorporated company is a fund set apart for the payment of its debts. *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Mumma v. Potomac Co.*, 8 Pet. 281, 8 L. Ed. 945; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 387, 16 L. Ed. 349; *New Albany v. Burke*, 11 Wall. 96, 106, 20 L. Ed. 155; *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Upton v. Tribilcock*, 91 U. S. 45, 47, 23 L. Ed. 203; *Webster v. Upton*, 91 U. S. 65, 66, 23 L. Ed. 384; *Scammon v. Kimball*, 92 U. S. 362, 367, 23 L. Ed. 483; *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654; *County of Morgan v. Allen*, 103 U. S. 498, 508, 26 L. Ed. 498; *Scovill v. Thayer*, 105 U. S. 143, 154, 26 L. Ed. 968; *Richardson v. Green*, 133 U. S. 30, 46, 33 L. Ed. 516; *Clark v. Bever*, 139 U. S. 96, 109, 35 L. Ed. 88; *Handley v. Stutz*, 139 U. S. 327, 417, 35 L. Ed. 227.

The capital paid in, and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received, for the benefit of shareholders and creditors. *Upton v. Tribilcock*, 91 U. S. 45, 48, 23 L. Ed. 203; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731.

32. **Unpaid subscriptions.**—*Fogg v. Blair*, 139 U. S. 118, 125, 35 L. Ed. 104;

Ogilvie v. Knox Ins. Co., 22 How. 380, 388, 16 L. Ed. 349; *New Albany v. Burke*, 11 Wall. 96, 108, 20 L. Ed. 155; *Sawyer v. Hoag*, 17 Wall. 610, 620, 21 L. Ed. 731; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *County of Morgan v. Allen*, 103 U. S. 498, 509, 26 L. Ed. 498; *Scovill v. Thayer*, 105 U. S. 143, 154, 26 L. Ed. 968; *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 345, 30 L. Ed. 420; *Morgan v. Struthers*, 131 U. S. 246, 254, 33 L. Ed. 132; *Hawkins v. Glenn*, 131 U. S. 319, 328, 335, 33 L. Ed. 184; *Richardson v. Green*, 133 U. S. 30, 45, 33 L. Ed. 516; *Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696; *Glenn v. Liggett*, 135 U. S. 533, 546, 34 L. Ed. 262; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88; *Potts v. Wallace*, 146 U. S. 689, 700, 36 L. Ed. 1135; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423.

"It is a substitute for the personal liability which subsists in private copartnerships. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied, otherwise than upon their demands, until such demands are satisfied." *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. Ed. 220; *Curran v. Arkansas*, 15 How. 304, 308, 14 L. Ed. 705; *County of Morgan v. Allen*, 103 U. S. 498, 508, 26 L. Ed. 498. See, also, *Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696; *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 29 L. Ed. 235; *Hawkins v. Glenn*, 131 U. S. 319, 332, 33 L. Ed. 184; *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721; *Richardson v. Green*, 133 U. S. 30, 44, 33 L. Ed. 516; *Clark v. Bever*, 139 U. S. 96, 109, 35 L. Ed. 88.

The corporation owns and holds them as a trustee. *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558.

Subscriber's right to arrange for security of his shares.—But this does not affect the right of each subscriber acting for himself, in the act of subscription,

Simulated Payment.—This trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith.³³

Independent of Statute.—This right exists, independently of any statute, by virtue of the relations between a corporation and its creditors and stockholders.³⁴

Dealings between Stockholders and Corporation Closely Watched.—Transactions between stockholders and the corporation must be closely scrutinized in the interests of creditors, lest they contravene these principles.³⁵

b. Payment in Money or Money's Worth—(1) *In General.*—Corporate stock is supposed to represent so much money or money's worth received by the corporation therefor, and the creditors of the corporation have the right to insist that this representation be made good, so far as necessary to pay their legal claims against the corporation.³⁶ But where the charter authorizes capital stock to be paid in property, and the shareholders honestly and in good faith put in property instead of money in payment of their subscriptions, third parties have no ground of complaint,³⁷ but any overvaluation of such property is fraudulent,

with the unrestricted right, in the exercise of vigilance and foresight, to make any arrangement for the security of his shares, provided he does not lessen the amount of his subscription, which constitutes part of the trust fund in which all the subscribers have an equal interest. *Morgan v. Struthers*, 131 U. S. 246, 255, 33 L. Ed. 132. See the title CORPORATIONS, vol. 4, p. 659. See, also, post, "Trust Relationship and Obligation," VIII, D, 1, a.

Municipal aid subscriptions.—The doctrine is applicable where the debt created by the subscription of a county is evidenced by its bonds, and they were surrendered to it in fraud of the rights of creditors, although the surrender was made pursuant to a consent decree in a suit to which they were not parties. *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498.

33. Simulated payment.—*Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Richardson v. Green*, 133 U. S. 30, 43, 33 L. Ed. 516.

An arrangement by which the stock is nominally paid, and the money immediately taken back as a loan to the stockholder, is a device to change the debt from a stock debt to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between the company and the stockholder. *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Richardson v. Green*, 133 U. S. 30, 44, 33 L. Ed. 516; *Camden v. Stuart*, 144 U. S. 104, 113, 36 L. Ed. 363.

And while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88; *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104; *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, was intended to overrule or qualify in any way the wholesome prin-

ciple adopted by the court in the earlier cases, especially as applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands. *Camden v. Stuart*, 144 U. S. 104, 113, 36 L. Ed. 363. See ante, "Release of Subscriptions," VII, B.

34. Independent of statute although recognized and enforced in statutes.—*Clark v. Bever*, 139 U. S. 96, 116, 35 L. Ed. 88; *Fogg v. Blair*, 139 U. S. 118, 125, 35 L. Ed. 104; *Blair v. Gray*, 104 U. S. 769, 26 L. Ed. 922.

Iowa statute.—*Clark v. Bever*, 139 U. S. 96, 116, 35 L. Ed. 88.

Missouri statute.—*Fogg v. Blair*, 139 U. S. 118, 125, 35 L. Ed. 104; *Wilson v. Seligman*, 144 U. S. 41, 45, 36 L. Ed. 338. See post, "Notice and Trial," VII, D, 8, c, (1), (c).

35. Sawyer v. Hoag, 17 Wall. 610, 620, 21 L. Ed. 731; *Richardson v. Green*, 133 U. S. 30, 43, 33 L. Ed. 516; *Clark v. Bever*, 139 U. S. 96, 113, 35 L. Ed. 88. See, also, post, "Trust Relationship and Obligation," VIII, D, 1, a.

36. Handley v. Stutz, 139 U. S. 417, 428, 35 L. Ed. 227; *Scovill v. Thayer*, 105 U. S. 143, 154, 26 L. Ed. 968; *Fogg v. Blair*, 139 U. S. 118, 125, 35 L. Ed. 104. See, also, *Webster v. Upton*, 91 U. S. 65, 68, 23 L. Ed. 384.

37. Coit v. Gold Amalgamating Co., 119 U. S. 343, 345, 30 L. Ed. 420; *Bank v. Alden*, 129 U. S. 372, 378, 32 L. Ed. 725; *Handley v. Stutz*, 139 U. S. 417, 432, 35 L. Ed. 227.

See *Sanger v. Upton*, 91 U. S. 56, 60, 23 L. Ed. 220, where it is said: "An agreement that a stockholder may pay in any other medium than money is also void as a fraud upon other stockholders, and upon creditors as well."

Constitutional prohibition of issuance

and the difference between the true value and face of the stock can be collected for the benefit of creditors.³⁸ And so where stock is issued in payment for services rendered.³⁹

Business Experience and Good Will.—The experience and good will of the partners, which it is claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection. And so as to loss of time and trouble, of which no account was made at the time.⁴⁰

Estoppel of Creditors.—Of course creditors may be estopped by their conduct from insisting on this requirement.⁴¹

Debt Paid in Stock at Real Value.—But a corporation, although embarrassed, may pay its debt in stock at its real value, without subjecting the creditor to liability to make good the difference between that value and the face of the stock.⁴²

of stock or bonds without value received.

—*Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 299, 300, 30 L. Ed. 595.

38. Over valuation of property.—*Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 345, 30 L. Ed. 420; *Lloyd v. Preston*, 146 U. S. 603, 642, 36 L. Ed. 1111.

"But where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account. A gross and obvious overvaluation of property would be strong evidence of fraud." *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 345, 30 L. Ed. 420; *Bank v. Alden*, 129 U. S. 372, 378, 32 L. Ed. 725; *Handley v. Stutz*, 139 U. S. 417, 432, 35 L. Ed. 227; *Camden v. Stuart*, 144 U. S. 104, 117, 36 L. Ed. 363. See *Lloyd v. Preston*, 146 U. S. 630, 642, 36 L. Ed. 1111.

In *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 345, 30 L. Ed. 420, it was held that the allegation of intentional and fraudulent overvaluation of the property was not sustained by the evidence.

Where the vital question whether the capital stock of this corporation was ever paid in money or money's worth is so covered up and obscured by a multiplication of figures and an entanglement of details that it is almost impossible to arrive at the exact truth, but from this testimony, however, one thing clearly appears, viz., that the company was incorporated with a capital stock of \$150,000, and that the stockholders were content to put a valuation of \$50,000 upon what had been put in at the time the company was formed, as there was apparently no motive for underestimating this value, in the absence of clear proof to the contrary, the court would be justified in accepting it as the correct valuation of the property turned over to the company. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. Ed. 420. But in view of the finding of the masters that \$70,000 had been paid in the court are content to accept this as the true amount. *Camden v. Stuart*, 144 U. S. 104, 117, 118, 36 L. Ed. 363.

Where the property was subsequently

reconveyed to the original owners, the corporation not having been successful, the fact that it was again sold by the holders at prices, which, if the company could have obtained them, would have made its retention advisable, does not alter the transaction. *Bank v. Alden*, 129 U. S. 372, 380, 32 L. Ed. 725. See the title CORPORATIONS, vol. 4, p. 643.

Credits already allowed.—A sum of money paid upon the purchase price of property which had been turned over to the corporation in payment of stock, cannot be allowed as a further credit in payment for the stock. This would be allowing it twice, and this payment added nothing to the assets of the company. *Camden v. Stuart*, 144 U. S. 104, 115, 36 L. Ed. 363.

39. Stock issued in payment for services.—*Fogg v. Blair*, 139 U. S. 118, 125, 35 L. Ed. 104.

40. Business experience and good will.—*Camden v. Stuart*, 144 U. S. 104, 115, 36 L. Ed. 363.

41. Estoppel of creditors to insist on requirement.—*Lloyd v. Preston*, 146 U. S. 630, 643, 36 L. Ed. 1111.

42. Paying debt with full paid stock at real valuation—Liability thereon.—*Handley v. Stutz*, 139 U. S. 417, 432, 35 L. Ed. 227; *Clark v. Bever*, 139 U. S. 96, 112, 35 L. Ed. 88, where it was said that the Iowa statute did not prevent.

If the stock was of no value when so disposed of by the corporation, no wrong was done the creditors, and for a creditor to recover from the holder of such stock upon the ground that the stock was of substantial value, it was incumbent upon him to distinctly allege facts that would enable the court—assuming such facts to be true—to say that the contract was one which, in the interest of creditors, ought to be closely scrutinized. As he impugned the good faith of the transaction, it was incumbent upon him to state the essential, ultimate facts upon which his cause of action rested, and not content himself with charging, generally, that what was done was "colorable," a "fraud," "a breach of trust," and a "scheme" by which contractors

(2) *Liability on Bonus Stock*—(a) *In General*.—If the corporation has no right as against creditors, to sell or dispose of this stock with an agreement that no further assessment shall be made upon it, much less has it the right to give it away, or distribute it among shareholders, without receiving a fair equivalent therefor, and thereby induce the public to deal with it upon the credit of such shares, as representing the assets of the corporation.⁴³

(b) *Increase of Stock*.—And so with an increase of stock distributed without consideration among the original stockholders.⁴⁴ But only as to creditors becoming such after the increase.⁴⁵

(3) *Liability on Stock Sold below Par*—(a) *Right to So Issue and Sell*.—An active corporation, or as it is called in some cases, a “going concern,” finding its original capital impaired by loss or misfortune, may, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market and sell it for the best price that can be obtained.⁴⁶

were to get the stock without paying for it. These are allegations of legal conclusions merely, which a demurrer does not admit. *Fogg v. Blair*, 139 U. S. 118, 127, 35 L. Ed. 104, citing *Dillon v. Barnard*, 21 Wall. 430, 437, 22 L. Ed. 673; *United States v. Ames*, 99 U. S. 35, 45, 25 L. Ed. 295; *Fullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 596, 29 L. Ed. 499.

Application on bonds.—“But certainly it was in the power of the directors to apply the subscription on bonds taken in payment to the extinguishment of debts, and, if thus applied in good faith, all being obtained for it that it was worth, no one has been wronged.” *New Albany v. Burke*, 11 Wall. 96, 106, 20 L. Ed. 155.

43. Liability on bonus stock.—*Handley v. Stutz*, 139 U. S. 417, 427, 35 L. Ed. 227; *Fogg v. Blair*, 139 U. S. 118, 126, 35 L. Ed. 104.

Where all the acts of a party as director, stockholder, chairman of the executive committee and treasurer, all of which offices he held at one time, had their origin in bonus stock, after having exercised all the privileges and powers of a stockholder in the corporation, it cannot be seriously contended that he is to be held exempt from the liabilities which would attach to a bona fide shareholder who has taken shares purporting to be paid up, but which in truth are not paid up. The case of *Scovill v. Thayer*, 105 U. S. 143, 153, 154, 26 L. Ed. 968, bears a close analogy to this. *Richardson v. Green*, 133 U. S. 30, 45, 33 L. Ed. 516.

Bonus stock given with bonds.—Where a corporation was formed to take over numerous paper mill properties, and bonds were issued to pay therefor, which were at once negotiated by the parties receiving them, if it were necessary to the negotiation of the corporate bonds to give a bonus in stock, it cannot be considered in the light of a mere donation. Nor, if it were done in good faith, would it necessarily afford a ground of complaint to dissenting stockholders. *Gratham v. Railroad Co.*, 102 U. S. 148, 26 L.

Ed. 106. Certainly, if this bonus were received in ignorance of the fraud practised upon the original mill owners, and simply as an inducement to take the bonds, the dissenting stockholders could not compel the bondholders to submit to a deduction from their bonds of the par value of the stock received as a bonus, particularly in view of the fact that the stock might turn out to be worthless. Here also the contract provided for the issue of stock to be on its face full paid and nonassessible, and it was so issued. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 202, 44 L. Ed. 423. See post, “Contract Exempting from Assessment,” VII, D, 8, b, (3), (c).

44. Increase of stock.—*Handley v. Stutz*, 139 U. S. 417, 426, 35 L. Ed. 227; *Sanger v. Upton*, 91 U. S. 56, 64, 23 L. Ed. 220; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523.

45. Subsequent creditors.—But it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. *Handley v. Stutz*, 139 U. S. 417, 435, 35 L. Ed. 227.

When such stock received immaterial.—Although creditors who became such after the increase was voted, are entitled to look to those who subsequently received the stock, notwithstanding they did not receive it until after the debts had been contracted. *Handley v. Stutz*, 139 U. S. 417, 436, 35 L. Ed. 227.

As to validity of increase, see ante, “Increase or Reduction of Stock,” III, G; post, “Right to So Issue and Sell,” VII, D, 8, b, (3), (a).

46. Stock sold below par.—*Handley v. Stutz*, 139 U. S. 417, 429, 35 L. Ed. 227. See *Clark v. Bever*, 139 U. S. 96, 107, 108, 35 L. Ed. 88.

“In the *Upton Cases*, arising out of the failure of the Great Western Insurance Company; in *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885, and in *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, the

(b) *Estoppel to Deny Consent to Issue and Acceptance of Stock.*—The stockholder may be estopped by his conduct from denying that he ever consented to the increase, or accepted the stock assigned to him without consideration.⁴⁷

(c) *Contract Exempting from Assessment.*—A contract that stock should be issued as full paid and nonassessable, when the full amount had not in fact been paid, though binding on the company, is a fraud in law on its creditors, which they can set aside; and when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full.⁴⁸

defendants were either original subscribers to the increased stock, at a price far below its par value, or transferees of such subscribers; and the stock was issued, not as in this case to purchase property or raise money to add to the plant, and facilitate the operations of the company, but simply to increase its original stock in order to carry on a larger business, and the stock thus issued was treated as if it formed a part of the original capital. In *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498, the same principle was applied to a subscription by a county to the capital stock of a railroad company, for which it had issued its bonds, although such bonds had been surrendered to the county with the consent of certain of its creditors." *Handley v. Stutz*, 139 U. S. 417, 429, 35 L. Ed. 227.

An exception to general rule.—The general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase. *Handley v. Stutz*, 139 U. S. 417, 430, 35 L. Ed. 227. See, also, *Clark v. Bever*, 139 U. S. 96, 107, 35 L. Ed. 88. See, also, ante, "Increase of Stock," VII, D, 8, b, (2), (b).

47. *Handley v. Stutz*, 139 U. S. 417, 437, 35 L. Ed. 227.

"The acceptance and holding of a certificate of shares in an incorporation makes the holder liable to the responsibilities of a shareholder." *Upton v. Tribilcock*, 91 U. S. 45, 47, 23 L. Ed. 203.

Stock issued below par in payment of debt.—See ante, "In General," VII, D, 8, b, (1).

48. *Scovill v. Thayer*, 105 U. S. 143, 154, 26 L. Ed. 968; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *New Albany v. Burke*, 11 Wall. 96, 20 L. Ed. 155; *Burke v. Smith*, 16 Wall. 390, 21 L. Ed. 361; *Handley v. Stutz*, 139 U. S. 417, 427, 35 L. Ed. 227; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179; *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498; *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Hawkins v. Glenn*, 131 U. S.

319, 33 L. Ed. 184; *Richardson v. Green*, 133 U. S. 30, 33 L. Ed. 516; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 202, 44 L. Ed. 423.

Undoubtedly such a transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. And in any controversy which might or could grow out of the matter between the insurance company and the stockholder the court are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full. *Sawyer v. Hoag*, 17 Wall. 610, 619, 21 L. Ed. 731.

When the interest of creditors require, those who hold shares of stock in a corporation, purporting to be, but which are shown not to have been, paid for to the extent of their face value, should be held liable to pay for such shares in full, unless it appears that they acquire the stock under circumstances that did not give creditors and other stockholders just ground for complaint. *Clark v. Bever*, 139 U. S. 96, 113, 35 L. Ed. 88. See, also, *Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696; *Graham v. Railroad Co.*, 102 U. S. 148, 161, 26 L. Ed. 106; *Wabash, etc., R. Co. v. Ham*, 114 U. S. 587, 594, 29 L. Ed. 235; *Fogg v. Blair*, 133 U. S. 534, 541, 33 L. Ed. 721; *Fogg v. Blair*, 139 U. S. 118, 126, 35 L. Ed. 104.

Ignorance of legal effect no defense.—*Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349.

The word "nonassessable" upon the certificate of stock does not cancel or impair the obligation to pay the amount due upon the shares created by the acceptance and holding of such certificate. At most, its legal effect is a stipulation against liability from further assessment or taxation after the entire subscription of one hundred per cent. shall have been paid. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179, where such a state was said to mean nothing more in law than that no assessment would be made unless the legal liabilities of the company required it. See, also, ante, "Release of Subscriptions," VII, B.

Liability on stock unlawfully issued.—See ante, "Payment in Money or Money's Worth," VII, D, 8, b.

As to assignee.—And so as to the rights of the assignee who represents the cred-

c. Enforcement—(1) *Jurisdiction and Form of Action*—(a) *In Equity and at Law*.—The jurisdiction in equity ordinarily rests upon the administration of a trust fund, where delinquent stockholders are charged with the obligation to make good their subscriptions to unpaid capital stock,⁴⁹ and this jurisdiction has been held to be exclusive under general principles of equity jurisdiction.⁵⁰ But where the liability is made by statute unconditional, original, and immediate, and not collateral to that of the corporation, equity has no jurisdiction on this ground.⁵¹ Sometimes it is concurrent, according to the relief required,⁵² but even in such case the jurisdiction of equity may be sustained as incidental to the enforcement of a lien on the corporate property.⁵³ And where the debts are such that the whole amount of the unpaid subscriptions will be necessary to pay them, it has been held that an action at law will lie.⁵⁴

itors. *Upton v. Tribilcock*, 91 U. S. 45, 47, 23 L. Ed. 203.

Recovery of payments.—See ante, "Recovery of Money Paid on Illegal Issue," III, G, 7.

49. Equity jurisdiction.—*Manufacturing Co. v. Bradley*, 105 U. S. 175, 182, 26 L. Ed. 1034; *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Patterson v. Lynde*, 106 U. S. 519, 521, 27 L. Ed. 265. See, also, *Sanger v. Upton*, 91 U. S. 56, 62, 23 L. Ed. 220; *Terry v. Anderson*, 95 U. S. 628, 636, 24 L. Ed. 365; *Scovill v. Thayer*, 105 U. S. 143, 154, 26 L. Ed. 968.

If the corporation fail, equity may lay hold of it, administer it, pay the debts, and give the residuum, if there be any, to the stockholders. If the corporation be dissolved by judgment of law, equity may interpose and perform the same functions. *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558.

Although no specific remedy was prescribed by the statute of a state (Missouri) for creditors seeking to reach the unpaid subscriptions of stockholders, it was open to them to proceed by a suit in equity. *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 525, 33 L. Ed. 994.

Pennsylvania.—In Pennsylvania, such fund cannot be appropriated by individual creditors, by means of attachments or executions directed against particular assets, but should be distributed on equitable principles, among the creditors at large. Accordingly, a bill in equity is a proper remedy. *Potts v. Wallace*, 146 U. S. 689, 700, 36 L. Ed. 1135.

50. Patterson v. Lynde, 106 U. S. 519, 521, 27 L. Ed. 265.

The remedy of the creditor to enforce this liability is in equity, where the rights of the corporation, the stockholder, and all the creditors can be adjusted in one suit. *Patterson v. Lynde*, 106 U. S. 519, 520, 27 L. Ed. 265.

Oregon.—*Patterson v. Lynde*, 106 U. S. 519, 520, 27 L. Ed. 265. See, also, *Scovill v. Thayer*, 105 U. S. 143, 156, 26 L. Ed. 968.

51. Where liability unconditional and not secondary to that of corporation.—*Manufacturing Co. v. Bradley*, 105 U. S. 175, 181, 26 L. Ed. 1034. See post, "Ex-

haustion of Recourse on Corporation," VII, D, 8, c, (1), (b).

South Carolina.—This is the case under the statute of South Carolina. *Manufacturing Co. v. Bradley*, 105 U. S. 175, 182, 26 L. Ed. 1034.

52. Jurisdiction concurrent.—Where the statute under consideration prescribes no form of action, the jurisdiction may be regarded as concurrent, both at law and in equity, according to the nature of the relief made necessary by the circumstances upon which the right arises. *Manufacturing Co. v. Bradley*, 105 U. S. 175, 182, 26 L. Ed. 1034. See, also, *Blair v. Gray*, 104 U. S. 769, 26 L. Ed. 922.

53. Enforcement of lien on corporate property.—Having jurisdiction to enforce a lien, it is entirely consistent with its principles and practice for a court of equity to extend it, so as to avoid a multiplicity of suits, and to give to the plaintiff a single and complete remedy. *Manufacturing Co. v. Bradley*, 105 U. S. 175, 182, 26 L. Ed. 1034. See post, "Parties," VII, D, 8, c, (6).

54. Where debts exceed unpaid subscriptions.—*Potts v. Wallace*, 146 U. S. 689, 700, 36 L. Ed. 1135; *Sanger v. Upton*, 91 U. S. 56, 62, 23 L. Ed. 220.

And where it is unnecessary to ascertain the extent of the liability before proceedings to enforce it, as here, an action at law will lie. *Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135.

Action by assignee in bankruptcy.—The liability of the stockholder, and the right and title of the company, were legal in their character. If the company had sued, it might have sued at law. The rights of the company passed to the assignee, and he also could enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. The assignee might have filed a bill in equity against all the delinquent shareholders jointly. *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349. But if the company is utterly insolvent, in any event, a separate action at law in each case is much to be preferred. It is cheaper, more speedy, and

On Notes Given for Stock.—Where the stockholder has executed notes for the unpaid balance, he may be sued at law upon the notes.⁵⁵

Action at Law to Enforce Assessment Previously Made.—An action at law lies to enforce an assessment or call upon the unpaid stock subscriptions, made by the corporate authorities or a court of equity having jurisdiction.⁵⁶

Necessity for Creditor to Exhaust Remedies at Law, and Accounting.—Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgments, proceed in equity by creditors' bill against a stockholder to enforce his liability to the company on his unpaid subscription, without any accounting of the indebtedness of the company.⁵⁷

Action or Suit by Assignee in Bankruptcy.—See the title BANKRUPTCY, vol. 2, p. 900. See, also, post, "When Statute Begins to Run," VII, D, 8, c, (7), (d), bb.

New Remedy No Impairment of Contract Obligation.—See note.⁵⁸

(b) *Exhaustion of Recourse on Corporation.*—It has been held under a state statute, providing for the liability of the stockholders of a corporation for its debts until its capital stock has been paid in full and a certificate thereof recorded, and enacting that all proceedings to enforce the liability of a stockholder for the debts of a corporation shall be either by suit in equity, or by an action of debt upon the judgment obtained against such corporation; that the debt must be established by a judgment recovered against the corporation, before proceeding against the stockholder, and a creditor of the corporation cannot bring an action at law against a stockholder or the executor of a stockholder in the circuit court of the United States in another state, without having obtained a judgment

more effectual. *Sanger v. Upton*, 91 U. S. 56, 62, 23 L. Ed. 220. See, also, post, "When Statute Begins to Run," VII, D, 8, c, (7), (d), bb.

55. *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 527, 33 L. Ed. 994, citing *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885.

56. *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262.

57. **Exhaustion of remedies at law.**—*Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885. See the title CREDITORS' SUITS, vol. 5, p. 27, et seq. See, also, post, "Parties," VII, D, 8, c, (6).

It was said in *Terry v. Anderson*, 95 U. S. 628, 636, 24 L. Ed. 365: "Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions, and we are not prepared to say that a creditor of a dissolved corporation may not, under certain circumstances, claim to be exempted from its operation."

"If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee. But here there was a trustee invested with ample powers to collect and dispose of all the as-

sets belonging to the alleged trust fund." *Terry v. Anderson*, 95 U. S. 628, 636, 24 L. Ed. 365.

"Since the debts due upon the subscription passed to the assignees, the creditors being parties to the suit instituted by them to close their trust, had the right to insist that the unpaid subscriptions part of the assets should be reduced to possession, and distributed before the trust was closed and the assignees were discharged. * * * Here there was a trustee invested with ample powers to collect and dispose of all the assets belonging to the alleged trust fund. In a suit to which these creditors were parties one court of equity has found that this trustee has fully executed his trust, and that the fund is exhausted. That decree is a bar to any further proceeding in equity by them, as creditors of the corporation before judgment, for the purpose of securing the administration of the same trust. If there are assets which the trustee did not reach, the creditors are remitted to their remedies, after judgment against the corporation, to subject equitable assets to the payment of their demands." *Terry v. Anderson*, 95 U. S. 628, 636, 24 L. Ed. 365. See post, "Necessity for Call or Assessment," VII, D, 8, c, (3), (b).

58. **New remedy no impairment of contract obligation.**—*Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 525, 33 L. Ed. 994. See the title IMPAIRMENT OF OBLIGATION OF CONTRACT, vol. 6, p. 871.

against the corporation, even if the corporation had been adjudged bankrupt.⁵⁹

(c) *Notice and Trial*.—Under the statute of Missouri, and upon fundamental principles of jurisprudence, he is entitled to legal notice and trial of the issue whether he is a stockholder, before he can be charged with personal liability as such; and personal service of the notice within the jurisdiction of the court is essential to support an order or judgment ascertaining and establishing such liability, unless he has voluntarily appeared, or otherwise waived his right to such service, which he has not done in this case.⁶⁰

(d) *Receivership*.—If it be necessary to a complete satisfaction to the complainants that the corporation be treated as an insolvent, the court may appoint a receiver, with authority to collect and receive all the debts due to the company, and administer all its assets. In this way, all the stockholders or debtors may be made to contribute.⁶¹

(2) *Who May Enforce, and When*.—The right which a corporation acquired by the subscription to its capital stock, was only a chose in action,⁶² and not assignable so as to authorize the assignee to sue at law in his own name. The action must be in the name of the corporation.⁶³

Creditors.—But all the cases agree that creditors of a corporation may compel payment of the stock subscribed, so far as it is necessary for the satisfaction of the debts due by the company,⁶⁴ and where a county subscribed to the capital stock of a railway company, and issued its bonds therefor, the creditors of the company, on its becoming insolvent, are entitled to enforce the liability of the county on the bonds which are due and unpaid.⁶⁵

Receiver.—See ante, "Receivership," VII, D, 8, c, (1), (d); post, "By Whom Enforcible," VIII, D, 4, f, (4).

59. Exhaustion of recourse on corporation.—Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. Ed. 825. See, also, Blair v. Gray, 104 U. S. 769, 26 L. Ed. 922; Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349; Hatch v. Dana, 101 U. S. 205, 211, 25 L. Ed. 885.

And it has been held that a judgment must be recovered in the state in which the liability of the stockholder is sought to be enforced. National Tube Works Co. v. Ballou, 146 U. S. 517, 523, 36 L. Ed. 1070. See also, post, "Pleading," VII, D, 8, c, (5). And see the title CREDITORS' SUITS, vol. 5, p. 27, et seq.

60. Notice and trial.—Wilson v. Seligman, 144 U. S. 41, 46, 36 L. Ed. 338. See, also, Fogg v. Blair, 139 U. S. 118, 35 L. Ed. 104. See post, "Notice of Assessment," VII, D, 8, c, (3), (f).

61. Receivership.—Ogilvie v. Knox Ins. Co., 22 How. 380, 391, 16 L. Ed. 349.

But the creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands, the creditors need look no further. They are not bound to settle up all the affairs of this corporation, and the equities between its various stockholders or partners, corporations or debtors. Ogilvie v. Knox Ins. Co., 22 How. 380, 391, 16 L. Ed. 349. See, generally, the title RECEIVERS, vol. 10, p. 538.

62. Chose in action.—Glenn v. Marbury, 145 U. S. 499, 509, 36 L. Ed. 790; Terry v. Anderson, 95 U. S. 628, 636, 24 L. Ed. 365. See ante, "Character as

Debt and Passage under Assignment," VII, D, 1; post, "Failure to Execute Illegal Preference as Directed," VII, D, 8, c, (7), (b).

63. Action must be in corporate name.—Glenn v. Marbury, 145 U. S. 499, 509, 36 L. Ed. 790.

The mere fact of being a stockholder in a corporation does not make his indebtedness a negotiable one, even against the terms of his agreement with the company and the intention of the parties. Glenn v. Marbury, 145 U. S. 499, 509, 36 L. Ed. 790. See, also, post, "Call or Assessment by Court," VII, D, 8, c, (3), (c).

64. Webster v. Upton, 91 U. S. 65, 71, 23 L. Ed. 384; County of Morgan v. Allen, 103 U. S. 498, 26 L. Ed. 498; Railroad Co. v. Howard, 7 Wall. 392, 416, 19 L. Ed. 117; Scammon v. Kimball, 92 U. S. 362, 367, 23 L. Ed. 483; Hawkins v. Glenn, 131 U. S. 319, 33 L. Ed. 184.

Payment for stock.—Where subscriptions to stock are payable in cash, and where only a part of the installments has been paid, there is still a debt due to the corporation, which, if it become insolvent, may be sequestered in equity by the creditors, as a trust fund liable to the payment of their debts. Coit v. Gold Amalgamating Co., 119 U. S. 343, 345, 30 L. Ed. 420; Bank v. Alden, 129 U. S. 372, 378, 32 L. Ed. 725.

65. County of Morgan v. Allen, 103 U. S. 498, 26 L. Ed. 498.

See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618.

Sale or Forfeiture as Condition Precedent.—It has been held that a sale or forfeiture of defendant's shares is not a condition precedent to the right to recover an assessment.⁶⁶

(3) *Calls and Assessments*—(a) *Liability Thereto and Duty of Corporation.*—**Liability to Assessment for Face Value.**—One who receives a certificate of stock for a certain number of shares, at a given sum per share, thereby becomes liable to pay the amount thereof when called upon by the corporation or its assignee. Nor is it necessary to sustain the action that there should have been a subscription for the whole amount named on the articles.⁶⁷ A resolution or agreement that no further call shall be made is void as to creditors.⁶⁸

Duty of Corporation.—It is the duty of the corporation to make the calls when funds are needed for payment, and its nonaction is no defense to calls by a court.⁶⁹

(b) *Necessity for Call or Assessment.*—See post, "Call or Assessment by Court," VII, D, 8, c, (3), (c). Where, upon the insolvency of a corporation (in Pennsylvania) a stockholder is liable for only so much of his unpaid subscription as may be required to pay the creditors, he may not be called upon in an arbitrary way to pay any sum that an assignee or creditor may demand. It is, therefore, requisite to ascertain, in an orderly manner, the extent of the stockholder's liability before proceedings are commenced to enforce it. But the necessity for this does not exist when the whole amount is required to pay the debts. Hence, in such cases an assessment is not essential. The assignee may sue at once for all that is required.⁷⁰ And it has been held that a charter provision that "the balance due on each share shall be subject to the call of the directors" did not prevent another mode of collecting the balance being provided by law, that did not increase the debtor's liability.⁷¹

66. Sale or forfeiture as condition precedent.—*Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 232, 47 L. Ed. 782.

"While a remedy by forfeiture is given by the articles of the association, this remedy is cumulative, and is no bar to an action at law for the debt. This is clearly intended as a concurrent remedy." *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 232, 47 L. Ed. 782. See, also, *Webster v. Upton*, 91 U. S. 65, 69, 23 L. Ed. 384.

67. Liability to assessment for face value.—*Chubb v. Upton*, 95 U. S. 665, 668, 24 L. Ed. 523, citing *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349. See, also, *Potts v. Wallace*, 146 U. S. 689, 703, 36 L. Ed. 1135; *Hawley v. Upton*, 102 U. S. 314, 316, 26 L. Ed. 179. See ante, "Necessity for Subscription and Payment of Certain Amount," VII, A, 3.

Promise implied in law.—*Handley v. Stutz*, 139 U. S. 417, 427, 35 L. Ed. 227; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203.

The ownership of such stock carries with it the legal duty of paying all legitimate calls made during the continuance of the ownership. *Webster v. Upton*, 91 U. S. 65, 67, 23 L. Ed. 384; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 232, 47 L. Ed. 782; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203;

Chubb v. Upton, 95 U. S. 665, 24 L. Ed. 523.

Superior equity must be shown to resist call.—When the unpaid portion of the capital is required to pay the creditors of the company, the stockholders cannot be allowed to refuse the payment of them, unless they show such an equity as would entitle them to a preference over the creditors, if the capital had been paid in cash, and they are liable to answer as garnishees of the principal debtor, the company. *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 388, 16 L. Ed. 349; *Potts v. Wallace*, 146 U. S. 689, 703, 36 L. Ed. 1135.

New Hampshire.—*Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 232, 47 L. Ed. 782.

Oregon.—*Patterson v. Lynde*, 106 U. S. 519, 520, 27 L. Ed. 265.

Part may be called without waiting until whole amount is needed.—*Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 526, 33 L. Ed. 994. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 870.

68. Sanger v. Upton, 91 U. S. 56, 60, 23 L. Ed. 220. See, also, ante, "Contract Exempting from Assessment," VII, D, 8, b, (3), (c).

69. Hatch v. Dana, 101 U. S. 205, 214, 25 L. Ed. 885.

70. Potts v. Wallace, 146 U. S. 689, 701, 36 L. Ed. 1135.

71. Hill v. Merchants' Mut. Ins. Co., 134 U. S. 515, 526, 33 L. Ed. 994.

After exhausting his legal remedies against the corporation which fails to make an assessment, a creditor may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made.⁷²

(c) *Call or Assessment by Court*.—Undoubtedly the corporation, having refused or neglected to make the necessary call or assessment, a court of equity could itself make it, if the interest of creditors required that to be done.⁷³ But it must still be enforced in the name of the corporation, although made by the court, in the absence of a statute on the subject,⁷⁴ and before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand.⁷⁵

Bankruptcy Court.—Where a corporation is adjudged a bankrupt, the proper district court of the United States, in order to provide means for the payment of the debts of the corporation, may direct an assessment upon the unpaid balance due on stock held by the several stockholders.⁷⁶

Conclusiveness on Stockholders of Decree against Corporation.—See post, "Parties," VII, D, 8, c, (6).

(d) *Discretion of Directors and Conclusiveness of Their Action*.—In the absence of fraud the necessity for an assessment upon the capital stock cannot be made the subject of inquiry by the courts.⁷⁷

72. Suit without call.—*Hawkins v. Glenn*, 131 U. S. 319, 334, 33 L. Ed. 184, citing *Hatch v. Dana*, 101 U. S. 205, 214, 25 L. Ed. 885; *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498.

Effect of delay in making assessment.—See post, "Statute of Limitations," VII, D, 8, c, (7), (d).

73. *Glenn v. Marbury*, 145 U. S. 499, 510, 36 L. Ed. 790; *Scovill v. Thayer*, 105 U. S. 143, 155, 26 L. Ed. 968, reaffirmed in *Hawkins v. Glenn*, 131 U. S. 319, 334, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 546, 34 L. Ed. 262; *Hatch v. Dana*, 101 U. S. 205, 214, 25 L. Ed. 885; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986.

In other words, as said in *Scovill v. Thayer*, 105 U. S. 143, 145, 26 L. Ed. 968, and repeated in *Hawkins v. Glenn*, 131 U. S. 319, 335, 33 L. Ed. 184. "The court will do what it is the duty of the company to do." *Glenn v. Marbury*, 145 U. S. 499, 510, 36 L. Ed. 790.

"Especially where the corporation went out of business before complainant obtained his judgment, so that there were no officers to make calls." *Hatch v. Dana*, 101 U. S. 205, 214, 25 L. Ed. 885. See, also, *Hill v. Merchants' Mut. Ins. Co.*, 134 U. S. 515, 527, 33 L. Ed. 994. And so where the corporation has gone into the hands of a receiver. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986.

After all, a company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor. *Hatch v. Dana*, 101 U. S.

205, 215, 25 L. Ed. 885. And see *Hawkins v. Glenn*, 131 U. S. 319, 334, 33 L. Ed. 184, reaffirmed in *Glenn v. Liggett*, 135 U. S. 533, 546, 34 L. Ed. 262; *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498.

Although, under the charter of a company, a call could only be made by the president and directors and was a corporate question merely. *Hawkins v. Glenn*, 131 U. S. 319, 329, 33 L. Ed. 184, reaffirmed in *Glenn v. Liggett*, 135 U. S. 533, 547, 34 L. Ed. 262.

74. *Glenn v. Marbury*, 145 U. S. 499, 511, 36 L. Ed. 790. See, also, *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184. See, also, the title *CORPORATIONS*, vol. 4, p. 795. As to effect of dissolution, see ante, "Who May Enforce and When," VII, D, 8, c, (2).

75. *Scovill v. Thayer*, 105 U. S. 143, 155, 26 L. Ed. 968, reaffirmed in *Hawkins v. Glenn*, 131 U. S. 319, 334, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 546, 34 L. Ed. 262. See, also, post, "Statute of Limitations," VII, D, 8, c, (7), (d).

76. *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437. See, also, *Hatch v. Dana*, 101 U. S. 205, 215, 25 L. Ed. 885; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, followed in *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224; *Pullman v. Upton*, 96 U. S. 328, 329, 24 L. Ed. 818. See, also, the title *BANKRUPTCY*, vol. 2, p. 792.

77. Discretion of directors and conclusiveness of their action.—*Oglesby v. Attrill*, 105 U. S. 605, 609, 26 L. Ed. 1186; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 230, 47 L. Ed. 782. See, also,

(e) *Successive Calls*.—The making of a call or assessment by a court, leaving a part of the stock subscriptions unpaid still, will not prevent a further call for the balance still due being made in that court or any other of competent jurisdiction.⁷⁸

(f) *Notice of Assessment*.—And notice by posting for a month is sufficient compliance with a charter provision for such notice to a nonresident stockholder.⁷⁹

(g) *Law Applicable and Rule of Decision*.—See the title CONFLICT OF LAWS, vol. 2, p. 1066.

State Decisions as Rules for Federal Courts.—The decision of the highest tribunal of the state where the corporation dwelt, in reference to whose laws the stockholders contracted, and in whose courts the creditors were obliged to seek the remedy accorded, should be followed in the United States supreme court.⁸⁰

(h) *Interest*.—See the title INTEREST, vol. 7, p. 229.

(+) *Evidence and Burden of Proof*.—**Presumption from Appearance of Name on Books**.—A person is presumed to be the owner of stock when his name appears on the books of a company as a stockholder; and, when he is sued as such, the burden of disproving that presumption is cast upon him.⁸¹

Production of Certificate Unnecessary.—No production of the certificate is necessary, nor need there have been one delivered to the subscriber.⁸²

Act of Incorporation.—An objection to the admissibility of the act of incorporation of the company, on account of a verbal variance between the name of the company as given in the act from that set forth in the declaration, is

Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220.

Presumption as to evidence to support.—Where the bill of exceptions contains nothing to indicate that the call was not properly made, and does not show that it contained all the evidence in the case, the court should be at liberty, if the circumstances of the case required it, to infer that there was other evidence to supply any defect in respect to the legality of the call. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 231, 47 L. Ed. 782; *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746; *City v. Babcock*, 3 Wall. 240, 18 L. Ed. 31.

By directors of foreign corporation.—The same is true as to an assessment by directors of a foreign corporation. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 47 L. Ed. 782.

78. Successive calls.—*Glenn v. Liggett*, 135 U. S. 533, 548, 34 L. Ed. 262.

79. Nashua Sav. Bank v. Anglo-American Land, etc., Co., 189 U. S. 221, 232, 47 L. Ed. 782.

Notice by publication sufficient.—*Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, followed in *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224; *Pullman v. Upton*, 96 U. S. 328, 329, 330, 24 L. Ed. 818.

The court pronouncing the decree of bankruptcy had jurisdiction and authority to make the order; and it was not necessary that the stockholders should have received actual notice of the application therefor. In contemplation of law, they were before the court in all the proceedings touching the corporation of which they were members. *Sanger v.*

Upton, 91 U. S. 56, 23 L. Ed. 220, followed in *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224. See, also, *Cadle v. Baker*, 20 Wall. 650, 22 L. Ed. 448.

The order of the district court, directing a call by the assignee of the unpaid balance of the stock, is admissible in evidence, and the call made under the order was effective to make the liability of the defendant complete. *Webster v. Upton*, 91 U. S. 65, 71, 23 L. Ed. 384. See, also, ante, "Notice and Trial," VII, D, 8, c, (1), (c); post, "Parties," VII, D, 8, c, (6).

80. State decisions as rules for federal courts.—*Hawkins v. Glenn*, 131 U. S. 319, 332, 33 L. Ed. 184, reaffirmed in *Glenn v. Liggett*, 135 U. S. 533, 544, 34 L. Ed. 262. See *Canada, etc., R. Co. v. Gebhard*, 109 U. S. 527, 27 L. Ed. 1020. See the title COURTS, vol. 4, p. 1076.

81. Presumption from appearance of name on books.—*Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184. See *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Herhold v. Upton*, 154 U. S. 624, 23 L. Ed. 892.

Destruction of stock ledger and effect of certificate as sufficient proof.—*Chubb v. Upton*, 95 U. S. 665, 669, 24 L. Ed. 523.

82. Hawley v. Upton, 102 U. S. 314, 316, 26 L. Ed. 179; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384. See ante, "Certificate of Stock," II, E.

without merit, as it presents no obstacle to a right understanding of the matter.⁸³

Receipt of Dividend.—The receipt of dividends is evidence of the ownership of stock.⁸⁴

Burden of Proof.—The fact of the stock holding and the making of the assessment are the main facts to be proved by the plaintiff.⁸⁵

Burden of Proving Additional Payments.—In a proceeding to enforce unpaid subscriptions to stock, if any further payments are claimed to have been made than are shown by the corporate records, the defendants should make it appear clearly and satisfactorily that they were made.⁸⁶

(5) *Pleading.*—The declaration in an action by a corporation to recover an assessment on its unpaid stock, was not defective in that it contained no averment or allegation upon what conditions the plaintiff was authorized to make assessments; that the declaration did not aver that such an assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; or in that it contains no averment of notice of such assessment to defendant; or that defendant ever made an express promise to pay such assessment; and no direct allegation that defendant was a stockholder at the time the assessment was made, when the articles of association left the assessment of unpaid shares to the discretion of the board of directors.⁸⁷

Alleging Deficiency of Assets.—In an action at law by a creditor to enforce unpaid subscriptions, it has been held that a deficiency of corporate assets must be alleged.⁸⁸

As to Value of Bonus Stock.—The real value of alleged bonus stock must be averred.⁸⁹

Averment as to Parties.—Of course the failure to aver, in an action to enforce an assessment made by a court of equity, that the president and directors were parties to the bill against the corporation, under which the assessment was made, is immaterial, as the president and the directors stand for the corporation, and it is alleged that the corporation was a party and that it was duly served with process in the cause, in accordance with the laws and practice of the state of Virginia. The corporation sufficiently represented the president and directors in their official capacity, in which alone they were to act in making a call.⁹⁰

Issue and Finding Thereon.—Where the pleadings distinctly presented the issue, whether the defendant made the subscription, a finding of all issues in favor

83. *Turnbull v. Payson*, 95 U. S. 418, 421, 24 L. Ed. 437.

84. *Turnbull v. Payson*, 95 U. S. 418, 421, 24 L. Ed. 437. See *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384.

85. *Turnbull v. Payson*, 95 U. S. 418, 420, 24 L. Ed. 437.

86. **Burden of proving additional payments.**—*Camden v. Stuart*, 144 U. S. 104, 118, 36 L. Ed. 363. See ante, "Payment in Money or Money's Worth," VII, D, 8, b.

87. *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 229, 47 L. Ed. 782.

88. **Alleging deficiency of assets.**—Where the charter of a corporation (insurance company) provides that each stockholder shall be held liable for the obligations of the company to the amount of his unpaid stock, in cases of losses exceeding the means of the corporation, a suit at law by a policy holder of the company, against the defendant as a stockholder, to recover an amount claimed to

be due on the policy, without averment in the declaration to the effect that the losses of the company, or its liabilities, exceed its assets, on demurrer to the declaration, was not maintainable, because until such contingency arises, a creditor cannot sue a stockholder to enforce this liability. *Blair v. Gray*, 104 U. S. 769, 770, 26 L. Ed. 922.

Quære, whether, under the decisions of the courts of Illinois, if it appeared that there was a deficiency of assets, an action like this might be maintained. *Blair v. Gray*, 104 U. S. 769, 770, 26 L. Ed. 922.

89. **Allegation as to value of bonus stock.**—But on a bill by a creditor to compel payment for stock alleged to have been issued to a contractor without consideration, which was demurred to, assuming this to be true, where there was no allegation as to the real or market value of the stock, the court will not assume that it was worth par, or had substantial value, and the demurrer was properly sustained. *Fogg v. Blair*, 139 U. S. 118, 126, 35 L. Ed. 104.

90. *Glenn v. Liggett*, 135 U. S. 533, 547, 34 L. Ed. 262.

of defendant is equivalent to a finding that defendant was never liable to pay the assessment.⁹¹

Alleging Recovery of Judgment against Corporation.—See the title CREDITORS' SUITS, vol. 5, p. 28.

(6) *Parties.*—See, generally, the title PARTIES, vol. 9, p. 34.

Creditors and Stockholders.—It is not a sufficient objection to the bill, for want of proper parties, that all the creditors or stockholders are not sued. If necessary, the court may, at the suggestion of either party that the corporation is insolvent, administer its assets by a receiver, and thus collect all the subscriptions or debts to the corporation.⁹² The presence of all the stockholders before the court is merely convenient, not necessary,⁹³ and it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud, although they are not made parties individually, and that this is involved in the contract created in becoming a stockholder. It is not open to collateral attack.⁹⁴

91. Pleading to issue and finding thereon.—Glenn v. Sumner, 132 U. S. 152, 156, 33 L. Ed. 301.

"The finding of the jury, that the defendant never subscribed for the shares or was liable to pay the assessment, constitutes of itself a conclusive determination of the case in his favor." Glenn v. Sumner, 132 U. S. 152, 157, 33 L. Ed. 301, citing Evans v. Pike, 118 U. S. 241, 30 L. Ed. 234; Moores v. National Bank, 104 U. S. 625, 26 L. Ed. 870. As to non-prejudicial error, see the title APPEAL AND ERROR, vol. 2, p. 336.

92. Creditors and stockholders.—Ogilvie v. Knox Ins. Co., 22 How. 380, 16 L. Ed. 349, reaffirmed in Hatch v. Dana, 101 U. S. 205, 211, 25 L. Ed. 885.

93. Stockholders not necessary parties.—Hatch v. Dana, 101 U. S. 205, 211, 214, 25 L. Ed. 885.

He may sue one stockholder and the other stockholders need not be made parties; although, by the terms of their subscriptions, the stockholders were to pay for their shares "as called for" by the company, and the latter had not called for more than thirty per cent of the subscriptions. Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376 and Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537, distinguished from the present case as being suits to enforce a proportional statutory liability for debts. Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885.

Enforcement of lien on corporate property.—See ante, "In Equity and at Law," VII, D, 8, c, (1), (a).

94. Representation by corporation.—Hawkins v. Glenn, 131 U. S. 319, 332, 33 L. Ed. 184, reaffirmed in Glenn v. Liggett, 135 U. S. 533, 544, 547, 34 L. Ed. 262. See, also, Great Western Tel. Co. v. Purdy, 162 U. S. 329, 336, 40 L. Ed. 986; Glenn v. Marbury, 145 U. S. 499, 36 L. Ed. 790; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. Ed. 619.

It has been held that "the order of assessment, whether made by the directors as provided in the contract of subscrip-

tion, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him." Great Western Tel. Co. v. Purdy, 162 U. S. 329, 336, 40 L. Ed. 986, citing Hawkins v. Glenn, 131 U. S. 319, 33 L. Ed. 184; Glenn v. Liggett, 135 U. S. 533, 34 L. Ed. 262; Glenn v. Marbury, 145 U. S. 499, 36 L. Ed. 790; Scovill v. Thayer, 105 U. S. 143, 155, 26 L. Ed. 968. See, however, the title EQUITY, vol. 5, p. 857.

"A stockholder is so far an integral part of the corporation that in the view of the law, he is privy to the proceedings touching the body of which he is a member. Sanger v. Upton, 91 U. S. 56, 58, 23 L. Ed. 220, in which case it is also said: 'It was not necessary that the stockholders should be before the court when it (the order) was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose.' As against creditors there is no difference between unpaid stock 'and any other assets which may form a part of the property and effects of the corporation' (County of Morgan v. Allen, 103 U. S. 498, 509, 26 L. Ed. 498), and 'the stockholder has no right to withhold the funds of the company upon the ground that he was not individually a party to the proceedings in which the recovery was obtained.'" Hawkins v. Glenn, 131 U. S. 319, 329, 33 L. Ed. 184, reaffirmed in Glenn v. Liggett, 135 U. S. 533, 542, 34 L. Ed. 262; Hancock Nat. Bank v. Farnum, 176

President and Directors Represented by Corporation.—In a suit in equity by creditors to subject the unpaid stock subscriptions, the corporation sufficiently represents the president and directors in their official capacity, in which alone they were to act in making a call under the authority given them by law, and they need not be made parties if the corporation is.⁹⁵

(7) *Defenses*—(a) *Fraud as Defense*.—See ante, "Effect of Fraud and Misrepresentation," VII, A, 4.

(b) *Failure to Execute Illegal Preference as Directed*.—A stockholder sued upon his stock by the assignee under a general assignment executed by the corporation, cannot set up as a defense to the authority of the assignee that a mortgage to secure a director in a preferred claim had never been executed as directed by the directors and stockholders to be done before the assignment should be made. Such a preference would have been invalid, and the validity of the assignment was not dependent on its previous execution.⁹⁶

(c) *Set-Off*.—**In General**.—It is a general rule that a holder of claims against an insolvent corporation cannot set them off against his liability for an assessment on his stock in the corporation, as the latter debt is a trust fund for the benefit of all creditors and cannot be thus appropriated, after insolvency, to the payment of the stockholder's claim.⁹⁷ So in a suit by an assignee in bankruptcy.⁹⁸

Payments on Void Stock.—And the stockholder is not entitled to offset against his liability to pay the sum due on his valid stock, the money paid on void stock.⁹⁹

Set-Off against Notes Given for Stock.—See note.¹

U. S. 640, 644, 44 L. Ed. 619. See, however, post, "When Statute Begins to Run," VII, D, 8, c, (7), (d), bb.

Where a suit in which a judgment recovered was not commenced until more than three years after a bank went into liquidation, the judgment against the corporation was not binding on the stockholders in the sense that it could not be re-examined, when transactions on which the judgment was rendered were not known to the stockholders. *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 77, 33 L. Ed. 564. See, also, *Ward v. Joslin*, 186 U. S. 142, 46 L. Ed. 1093. See the title **BANKS AND BANKING**, vol. 3, p. 152.

Order of bankruptcy court.—*Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220. See ante, "Notice of Assessment," VII, D, 8, c, (3), (f).

Right of stockholders to make defense of ultra vires.—*Ward v. Joslin*, 186 U. S. 142, 46 L. Ed. 1093. See, also, *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. Ed. 619. Generally, as to the defense of ultra vires, see the title **CORPORATIONS**, vol. 4, p. 746.

Effect of assignment—Trustees should be parties.—The same rules apply where it has become insolvent and ceased to carry on its operations; notwithstanding its death, it stands, for the purpose of being sued by creditors, just as it did while alive and going, and may sue and be sued as before, and that the directory has assigned to trustees alters the case only so far as to make the trustees necessary parties. *Hawkins v. Glenn*, 131 U. S. 319, 331, 33 L. Ed. 184. See, also, the title **PARTIES**, vol. 9, pp. 45, 47.

Averment as to parties.—See ante, "Pleading," VII, D, 8, c, (5).

95. President and directors represented by corporation.—*Glenn v. Liggett*, 135 U. S. 533, 547, 34 L. Ed. 262. See, also, post, "Representation by Corporation in Litigation," VIII, C, 4, c, (2), (a); "Recovery of Judgment against Corporation," VIII, D, 4, f, (3), (d).

96. Failure to execute illegal preference no defense to action by assignee for creditors.—*Potts v. Wallace*, 146 U. S. 689, 36 L. Ed. 1135. See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 8, p. 976.

97. Set-off to liability on stock.—*Scovill v. Thayer*, 105 U. S. 143, 152, 26 L. Ed. 968; *Handley v. Stutz*, 139 U. S. 417, 437, 35 L. Ed. 227; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Cook County Nat. Bank v. United States*, 107 U. S. 445, 452, 27 L. Ed. 537. See, also, *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Scammon v. Kimball*, 92 U. S. 362, 23 L. Ed. 483; *County of Morgan v. Allen*, 103 U. S. 498, 26 L. Ed. 498; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 44 L. Ed. 423.

98. Suit by assignee in bankruptcy.—*Scovill v. Thayer*, 105 U. S. 143, 152, 26 L. Ed. 968. See, also, *Sawyer v. Hoag*, 17 Wall. 610, 623, 21 L. Ed. 731. See the title **BANKRUPTCY**, vol. 2, pp. 923, 924.

99. Payments on void stock.—*Scovill v. Thayer*, 105 U. S. 143, 152, 26 L. Ed. 968. See ante, "Capital Stock and Unpaid Subscriptions as Trust Fund," VII, D, 8, a.

1. Losses due from insurance company against stock notes.—See the title **INSURANCE**, vol. 7, p. 86.

(d) *Statute of Limitations*.—As to laches, see ante, "Conditional Subscriptions," VII, A, 7.

aa. *Periods of Limitation*.—The period of limitations is in some states five years,² in some three,³ and, where the subscription is in writing, it may be ten.⁴

bb. *When Statute Begins to Run*.—**Date of Call or Assessment**.—The statutes of limitation do not commence to run in respect to unpaid subscriptions until the retention of the money has become adverse by a refusal to pay upon due requisition.⁵

cc. *Interruption by Suit Commenced*.—**Second Suit after Nonsuit Suffered**.—Where the action was commenced within the statutory limitation of time, five years, and the plaintiff suffered a nonsuit, and was allowed under the state statute to commence a new action within one year after the nonsuit was suffered, and the first call was made by decree of December 14, 1880, and the first suit brought in 1884, the plaintiff suffering a nonsuit on the 15th of July, 1885, and bringing the present suit on the 12th of July, 1886, the second suit was in time.⁶

(8) *Decree*.—The objection that the decree was for an unnecessarily large amount, thus forming a basis for an inequitable division of the proceeds of the assets of subscriber's estate, is not well founded, where the amount of the decree is not, as suggested by the assignee, the joint and aggregate amount of the stock involved, but is restricted to the aggregate amount of the judgments owned by the complainants.⁷

2. *Glenn v. Liggett*, 135 U. S. 533, 547, 34 L. Ed. 262, Missouri.

3. *Glenn v. Marbury*, 145 U. S. 499, 506, 36 L. Ed. 790, District of Columbia.

4. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 338, 40 L. Ed. 986, Illinois.

5. *Hawkins v. Glenn*, 131 U. S. 319, 322, 33 L. Ed. 184; *Scovill v. Thayer*, 105 U. S. 143, 155, 26 L. Ed. 968, reaffirmed in *Glenn v. Liggett*, 135 U. S. 533, 546, 34 L. Ed. 262; *Glenn v. Marbury*, 145 U. S. 499, 507, 36 L. Ed. 790. See, also, *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 338, 40 L. Ed. 986, where this is stated to be the usual rule, though in Iowa a different rule prevailed when the delay was due to the directors. See ante, "Call or Assessment by Court," VII, D, 8, c, (3), (c).

Assessment in bankruptcy and setting aside contract for exemption.—"The proceeding for an assessment in the bankruptcy court was in effect a proceeding to accomplish two purposes; first, to set aside the contract between the company and the stockholder; and, second, to fix the amount which he should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock." *Scovill v. Thayer*, 105 U. S. 143, 156, 26 L. Ed. 968. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 1011, et seq.

After assignment to trustees.—*Hawkins v. Glenn*, 131 U. S. 319, 333, 33 L. Ed. 184, reaffirmed in *Glenn v. Liggett*, 135 U. S. 533, 543, 34 L. Ed. 262, and *Glenn v. Marbury*, 145 U. S. 499, 507, 36 L. Ed. 790.

Delay due to stockholders or their representatives.—*Scovill v. Thayer*, 105 U. S. 143, 157, 26 L. Ed. 968, distinguishing *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537, and *Terry v. Anderson*, 95 U. S. 623, 24 L. Ed. 365.

Exceptions to rule—Conflict of laws.—The laws of the state creating the corporation must govern. *Glenn v. Liggett*, 135 U. S. 533, 548, 34 L. Ed. 262. See the title **CONFLICT OF LAWS**, vol. 3, p. 1066.

Missouri act held not to apply.—*Glenn v. Liggett*, 135 U. S. 533, 548, 34 L. Ed. 262. See, however, *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 338, 40 L. Ed. 986, where rule of the *lex fori* governed the question of the limitation of an action to enforce the liability of the stockholder in a foreign corporation. Here the question was, when did the statute begin to run?

It was held, following the Iowa decisions, and contrary to the usual rule, that where the delay in making an assessment, which was finally made at the instance of stockholders, was due to non-action of the directors, and the defendant stockholders were not parties to the proceeding, the operation of the statute was not suspended until the assessment made. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 338, 40 L. Ed. 986.

6. *Glenn v. Liggett*, 135 U. S. 533, 547, 34 L. Ed. 262.

7. **Amount of decree**.—*Lloyd v. Preston*, 146 U. S. 630, 645, 36 L. Ed. 1111.

Collateral attack on adjudication in suit to recover call.—See ante, "Parties," VII, D, 8, c, (6).

(9) *Forfeiture and Sale of Stock or Interest for Nonpayment of Assessment.—To Pay Tax on Corporate Property.*—The words, "all necessary expenses of the company," in a grant of power to lay assessments, cannot be so construed as to enlarge the power to assess a tax, which is given for specific purposes; a tax by the state is not necessary expense of the company, within the meaning of the act; such an expense can only result from the action of the company in the exercise of its corporate powers.⁸

Relief against Forfeiture.—The application of the principle that equity will not relieve unless just compensation can be made for the breach, becomes more manifest in cases where a public interest or policy supervenes, as where, for non-compliance by stockholders in corporations engaged in undertakings of a public nature, with the terms of payment of installments due on account of their shares, by which a forfeiture of the stock and of all previous payments thereon has been incurred and declared, the courts refuse to grant relief.⁹

Suit to Set Aside Sale—Parties.—In a suit in equity brought in the federal court for the district where the principal officer of a domestic mining corporation was, against the corporation and others, to set aside an alleged fraudulent sale of the plaintiffs' stock therein for an unpaid assessment thereon, as a cloud upon their title to said stock, it was held that the purchasers of the stock at said sale were necessary parties to the controversy made by the bill.¹⁰

Service by Publication.—And they may be brought in by publication of notice, if nonresidents, under a statute allowing it as to claimants of a right in respect to personal property which is the subject of suit, and which is "within the district" where the suit is brought.¹¹

VIII. Stockholders.

A. Definitions and General Considerations.—What Constitutes a Stockholder.—To take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such.¹²

Corporation and Stockholders Distinguished.—The term "corporation" does not include stockholders.¹³

State as Stockholder.—As a member of a corporation, a government never exercises its sovereignty, and is not identified with the corporation. It acts merely as a corporator, and exercises no other powers in the management of

8. **Assessment to pay tax.**—Beatty v. Knowler, 4 Pet. 152, 7 L. Ed. 813. See, also, Dodge v. Woolsey, 18 How. 331, 353, 15 L. Ed. 401.

9. **Relief against forfeiture.**—Clark v. Barnard, 108 U. S. 436, 456, 27 L. Ed. 780. See the title PENALTIES AND FORFEITURES, vol. 9, pp. 361, 362.

10. **Purchasers necessary parties.**—Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 8, 44 L. Ed. 647.

11. **Service by publication.**—Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647.

12. **What constitutes a stockholder.**—National Bank v. Case, 99 U. S. 628, 631, 25 L. Ed. 448; Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818; Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 300, 301, 50 L. Ed. 1036. See, also, ante, "Certificate of Stock," II, E; "Assignment, Transfer, Sale and Pledge," VI; "Requisites and Validity," VII, A.

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Estoppel to deny corporate existence.—See the title CORPORATIONS, vol. 4, pp. 674, 675.

13. **"Corporation" does not include stockholders.**—Park Bank v. Remsen, 158 U. S. 337, 346, 39 L. Ed. 1008; United States Bank v. Deveaux, 5 Cranch 61, 3 L. Ed. 38; Hope Ins. Co. v. Boardman, 5 Cranch 57, 3 L. Ed. 36; Doctor v. Harrington, 196 U. S. 579, 586, 49 L. Ed. 606.

He is an integral part of the corporation. Sanger v. Upton, 91 U. S. 56, 59, 23 L. Ed. 220, followed in Carver v. Upton, 91 U. S. 64, 23 L. Ed. 224. See post, "Corporate Liability Distinguished," VIII, D, 1, b.

"A corporation retains its identity through all the changes that may take place in its individual membership." Railroad Co. v. Soutter, 13 Wall. 517, 525, 20 L. Ed. 543. See the title CORPORATIONS, vol. 4, pp. 628, et seq., 633.

the affairs of the corporation, than are expressly given by the incorporating act, or than any other stockholder.¹⁴

Law Governing Stockholder's Contract.—See the title CONFLICT OF LAWS, vol. 3, p. 1066.

B. Stockholders' Meetings and Formality of Action.—See ante, "Voting Privilege," V. A meeting in one of several states of the stockholders of a corporation chartered by all those states is valid in respect to the property of the corporation in all of them, without the necessity of a repetition of the meeting in any other of those states.¹⁵ And so with a meeting held outside of the state of the incorporation, at which an increase of stock was authorized.¹⁶

Formal Action at Regular Meeting Essential.—See the title CORPORATIONS, vol. 4, p. 725. See, also, post, "Majority Rule," VIII, C, 4, h.

The failure to enter a stockholder's resolution at the time it was adopted upon the minute book of the corporation, did not affect its validity, as most corporate acts can be proved as well by parol as by written entries.¹⁷

Refusal to Vote.—Where action was taken at a stockholders' meeting without a dissenting vote being cast against it, endorsing the guaranty of bonds of another corporation, as required by law, the fact that stock represented in the meeting was not voted, when such vote would have controlled the action taken, although dissatisfaction was openly expressed, did not affect the validity of the action, when the bonds had been put into circulation.¹⁸

Use of Seal.—See the title CORPORATIONS, vol. 4, p. 648.

C. Stockholders' Rights and Powers—1. **To Call Officers to Account.**—The stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate right, not adverse to the corporate interests, but coincident with them.¹⁹

14. State as stockholder.—United States Bank *v.* Planters' Bank, 9 Wheat. 904, 907, 6 L. Ed. 244; Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 559, 14 L. Ed. 249; Railroad Co. *v.* Commissioners, 103 U. S. 1, 4, 26 L. Ed. 359; Bank *v.* Wister, 2 Pet. 318, 324, 7 L. Ed. 437; Briscoe *v.* Bank, 11 Pet. 257, 324, 9 L. Ed. 709. See the titles BANKS AND BANKING, vol. 3, p. 124; CORPORATIONS, vol. 4, p. 643; STATE.

And the public ownership of the stock gave the company no more rights against the state than a private ownership would. Railroad Co. *v.* Commissioners, 103 U. S. 1, 4, 26 L. Ed. 359.

State or municipality as stockholder by subscription or bond issue.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, pp. 643, 647, 648, 649.

15. Locality.—Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 169, 30 L. Ed. 196. See the title CORPORATIONS, vol. 4, p. 740.

16. Meeting authorizing increase of stock.—Handley *v.* Stutz, 139 U. S. 417, 422, 35 L. Ed. 227. See ante, "Authorization at Meeting Out of State," III, G, 3.

It is true there are cases holding that stockholders' meetings cannot be legally held outside of the home state of the corporation, but the question has generally arisen where a majority present at such

meeting had attempted by their action to bind a dissenting minority, or had taken action prejudicial to the rights of third persons. Handley *v.* Stutz, 139 U. S. 417, 422, 35 L. Ed. 227.

The authorities seem uniform to the effect that the action taken at such meetings is binding upon those who participate in or take the benefit of them. Handley *v.* Stutz, 139 U. S. 417, 422, 35 L. Ed. 227.

17. Failure to enter resolution on minutes.—Handley *v.* Stutz, 139 U. S. 417, 422, 35 L. Ed. 227.

18. Refusal to vote.—Zabriskie *v.* Cleveland, etc., R. Co., 23 How. 381, 16 L. Ed. 488.

19. Graham *v.* Railroad Co., 102 U. S. 148, 160, 26 L. Ed. 106.

Relationship and duties of officers to stockholders.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 985, et seq.

Rights in property after dissolution.—See the title CORPORATIONS, vol. 4, p. 794, et seq.

Duties and responsibilities of promoters.—See the title CORPORATIONS, vol. 4, p. 658, et seq.

Mortgage to secure directors and stockholders.—See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 975.

2. **TITLE AND RIGHTS TO PROPERTY**—a. *Ownership*.—The assets are the property of the corporation, not of its stockholders.²⁰

b. *Power of Disposal*.—The stockholders have no right or authority as such to dispose of the corporate assets, or encumber the corporate property.²¹

3. **CREDITORS' PREFERENCE OVER STOCKHOLDERS**.—See the title **CORPORATIONS**, vol. 4, pp. 640, 798. Claims of stockholders, as such, on the corpus of the property of the company in which they are stockholders, do not arise until the debts of the company are paid. Until then the shares confer rights merely as regards profits and voting power.²²

20. **Assets belong to corporation**.—De La Vergne, etc., Mach. Co. v. German Sav. Institution, 175 U. S. 40, 60, 44 L. Ed. 65; Humphreys v. McKissock, 140 U. S. 304, 312, 35 L. Ed. 473; Gottfried v. Miller, 104 U. S. 521, 528, 26 L. Ed. 851.

"The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts." *Gibbons v. Mahon*, 136 U. S. 549, 557, 34 L. Ed. 525; *Van Allen v. Assessors*, 3 Wall. 573, 584, 18 L. Ed. 229; *The Delaware Railroad Tax*, 18 Wall. 206, 230, 21 L. Ed. 888; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830; *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. Ed. 411. See, also, *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 391, 51 L. Ed. 841; *Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499. See ante, "Right to Dividends," IV, B.

The scrip or certificate holders, in the association called the New England Mississippi Land Company, held their shares under the company itself, as a part of the common capital stock, and are not considered as holding derivatively, and solely as individual subpurchasers, under the separate original titles of the original purchasers from the Georgia Mississippi Company, so as to be affected by any circumstances of defect in these separate original titles; these titles being in fact vested in the trustees of the New England Mississippi Company itself, as part of its common stock, and not in the individual holders. *Brown v. Gilman*, 4 Wheat. 255, 256, 4 L. Ed. 564.

Elevator company formed by railroads—**Title to property**.—Where several (railroad) corporations combined to form another corporation to construct and operate an elevator, each receiving certificates of stock therein, it was held that the facts as to the organization of the latter company, the subscription to its stock, the construction of the elevator

and its lease to others, show beyond controversy the independent existence of that corporation, and that the railway companies had no specific interest in its elevator or other property which either could mortgage. They were mere stockholders in the elevator company. *Humphreys v. McKissock*, 140 U. S. 304, 311, 35 L. Ed. 473.

Trust for corporation in property purchased by promoters.—*Loring v. Palmer*, 118 U. S. 321, 342, 30 L. Ed. 211.

Attachment of stock does not reach corporate property.—*Gottfried v. Miller*, 104 U. S. 521, 528, 26 L. Ed. 851. See ante, "Liability to Attachment or Execution," II, H.

Preferred stockholders.—See ante, "Preferred or Interest Bearing Stock," II, K.

21. **Cannot dispose of assets**.—*De La Vergne, etc., Mach. Co. v. German Sav. Institution*, 175 U. S. 40, 60, 44 L. Ed. 65; *Humphreys v. McKissock*, 140 U. S. 304, 312, 35 L. Ed. 473.

Where the stockholders of a corporation entered into an agreement with another corporation to sell to it the assets of the first corporation, the promise to pay therefor is without consideration, since the assets were the property of the corporation, not of its stockholders, and the proceeds of such sale belonged to the company or its assignee and not the stockholders. *De La Vergne, etc., Mach. Co. v. German Sav. Institution*, 175 U. S. 40, 60, 44 L. Ed. 65.

The attempt to do so could at most only operate as a sale of their stock. *De La Vergne, etc., Mach. Co. v. German Sav. Institution*, 175 U. S. 40, 54, 44 L. Ed. 65. See, generally, the title **CORPORATIONS**, vol. 4, p. 731, et seq.

22. **Creditors' preference over stockholders**.—*Warren v. King*, 108 U. S. 389, 397, 27 L. Ed. 769.

Each share represents an aliquot part of the capital stock. But the holder cannot touch a dollar of the principal. He is entitled only to share in the dividends and profits. Upon the dissolution of the institution, each shareholder is entitled to a proportionate share of the residuum after satisfying all liabilities. The liens of all creditors are prior to his. *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. Ed. 558; *St. John v. Erie R. Co.*, 22 Wall. 136, 147, 22 L. Ed. 743; *New York, etc., Railroad v. Nickals*, 119 U. S. 296, 307, 30 L. Ed. 363; *Louisville Trust Co. v. Louis-*

4. CONTROL OF CORPORATE AFFAIRS.—a. *In General*.—When, by the charter of a corporation, its powers are vested in its stockholders, and this was the common-law rule when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stockholders.²³ But this control is indirect and exercised through a governing board of directors and corporate officers.²⁴

b. *Majority Rule*.—The majority of a corporate body must have power to bind its individuals, although it is true that this general power of a corporate body must be restricted by the nature and object of its institution.²⁵

Mode of Action.—An act within the corporate franchise, or the ordinary power of the corporation to contract, is done by the president and directors, or

ville, etc., R. Co., 174 U. S. 674, 684, 43 L. Ed. 1130.

This is one of the characteristics of capital stock, and preferred stock as well. *Warren v. King*, 108 U. S. 389, 396, 27 L. Ed. 769.

Acquisition of property by sole stockholder may have against a sole stockholder who wrongfully causes the transfer of all the property of the corporation to be made to himself, need not be inquired into. It is clear that this stockholder cannot secure this transfer from the corporation to itself of the property of the latter so as to deprive a creditor of the corporation of the payment of his debts. *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 15, 38 L. Ed. 55.

Whatever the company might do, a creditor may rightfully hold the sole stockholder responsible for that payment which the corporation would have made but for the wrongful acts of such stockholder. *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 15, 38 L. Ed. 55.

23. **Control of corporate affairs**.—*Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 597; 41 L. Ed. 265.

Under the authority conferred upon them by the charter, the stockholders of a company may adopt by-laws for the holder.—*Quere*, what rights, if any, a government of the corporation and for the regulation of its business affairs, and authorize the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors. *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 564, 597, 41 L. Ed. 265.

And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. *Sawyer v. Hoag*, 17 Wall. 610, 623, 21 L. Ed. 731; *Tennessee v. Whitworth*, 117 U. S. 129, 138, 29 L. Ed. 830.

24. **Control indirect**.—*Tennessee v. Whitworth*, 117 U. S. 129, 138, 29 L. Ed. 830; *Hawes v. Oakland*, 104 U. S. 450, 454, 26 L. Ed. 827; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 116 U. S. 587, 597, 29 L. Ed. 499. See ante, "Definitions and Distinctions," II, A.

Ownership of majority of stock by foreign corporation.—Although a foreign railroad company practically owns the controlling stock in a local company, and both companies constitute elements of a railroad system, the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the foreign company the power to control the road by the election of the directors of the local company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business. The power to change the management does not give it present control of the corporate property and business. That was intrusted to the local company, a separate entity. *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 391, 51 L. Ed. 841; *Pullman's Palace Car Co. v. Missouri Pac. R. Co.*, 115 U. S. 587, 597, 29 L. Ed. 499. See, also, *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113. See, also, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

Correction of consent decree.—Although, under the peculiar provisions of a charter the stockholders have a sort of supervisory power over the doings of the directors, yet they cannot avoid what has been done by the directors in a suit pending in a court against the company, authorizing a consent decree, except by the employment of such remedies as are consistent with the orderly course of judicial proceedings. They cannot correct errors arising from what has thus been done by appeal any more than the company can. If they have been defrauded, they must apply for relief in the first instance to the court in which the fraud was perpetrated. *Pacific Railroad v. Ketchum*, 101 U. S. 289, 296, 25 L. Ed. 932. See the title APPEAL AND ERROR, vol. 1, p. 927.

25. **Power of majority**.—*Korn v. Mutual Assur. Society*, 6 Cranch 192, 200, 3 L. Ed. 195; *Dodge v. Woolsey*, 18 How. 331, 343, 15 L. Ed. 401; *Wright v. Minnesota, etc., Ins. Co.*, 193 U. S. 657, 663, 48 L. Ed. 832. See the title CORPORATIONS, vol. 4, p. 713.

by their agent. If, however, an act is to be done relative to the institution, by which its charter is to be in any way changed, the stockholders must do it, unless another mode to effect it has been provided by the charter.²⁶

c. *Rights of Minority or Single Stockholder*—(1) *In General*.—If the corporation saw fit to consent to a foreclosure of a mortgage, a minority of stockholders cannot question their right to do so.²⁷

(2) *Right of Action or Suit*—(a) *Representation by Corporation in Litigation*.—A stockholder is an integral part of the corporation, and, in view of the law, is before the court in all the proceedings touching the body of which he is a member.²⁸ And it would seem to be well established that, in the absence of fraud, a stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company.²⁹

(b) *Suits by Stockholders on Behalf of Corporation*—aa. *Right in General*.—It is well settled that a shareholder may interpose and set the machinery of the law in motion for the protection of corporate rights, or the redress of corporate wrongs, when the corporate management, after proper demand, refuses or fails to act in the matter.³⁰ And this same doctrine obtains under the equity

26. *Mode of action*.—Gordon v. Appeal Tax Court, 3 How. 133, 148, 11 L. Ed. 529; Korn v. Mutual Assur. Society, 6 Cranch 192, 200, 3 L. Ed. 195. See ante, "Stockholders' Meetings and Formality of Action," VIII, B.

27. *Right to question action of corporation*.—It was held in *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 187, 44 L. Ed. 423, that a minority of the stockholders of a corporation had no right to intervene in the foreclosure of a mortgage upon the corporate property for the purpose of showing that the property was sold to the corporation by the connivance of the mortgagees at a gross overvaluation, and to compel the bonds held by them to be subjected to a set-off of their indebtedness to the corporation for unpaid stock.

"It should be borne in mind in connection with the several defenses set up by the intervenors that they do not appear here in the capacity of creditors, but as stockholders; that their rights are the rights of the corporation and must be asserted and enforced through the corporation, and upon the theory that the latter has or threatens, by collusion or otherwise, to neglect the proper defense of the foreclosure suit. *Dodge v. Woolsey*, 18 How. 331, 341, 343, 15 L. Ed. 401; *Koehler v. Black River Falls Iron Co.*, 2 Black 715, 17 L. Ed. 339; *Bronson v. La Crosse, etc.*, R. Co., 2 Wall. 283, 17 L. Ed. 725; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. Ed. 827; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300. *Cook on Stockholders*, §§ 645, 659, 750." *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 188, 44 L. Ed. 423.

Minority stockholders can only ask the protection of equity against acts of the majority where there is an abuse of power to the injury of the corporate privileges

or property of the minority. *The Passaic Bridges*, 3 Wall., appx., 782, 16 L. Ed. 799.

Right to sale and distribution on dissolution.—See the title CORPORATIONS, vol. 4, p. 797.

Amendment of charter.—See the title CORPORATIONS, vol. 4, p. 713.

28. *Representation by corporation in litigation*.—*Sanger v. Upton*, 91 U. S. 56, 59, 23 L. Ed. 220, followed in *Carver v. Upton*, 91 U. S. 64, 23 L. Ed. 224; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. Ed. 619; *Graham v. Boston, etc.*, R. Co., 118 U. S. 161, 30 L. Ed. 196, where an adjudication in bankruptcy was held conclusive against collateral attack by a stockholder.

29. *Stockholder concluded by decree against corporation*.—*Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 34 L. Ed. 262; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. Ed. 619; *Ward v. Joslin*, 186 U. S. 142, 46 L. Ed. 1093; *Railroad Co. v. Howard*, 7 Wall. 392, 19 L. Ed. 117. See post, "Parties," VIII, C, 4, c, (2), (b), ee; "Recovery of Judgment against Corporation," VIII, D, 4, f, (3), (d). See, as to defense of ultra vires, the title CORPORATIONS, vol. 4, p. 746.

In proceeding to enforce assessment.—See ante, "Parties," VII, D, 8, c, (6).

30. *Right of action in general*.—*Carey v. Houston, etc.*, R. Co., 161 U. S. 115, 131, 40 L. Ed. 638, reaffirmed in *Murphy v. Colorado Paving Co.*, 166 U. S. 719, 41 L. Ed. 1188; *Darragh v. Wetter Mfg. Co.*, 169 U. S. 735, 42 L. Ed. 1216; *Blythe Co. v. Blythe*, 172 U. S. 644, 43 L. Ed. 1183; *Mobile Transp. Co. v. Mobile*, 199 U. S. 604, 50 L. Ed. 330; *Greenwood v. Freight Co.*, 105 U. S. 13, 15, 26 L. Ed. 961; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401;

rule 94.³¹

Restraining Enforcement of Unconstitutional Law.—In a number of cases bills have been sustained by one or more stockholders in a corporation against the corporation and other parties, to restrain the enforcement of an unconstitutional law against the corporation itself.³²

Restraining Payment of Unconstitutional Tax.—So as to the payment of an unconstitutional tax upon the corporate property. Such was the ground for the bill in the income tax cases, the objection of adequate remedy at law not being raised, but waived so far as possible.³³

To Prevent Ultra Vires Acts or Breach of Duty.—A stockholder in a corporation has a remedy in chancery against the directors, to prevent them from doing acts which would amount to a violation of the charter, or to prevent any misapplication of their capital or profits which might lessen dividends or the value of the shares, if the acts intended to be done amount to what is called in law a breach of trust or duty, for which there is not an adequate remedy at law.³⁴

Bacon v. Robertson, 18 How. 480, 486, 15 L. Ed. 499; *Memphis City v. Dean*, 8 Wall. 64, 73, 19 L. Ed. 326; *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Dewing v. Perdicaries*, 96 U. S. 193, 198, 24 L. Ed. 654; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Detroit v. Dean*, 106 U. S. 537, 541, 27 L. Ed. 300; *Smyth v. Ames*, 169 U. S. 466, 515, 42 L. Ed. 819; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 113, 46 L. Ed. 92.

31. *Doctor v. Harrington*, 196 U. S. 579, 587, 49 L. Ed. 606.

They must have made a bona fide attempt to prevent the commission of the alleged illegal acts. Objections come bad grace from parties who knew at the time all that was being done by the company, and gave no sign of dissatisfaction. *Dimpell v. Ohio*, etc., R. Co., 110 U. S. 209, 216, 28 L. Ed. 121; *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833; *Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. Ed. 827; *Quincy v. Steel*, 120 U. S. 441, 248, 30 L. Ed. 624; *Taylor v. Holmes*, 127 U. S. 489, 32 L. Ed. 170.

The judgment of the court in the case of *Dodge v. Woolsey*, 18 How. 331, 345, 15 L. Ed. 401, authorizes the stockholder of a company to institute a suit in equity in his own name against a wrongdoer, whose acts operate to the prejudice of the interests of the stockholders, such as diminishing their dividends and lessening the value of their stock, in a case where application has first been made to the directors of the company to institute the suit in its own name, and they have refused. This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders, the general management of the business of the company. There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own be-

half, or for himself and other stockholders who may choose to join. *Memphis City v. Dean*, 8 Wall. 64, 73, 19 L. Ed. 326. See, also, *Bronson v. La Crosse*, etc., R. Co., 2 Wall. 283, 17 L. Ed. 725; *Detroit v. Dean*, 106 U. S. 537, 541, 27 L. Ed. 300. See, also, post, "Jurisdiction—94th Equity Rule and Necessary Allegations," VIII, C, 4, c, (2), (b), bb.

32. **Restraining enforcement of unconstitutional law.**—*Davis*, etc., Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. Ed. 782. A stockholder who asks an injunction on the ground that a statute impairs the obligation of a contract will have a standing in a court of equity, when the company refuses to seek a remedy. *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961. So as to a municipal ordinance. *Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504; *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300. But it must not be a collusive scheme to control the federal courts. *Memphis City v. Dean*, 8 Wall. 64, 73, 19 L. Ed. 326. This rule, however, has no application to subcontractors who stand in no position to enforce the right of their immediate contractors, or of the owner of the property who had agreed with such immediate contractors to do the work. *Davis*, etc., Mfg. Co. v. Los Angeles, 189 U. S. 207, 47 L. Ed. 782.

33. **Restraining payment of unconstitutional tax.**—*Pollock v. Farmers' Loan*, etc., Co., 157 U. S. 429, 433, 39 L. Ed. 759; *Pelton v. National Bank*, 101 U. S. 143, 148, 25 L. Ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401. See the title TAXATION.

34. **To prevent ultra vires acts or breach of duty.**—*Dodge v. Woolsey*, 18 How. 331, 341, 15 L. Ed. 401; *Bacon v. Robertson*, 18 How. 480, 15 L. Ed. 499; *Zabriskie v. Cleveland*, etc., R. Co., 23 How. 381, 395, 16 L. Ed. 488; *Memphis City v. Dean*, 8 Wall. 64, 73, 19 L. Ed.

Action against Directors to Enforce Personal Liability.—Cases are numerous where the directors having made themselves personally liable for neglect or breach of duty, and the corporation refusing to proceed against them, a stockholder has been permitted to sue in its behalf. In such cases, the corporation is an indispensable party. The refusal must be made distinctly to appear; and the avails of the litigation, if there be any, go to the corporation, and are a part of its means, as if it had itself sued and recovered.³⁵

Diminution of Dividends.—One stockholder may not litigate for the corporation and all other stockholders, because the amount of his dividends is diminished.³⁶

Right Dependent on Circumstances as Determined by the Pleadings.—And the right to relief is dependent on the circumstances of the case, as determined by the pleadings.³⁷

Diverse Citizenship.—If the stockholder be a resident of another state than that in which the bank and persons attempting to violate its charter, or commit a breach of trust or duty have their domicile, he may file his bill in the courts of the United States. He has this right under the constitution and laws of the United States.³⁸

Necessity for Contest between Stockholder and Corporation and Illegal or Ultra Vires Contract.—But there must be a real contest between the stockholder and the corporation of which he is a member. And nothing connected with internal disputes between shareholders is to be made the subject of a

326; *Jackson v. Ludeling*, 21 Wall. 610, 22 L. Ed. 492; *Hawes v. Oakland*, 104 U. S. 450, 453, 26 L. Ed. 827; *Porter v. Sabin*, 149 U. S. 473, 478, 37 L. Ed. 815.

So also a stockholder has a remedy against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law. *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401. Yet it is to be observed, that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension, or simple negligence on the part of the directors. *Dodge v. Woolsey*, 18 How. 331, 343, 344, 15 L. Ed. 401.

Payment of illegal interest.—*Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 395, 16 L. Ed. 488, citing *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401.

The usual and more approved form of such a suit is that of one or more stockholders to sue in behalf of the others. *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 395, 16 L. Ed. 488.

Actions to compel refund.—"It is not only illegal for a corporation to apply its capital to objects not contemplated by its charter, but also to apply its profits. And therefore a shareholder may maintain a bill in equity against the directors and compel the company to refund any of the profits thus improperly applied." *Dodge v. Woolsey*, 18 How. 331, 342, 15 L. Ed. 401.

Estoppel of corporators to object to want of authority.—See the title CORPORATIONS, vol. 4, pp. 749, 750.

35. **Action against directors to enforce**

personal liability.—*Dewing v. Perdicaries*, 96 U. S. 193, 198, 24 L. Ed. 654. See *Porter v. Sabin*, 149 U. S. 473, 478, 37 L. Ed. 815. See, also, the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 995.

36. *Hawes v. Oakland*, 104 U. S. 450, 462, 26 L. Ed. 827. See, however, *Dodge v. Woolsey*, 18 How. 331, 345, 15 L. Ed. 401; *Memphis City v. Dean*, 8 Wall. 64, 73, 19 L. Ed. 326.

37. **Right dependent on circumstances as determined by pleadings.**—"It is obvious, from the rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought. That the pleadings must be relied upon to collect what they are, to ascertain in what character, and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement of a board of directors; whether such acts are out of or beyond the limits of the act of incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do." *Dodge v. Woolsey*, 18 How. 331, 344, 15 L. Ed. 401. See, also, *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 463, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261. See post, "Jurisdiction—94th Equity Rule and Necessary Allegations," VIII, C, 4, c. (2), (b), bb.

38. **Diverse citizenship.**—*Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401. See, also, the title COURTS, vol. 4, p. 949.

Presumption that stockholders are citizens of state of incorporation.—See the title COURTS, vol. 4, p. 949, et seq. And see post, "Denial of Collusion," VIII, C, 4, c. (2), b, bb, (bb).

bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent; unless there is something ultra vires on the part of the company, qua company, or on the part of the majority of the company, so that they are not fit persons to determine it, but every litigation must be in the name of the company, if the company really desires it.³⁹

After Dissolution.—And the same principles apply after dissolution.⁴⁰

Refusal of Corporation to Act and Absence of Collusion.—See post, "Jurisdiction"—9th Equity Rule and Necessary Allegations," VIII, C, 4, c, (2), (b), bb; "Evidence and Burden of Proof," VIII, C, 4, c, (2), (b), cc.

bb. *Jurisdiction*—9th Equity Rule and Necessary Allegations—(aa) *As to Stockholding*.—Every bill brought by one or more stockholders in a corporation,

39. **Necessity for contest between stockholder and corporation and illegal or ultra vires conduct.**—*Hawes v. Oakland*, 104 U. S. 450, 453, 457, 26 L. Ed. 827; *Greenwood v. Freight Co.*, 105 U. S. 13, 16, 26 L. Ed. 961.

"The principle involved in the case of *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401, permits the stockholder in one of these corporations to step in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are those of the corporation, and the controversy is one really between that corporation and the other party, each being entirely capable of asserting its own rights." *Hawes v. Oakland*, 104 U. S. 450, 454, 26 L. Ed. 827.

Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 39 L. Ed. 759, does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation but really for its benefit. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, is pertinent in this direction. *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 459, 461, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261.

In *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, it was said: "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other share-

holders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity." Quoted in *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 459, 461, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261. See, also, *Detroit v. Dean*, 106 U. S. 537, 542, 27 L. Ed. 300; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases." *Hawes v. Oakland*, 104 U. S. 450, 460, 26 L. Ed. 827. See *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 459, 461, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261. See, also, *Detroit v. Dean*, 106 U. S. 537, 542, 27 L. Ed. 300; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

Another suit pending.—Where the question had been presented to a court of competent jurisdiction, in a suit then pending, he is disabled, according to the settled rule on this subject, from instituting a suit in his own name in another court. *Memphis City v. Dean*, 8 Wall. 64, 76, 19 L. Ed. 326.

40. Suits by stockholders after dissolution.—*Bacon v. Robertson*, 18 How. 480, 486, 15 L. Ed. 499. See, also, *Smith v. Swormstedt*, 16 How. 288, 14 L. Ed. 942; *Taylor v. Holmes*, 127 U. S. 489, 492, 32 L. Ed. 179.

But sufficient reason must be shown why the suit is not brought by the corporation, where its existence is continued after dissolution for the purpose of winding up its business and collecting its assets. *Taylor v. Holmes*, 127 U. S. 489, 32 L. Ed. 179. See the title CORPORATIONS, vol. 4, p. 794, et seq.

Effect of delay and lapse of time.—See the title RESCISSION, CANCELLATION AND REFORMATION, vol. 11, p. 823.

against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law.⁴¹ Such is the 94th equity rule.⁴² It had been held before that rule was adopted, that when it was alleged and not denied that the complainant was the owner of stock in his own right, it was sufficient.⁴³

(bb) *Denial of Collusion*.—A bill must contain an allegation under oath that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance,⁴⁴ and merely averring that it is "brought in good faith" is insufficient.⁴⁵

(cc) *Averments as to Efforts to Secure Action by Corporation*.—The plaintiff must set forth with particularity his efforts to secure action on the part of the managing directors or trustees of a corporation of which he is a member, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.⁴⁶

41. *Allegation as to stockholding*.—*Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410; *Dimpfell v. Ohio, etc., R. Co.*, 110 U. S. 209, 210, 28 L. Ed. 121; *Hawes v. Oakland*, 104 U. S. 450, 561, 26 L. Ed. 827; *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833.

42. *Equity rule 94*.—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410; *Quincy v. Steel*, 120 U. S. 241, 246, 30 L. Ed. 624.

And "although there is in the bill a declaration that the two complainants are owners of a majority of the stock of the * * * company, there is no statement as to when or how they became such, or whether they were such stockholders during the times that injuries were inflicted, of which they now complain, in regard to the taking possession of the property by the defendants, or whether they became stockholders afterwards. In short, there is no such averment of their relation to the corporation or of their interest in the matter, about which they now seek relief, as brings this action within the principle of the decisions of this court upon the subject. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827." And it is demurrable on this ground also. *Taylor v. Holmes*, 127 U. S. 489, 492, 32 L. Ed. 179. See, also, *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

Purchase of stock for purpose of bringing suit.—It has been held that a person may purchase stock in a corporation for the very purpose of bringing a stockholder's suit, and that the law will not inquire into the motive which actuated his purchase. *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 192, 44 L. Ed. 423.

43. *Allegation and proof of stockholding*.—*Jones v. Bolles*, 9 Wall. 364, 19 L. Ed. 734.

It was to give effect to the principles laid down in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, and *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833, that

the 94th equity rule was adopted at the same term those cases were decided.

44. *Denial of collusion*.—*Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624. It has always been so held and equity rule 94 requires it. *Davis, etc., Mfg. Co. v. Los Angeles*, 189 U. S. 207, 220, 47 L. Ed. 782, citing *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 47 L. Ed. 256. See, to same effect, *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410; *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 433, 39 L. Ed. 759. See *Railroad Co. v. Koontz*, 104 U. S. v, x, 26 L. Ed. 643.

45. *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

46. *As to efforts to secure corporate action*.—*Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624; *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410; *Dimpfell v. Ohio, etc., R. Co.*, 110 U. S. 209, 211, 28 L. Ed. 121; *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 462, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261; *Davis, etc., Mfg. Co. v. Los Angeles*, 189 U. S. 207, 220, 47 L. Ed. 782; *Hawes v. Oakland*, 104 U. S. 450, 461, 26 L. Ed. 827; *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833; *Porter v. Sabin*, 149 U. S. 473, 478, 37 L. Ed. 815; *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938.

It has always been held, and general equity rule 94 requires, that such bill must contain an allegation under oath that the directors of a corporation have refused to institute the proceedings themselves in the name of such corporation, and the efforts of the plaintiff to secure such action on the part of the directors, and the cause of his failure to obtain it. *Davis, etc., Mfg. Co. v. Los Angeles*, 189 U. S. 207, 220, 47 L. Ed. 782, citing *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Corbus v. Alaska, etc., Min. Co.*,

(dd) *Verification of Bill*.—The bill should be verified by affidavit.⁴⁷

cc. *Evidence and Burden of Proof*—(aa) *Burden of Proof*.—A stockholder must show wrongs which he has suffered, and also efforts to obtain relief against them, before a court of equity will interfere and set aside the transactions of a corporation or of its directors. It is not enough that there may be a doubt as to the authority of the directors or as to the wisdom of their proceedings. Grievances, real and substantial, must exist, and before an individual stockholder can be heard he must show, in the language of the federal supreme court, that "he

187 U. S. 455, 47 L. Ed. 256; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 433, 39 L. Ed. 759. See *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. Ed. 643.

In *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300, the right of a stockholder to sue a corporation for the protection of his rights was recognized, the condition only being the refusal of the directors to act, which refusal, it is said, must be real, not feigned. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, was cited, where a like right was decided to exist. See, also, *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Davenport v. Dows*, 18 Wall. 626, 21 L. Ed. 938; *Memphis City v. Dean*, 8 Wall. 64, 19 L. Ed. 326; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624. It was said in *Dodge v. Woolsey*, that the refusal of the directors to sue caused them and *Woolsey*, who was a stockholder in a corporation of which they were directors, "to occupy antagonistic grounds in respect to the controversy, which their refusal to sue forced him to take in defense of his rights." *Dodge v. Woolsey* was modified by *Hawes v. Oakland*, as to what circumstances would justify a suit by a stockholder if the directors refuse to sue. *Doctor v. Harrington*, 196 U. S. 579, 588, 49 L. Ed. 606; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

He cannot rely simply on the distance of the directors from the place where he resides and in which the court is held as an excuse for not applying to them. *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 465, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261.

The fact that the officers of the corporation agreed with the stockholders as to the unconstitutionality of the statute does not show collusion where officers were refusing to protect the interests of the stockholders, not wantonly, but from prudential reasons. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 113, 46 L. Ed. 92; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401.

After expiration of corporate existence.—*Taylor v. Holmes*, 127 U. S. 489, 492, 32 L. Ed. 179.

Examples.—Letter addressed to board.—*Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

General averments of perfunctory ac-

tion.—*Quincy v. Steel*, 120 U. S. 241, 242, 243, 30 L. Ed. 624.

In the case of *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, in speaking of this perfunctory effort to induce the trustees of the corporation to act, it is said: "He (the plaintiff) must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court." *Quincy v. Steel*, 120 U. S. 241, 247, 30 L. Ed. 624, quoted, also, in *Corbus v. Alaska, etc., Min. Co.*, 187 U. S. 455, 459, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261.

In the case of *Huntington v. Palmer*, 104 U. S. 482, 26 L. Ed. 833 the court says: "Of course, as we have attempted to show in the case just mentioned, *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, this cannot be done without there has been an honest and earnest effort by the complainant to induce the corporation to take the necessary steps to obtain relief." *Quincy v. Steel*, 120 U. S. 241, 248, 30 L. Ed. 624. See *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300; *Dimpfell v. Ohio, etc., R. Co.*, 110 U. S. 209, 211, 28 L. Ed. 121. And see *Huntington v. Palmer*, 104 U. S. 482, 484, 26 L. Ed. 833, where the stockholder's effort was held not sufficient.

But where a stockholder alleges that he has requested and urged the directors of the company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so, and he also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the state courts is accompanied with so many embarrassments that they decline to attempt it, and the prayer of the bill is for an injunction against all the defendants, to prevent these acts so injurious to the rights of the company, ground for equity jurisdiction is shown. *Greenwood v. Freight Co.*, 105 U. S. 13, 15, 26 L. Ed. 961. See, also, post, "Weight and Competency of Evidence," VIII, C, 4, c, (2), (b), cc, (bb).

47. *Verification of bill*.—*Hawes v. Oakland*, 104 U. S. 450, 461, 26 L. Ed. 827; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624; and cases cited in the six preceding notes.

has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances or action in conformity to his wishes."⁴⁸

As to Ownership of Stock.—It must appear that the complainants owned their shares when these transactions took place, or acquired them afterwards by operation of law.⁴⁹

(bb) *Weight and Competency of Evidence.*—See, also, ante, "Jurisdiction—94th Equity Rule and Necessary Allegations," VIII, C. 4, c, (2), (b), bb. It has been held that a request to sue and the voting down of a resolution to sue at the annual meeting of stockholders, is sufficient, in the absence of collusion.⁵⁰ So where the corporate existence and powers have been destroyed,⁵¹ for example of the insufficiency of the evidence to maintain the jurisdiction, see case cited in note.⁵²

Evidence of Collusion to Confer Jurisdiction.—Contribution by an officer to the expenses does not necessarily show collusion,⁵³ and it has been held that an admission, in answer to a question not understood, may be explained away.⁵⁴ For instance of evidence held to show collusion, see note.⁵⁵

Competency of Records in Former Suits.—See note.⁵⁶

48. Burden of proof.—*Dimpell v. Ohio*, etc., R. Co., 110 U. S. 209, 211, 28 L. Ed. 121; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Hallenborg v. Cobre Grande Copper Co.*, 200 U. S. 239, 50 L. Ed. 458; *Corbus v. Alaska*, etc., Min. Co., 187 U. S. 455, 459, 461, 463, 47 L. Ed. 256, followed in *Stewart v. Washington*, etc., Steamship Co., 187 U. S. 466, 47 L. Ed. 261. See, also, *Detroit v. Dean*, 106 U. S. 537, 542, 27 L. Ed. 300; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624; *Porter v. Sabin*, 149 U. S. 473, 478, 37 L. Ed. 815.

"He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." *Corbus v. Alaska*, etc., Min. Co., 187 U. S. 455, 459, 461, 47 L. Ed. 256, followed in *Stewart v. Washington*, etc., Steamship Co., 187 U. S. 466, 47 L. Ed. 261. See, also, *Detroit v. Dean*, 106 U. S. 537, 542, 27 L. Ed. 300; *Quincy v. Steel*, 120 U. S. 241, 30 L. Ed. 624.

"The opinion in the case of *Hawes v. Oakland* is full of instruction on this head, and to it we refer for a statement of the law; we can add nothing to its cogent reasoning." *Detroit v. Dean*, 106 U. S. 537, 541, 27 L. Ed. 300; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827.

49. As to ownership of stock.—*Dimpell v. Ohio*, etc., R. Co., 110 U. S. 209, 210, 28 L. Ed. 121.

50. Request to sue and noting down resolution to sue.—*Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504.

51. Destruction of corporate existence and powers.—*Greenwood v. Freight Co.*, 105 U. S. 13, 16, 26 L. Ed. 961.

52. Therefore any fraud in fact is out

of the case. *Hallenborg v. Cobre Grande Copper Co.*, 200 U. S. 239, 244, 50 L. Ed. 458.

53. Contribution personally by officer to expenses of suit—Effect.—*Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504.

Subsequent contribution of corporation immaterial.—Collusion not appearing under the 94th equity rule, jurisdiction is not lost because subsequent events made it to the interest of the corporation to make common cause with the complainant stockholder. *Chicago v. Mills*, 204 U. S. 321, 51 L. Ed. 504.

The agreement of the officers with the stockholders as to the unconstitutionality of the statute objected to, is no evidence of collusion. *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 113, 46 L. Ed. 92.

54. Admission of purpose to confer jurisdiction on federal court—Explanation.—*Chicago v. Mills*, 204 U. S. 321, 330, 51 L. Ed. 504.

55. Evidence held to show collusion.—*Detroit v. Dean*, 106 U. S. 537, 541, 27 L. Ed. 300, where it was said that it was impossible to read the testimony of the president contained in the record, with his hesitating and evasive answers to the interrogatories of counsel, and not be convinced that the refusal, to take legal proceedings in the local courts, which constituted the basis of the present suit, was made for the express purpose of enabling a suit to be brought in the federal court, and that no such refusal would have been given if that result had not been desired. It was an attempt to get into the federal court upon the pretense that justice was impossible in the state courts, owing to the excited condition of the public mind.

56. Records of other suits in evidence.—The complaint charges a conspiracy between the purchaser of the bulk of the stock and another, being at the time directors of the company, to deprive the company of its mines and property and

dd. *Mode of Raising Question of Jurisdiction and Sufficiency of Allegations.*—The objection that plaintiff has failed to comply with the ninety-fourth rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case.⁵⁷

ee. *Parties.*—**Corporation.**—Although a stockholder in a corporation may bring a suit when the corporation refuses, yet, as in such case the suit can be maintained only on the ground that the rights of the corporation are involved, the corporation should be made a party to the suit, and a demurrer will lie if it is not so made.⁵⁸ It is always a proper party.⁵⁹

Stockholders, Trustees and Bondholders.—See the title *PARTIES*, vol. 9, pp. 45, 47. Where dissatisfied stockholders sued to set aside what was alleged to be a collusive sale of the corporate property under an amicable foreclosure of a mortgage thereon, the trustees in the mortgages and the consenting stockholders were necessary parties to the bill.⁶⁰ And bondholders may make themselves defendants, where payment of their interest is sought to be enjoined.⁶¹

Directors.—It is proper in a suit by a stockholder to restrain ultra vires acts of a corporation to join as defendants the directors of the corporation. This ruling is reconcilable with the other cases. The reconciliation lies in the distinction between proper and indispensable parties in view of the statute providing for the removal of causes to the federal courts.⁶²

Receiver.—The receiver of an insolvent corporation is the proper party to bring suit to enforce its rights of property, and, if he does not himself sue,

acquire it for themselves, and that in pursuance of the conspiracy they took possession of the company's property, no evidence being offered in the present suit to sustain the charge, records of suits in which like charges were made cannot be regarded as such. *Hallenborg v. Cobre Grande Copper Co.*, 200 U. S. 239, 244, 50 L. Ed. 458.

57. Mode of raising question of sufficiency of allegations.—*Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 35, 45 L. Ed. 410.

The defense set up of failure to comply with this rule does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain this bill. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. *Illinois Cent. R. Co. v. Adams*, 180 U. S. 28, 34, 45 L. Ed. 410.

Plea in abatement.—The pendency of another suit by the corporation on practically the same cause of action, as taking away stockholder's right to sue, is properly raised by a plea in the nature of a plea in abatement. *Memphis City v. Dean*, 8 Wall. 64, 73, 19 L. Ed. 326.

58. Corporation as necessary party.—*Davenport v. Dows*, 18 Wall. 626, 627, 21 L. Ed. 938; *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938. See, also, *Dewing v. Perdicaries*, 96 U. S. 193, 198, 24 L. Ed. 654; *Ambler v. Choteau*, 107 U. S. 586, 27 L. Ed. 322; *Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 37 L. Ed. 577; *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815.

59. As proper party.—*Jones v. Bolles*, 9 Wall. 364, 19 L. Ed. 734.

Where a cause of action affects the en-

tire interests of a corporation as such, the corporation is the proper party to sue. Where it affects specially a stockholder, he has the same right to sue pro interesse suo as any one else. In the latter case, it may or may not be necessary to make the corporation a party. *Dewing v. Perdicaries*, 96 U. S. 193, 196, 24 L. Ed. 654. See, also, post, "*Parties*," VIII, C, 4, c, (2), (b), ee.

Suit to enjoin lease of Indian lands.—A corporation desiring to lease Indian mineral lands is not a necessary party to suit to enjoin secretary of the interior from making lease. *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. Ed. 183. See the title *INDIANS*, vol. 6, p. 931.

60. Stockholders and trustees.—*Ribon v. Railroad Companies*, 16 Wall. 446, 21 L. Ed. 367.

Corporation as party representing stockholders.—See the titles *CORPORATIONS*, vol. 4, pp. 766, 791; *FOREIGN CORPORATIONS*, vol. 6, p. 332. See, also, ante, "*Parties*," VII, D, 8, c, (6); "*Representation by Corporation in Litigation*," VIII, C, 4, c, (2), (a); post, "*Parties*," VIII, D, 4, f, (7).

61. Bondholders.—*Zabriskie v. Cleveland, etc., R. Co.*, 23 How. 381, 16 L. Ed. 488.

62. Directors.—*Geer v. Mathieson Alkali Works*, 190 U. S. 428, 436, 47 L. Ed. 1122; *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514.

Where the action of the board of directors was not "an error of judgment merely," but a breach of duty, they were properly made parties to the bill, and the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require. *Dodge v. Woolsey*, 18 How. 331, 345, 15 L. Ed. 401.

should properly be made a defendant to any suit by stockholders in the right of the corporation.⁶³

ff. *Nonaction as Not Affecting Rights of Corporation*.—While stockholders may interpose by legal proceedings to prevent fraudulent and illegal acts by the directors, if they have the means and inclination to assume the burden of so doing, the fact that they do not do so, having knowledge of such action, will not prevent the corporation itself from seeking redress if it acts promptly when freed from the control of such directors.⁶⁴

(c) *Ancillary Suits*.—"It is very well settled that a bill in equity by a corporation or the stockholders of a corporation in the circuit court to set aside a final decree of that court against the corporation in a foreclosure suit upon the ground that such a decree was obtained by collusion and fraud, and the court had no jurisdiction to make it, is an ancillary suit and a continuation of the main suit so far as the jurisdiction of the circuit court as a court of the United States is concerned."⁶⁵

(d) *Answers of Stockholders*.—Stockholders of a corporation, who have been allowed to put in answers in the name of a corporation, cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant, for the purpose of protecting—from unfounded and illegal claims against the company—his own interest and the interest of such other stockholders as choose to join him in the defense.⁶⁶ And where the stockholders were irregularly allowed by the court to appear and answer in the name of the company, yet, where the defense set up was doubtless the same as that which they would have relied on if they had been admitted simply as stockholders, the answers were regarded as if put in by them in that character.⁶⁷

5. *INSPECTION OF BOOKS*.—There can be no question that the decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member.⁶⁸

63. Receiver.—Porter v. Sabin, 149 U. S. 473, 478, 37 L. Ed. 815. See the title RECEIVERS, vol. 10, p. 538.

64. Nonaction as not affecting rights of corporation.—Pacific Railroad v. Missouri Pac. R. Co., 111 U. S. 505, 521, 28 L. Ed. 498. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 957.

65. Ancillary suits.—Carey v. Houston, etc., R. Co., 161 U. S. 115, 130, 40 L. Ed. 638, reaffirmed in Murphy v. Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Darragh v. Wetter Mfg. Co., 169 U. S. 735, 42 L. Ed. 1216; Blythe Co. v. Blythe, 172 U. S. 644, 43 L. Ed. 1183; Mobile Transp. Co. v. Mobile, 199 U. S. 604, 50 L. Ed. 330. See, also, Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. Ed. 886; Krippendorf v. Hyde, 110 U. S. 276, 28 L. Ed. 145; Pacific Railroad v. Missouri Pac. R. Co., 111 U. S. 505, 522, 28 L. Ed. 498. See the title COURTS, vol. 4, p. 983, et seq.

66. Answers of stockholders.—Bronson v. La Crosse, etc., R. Co., 2 Wall. 283, 17 L. Ed. 725.

"But this defense (by a stockholder) is independent of the company and of its directors, and the stockholder becomes a

real and substantial party to the extent of his own interests and of those who may join him, and against whom any proceeding, order, or decree of the court in the cause is binding, and may be enforced. It is true, the remedy is an extreme one, and should be admitted by the court with hesitation and caution; but it grows out of the necessity of the case and for the sake of justice, and may be the only remedy to prevent a flagrant wrong." Bronson v. La Crosse, etc., R. Co., 2 Wall. 283, 302, 17 L. Ed. 725.

"A complainant, if he chooses, may compel a corporation to appear and answer by a writ of distringas; or he may join with the corporation, a director, or officer, if he desires a discovery under oath. But we are not aware of any other except a complainant who can compel an appearance or answer." Bronson v. La Crosse, etc., R. Co., 2 Wall. 283, 303, 17 L. Ed. 725.

67. Answers treated as those of stockholders.—Bronson v. La Crosse, etc., R. Co., 2 Wall. 283, 303, 17 L. Ed. 725.

Intervention in foreclosure proceedings.—See ante, "In General," VIII, C, 4, c, (1).

68. Inspection of books.—Guthrie v.

6. **CONTRACTS AND DEALINGS WITH CORPORATION.**—See the title **CORPORATIONS**, vol. 4, p. 744. See, also, post, "In General," VIII, D, 1.⁶⁹

7. **COMBINATIONS OF STOCKHOLDERS IN RESTRAINT OF TRADE.**—See the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 431, and particularly at p. 440.

8. **NOTICE TO STOCKHOLDERS AS AFFECTING CORPORATION.**—See the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 8, p. 999.

D. Stockholders' Duties and Liabilities—1. **IN GENERAL**—a. *Trust Relationship and Obligation.*—Every shareholder is a cestui que trust to the extent of his ownership,⁷⁰ and the relations of a stockholder to the corporation, and to the public who deal with the latter, are such as to require good faith and fair dealing in every transaction between him and the corporation, of which he is part owner and controller, which may injuriously affect the rights of creditors or of the general public, and a rigid scrutiny will be made into all such transactions in the interest of creditors.⁷¹ But a stockholder is not under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to continue in the holding of stock to enable another stockholder to make gains and profits.⁷²

b. *Corporate Liability Distinguished.*—The term "corporation" does not include stockholders, and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders.⁷³

c. *On Subscription to Stock of Foreign Corporation.*—See the title **FOREIGN CORPORATIONS**, vol. 6, p. 306.

2. **FOR ASSETS RECEIVED BEFORE DEBTS PAID.**—A party having a claim for unliquidated damages against a corporation, which has not been dissolved, but has merely distributed its corporate funds amongst its stockholders, and ceased or suspended business, cannot maintain a suit on the equity side of the United States circuit court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment and without making the corporation a de-

Harkness, 199 U. S. 148, 153, 50 L. Ed. 130.

"The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders who are the real owners of the property." Guthrie v. Harkness, 199 U. S. 148, 155, 50 L. Ed. 130.

Although there may be circumstances which would justify the court in withholding relief to a stockholder seeking an examination of the books, the possibility of the abuse of a legal right affords no ground for its denial. Guthrie v. Harkness, 199 U. S. 148, 155, 50 L. Ed. 130. See, also, the title **BANKS AND BANKING**, vol. 3, p. 128.

69. **Right of stockholders to buy at sale of property on winding up.**—See the title **CORPORATIONS**, vol. 4, p. 800.

70. **Trust relationship and obligation.**—Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558.

He will not be heard in equity to say he is not interested in preventing the law of the corporation from being broken. Zabriskie v. Cleveland, etc., R. Co., 23 How. 381, 16 L. Ed. 488. See the title **CORPORATIONS**, vol. 4, p. 750.

71. **Trust relation to corporation and creditors.**—Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 589, 23 L. Ed. 328,

where it is said he is bound to candor and good faith in making a contract of any kind with the corporation of which he is a member.

72. **Limitation of rule.—Right to secure own interests.**—Farmers' Loan, etc., Co. v. Chicago, etc., R. Co., 163 U. S. 31, 44, 41 L. Ed. 60.

And it does not seem that a stockholder can be condemned of any breach of trust, or other obligation, to the company when, having offered the stock to a corporation seeking to acquire control at the instance of the company at the price afterwards paid by another rival company, and such offer having been declined, he sold it to the other company. Farmers' Loan, etc., Co. v. Chicago, etc., R. Co., 163 U. S. 31, 43, 41 L. Ed. 60. See ante, "Capital Stock and Unpaid Subscriptions as Trust Fund," VII, D, 8, a.

For payment of sinking fund.—See the title **CORPORATIONS**, vol. 4, p. 709, et seq.

Original undertaking of stockholder to pay corporate debt not within statute of frauds.—Emerson v. Slater, 22 How. 28, 16 L. Ed. 360. See the title **FRAUDS**, **STATUTE OF**, vol. 6, p. 454.

73. *Park Bank v. Remsen*, 158 U. S. 337, 346, 39 L. Ed. 1008. See ante, "Definition and General Considerations," VIII, A.

defendant and bringing it before the court. The stockholder cannot represent the corporation against which the claim for damages is asserted.⁷⁴

3. **LIABILITY FOR FRAUD OF CORPORATION.**—Where there is no averment or even intimation in the bill that the stockholders in any way participated in the fraudulent misrepresentations of the vendor companies, on which it is charged the complainant relied and acted to its injury, they are not personally responsible for any damage resulting to the complainant by reason of the alleged fraud.⁷⁵

4. **STATUTORY AND EXTRAORDINARY LIABILITY.**—As to liability of bank stockholders, see the title **BANKS AND BANKING**, vol. 3, p. 130, et seq.

a. *Nature and Terms.*—(1) *Statutory and Contractual.*—The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law.⁷⁶ It is a liability created by statute, because the statute is the foundation for the implied contract arising from the purchase of or subscription for the stock, the contract being that the holder of the stock shall be liable in accordance with the terms of the statute, or the constitution, or a combination of both, by virtue of the application of general principles of law to the facts in the case.⁷⁷ It is not penal.⁷⁸

Protected by Federal Constitution against Impairment.—The incident of individual liability attaches to and forms a part of a contract with the corporation as long as it lasts, but its repeal does not deprive the creditor under such contract of any of the rights secured to him when the contract was made. They still exist, and the remedy to enforce them remains the same. If the corporation itself cannot pay, the members who composed it at the time of the repeal are unaffected by it, and there is nothing in the way of subjecting them to the double liability provision.⁷⁹

74. Liability for assets received before debts paid.—*Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 604, 37 L. Ed. 577; *Bronson v. La Crosse, etc., R. Co.*, 2 Wall. 283, 301, 302, 17 L. Ed. 725. See the title **CREDITORS' SUITS**, vol. 5, p. 28. As to the trust fund doctrine, see the title **CORPORATIONS**, vol. 4, p. 639, et seq.

75. Liability for fraud of corporation.—*Swan Land, etc., Co. v. Frank*, 148 U. S. 603, 610, 37 L. Ed. 577.

76. A creature of statute.—*Terry v. Little*, 101 U. S. 216, 217, 25 L. Ed. 864; *Patterson v. Lynde*, 106 U. S. 519, 520, 27 L. Ed. 265; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Pollard v. Bailey*, 20 Wall. 520, 526, 22 L. Ed. 376; *United States v. Stanford*, 161 U. S. 412, 429, 40 L. Ed. 751. See, also, *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 666, 23 L. Ed. 336; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 19 L. Ed. 1029.

77. Statutory and contractual.—*Platt v. Wilmot*, 193 U. S. 602, 612, 48 L. Ed. 809; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. Ed. 587. See, also, *Godfrey v. Terry*, 97 U. S. 171, 180, 24 L. Ed. 944; *Carrol v. Green*, 92 U. S. 509, 513, 23 L. Ed. 738; *Hawthorne v. Calef*, 2 Wall. 10, 22, 17 L. Ed. 776; *Bernheimer v. Converse*, 206 U. S. 516, 529, 51 L. Ed. 1163; *Flash v. Conn*, 109 U. S. 371, 377, 27 L. Ed. 966; *Richmond v. Irons*, 121 U. S. 27, 56, 30 L. Ed. 864; *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732; *McClaine v. Rankin*, 197 U. S. 154, 161, 49 L. Ed. 702; *Hawkins v. Glenn*,

131 U. S. 319, 33 L. Ed. 184; *Ochiltree v. Railroad Co.*, 21 Wall. 249, 22 L. Ed. 546; *United States v. Knox*, 102 U. S. 422, 424, 26 L. Ed. 216; *Pollard v. Bailey*, 20 Wall. 520, 526, 22 L. Ed. 376.

Charter provision.—Sometimes it was embodied in the corporate charter. *Hawthorne v. Calef*, 2 Wall. 10, 22, 17 L. Ed. 776; *Terry v. Little*, 101 U. S. 216, 218, 25 L. Ed. 864; *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738.

Stockholders of Union Pacific Railroad Company.—*United States v. Stanford*, 161 U. S. 412, 429, 40 L. Ed. 751.

Central Pacific Railroad Company.—*United States v. Stanford*, 161 U. S. 412, 430, 40 L. Ed. 751.

Minnesota.—"The courts of Minnesota have held that a stockholder's liability is, therefore, fixed and measured by the constitution." *Bernheimer v. Converse*, 206 U. S. 516, 529, 51 L. Ed. 1163; *First Nat. Bank v. Converse*, 200 U. S. 425, 434, 50 L. Ed. 537.

78. Not penal.—"That an action upon this liability is not one to enforce a penal statute of Kansas but only to secure a private remedy is not open to question since the decision in *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123." *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 567, 44 L. Ed. 587; *Flash v. Conn*, 109 U. S. 371, 377, 27 L. Ed. 966. See the title **CONFLICT OF LAWS**, vol. 3, p. 1074.

79. Protected by federal constitution against impairment.—*Ochiltree v. Railroad Co.*, 21 Wall. 249, 253, 22 L. Ed. 546.

An amended constitution does not im-

Statute of State Where Corporation Does Business.—See the titles CONFLICT OF LAWS, vol. 3, p. 1066; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 872.

Survival.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 23.

(2) *Several.*—The extraordinary statutory liability of stockholders for the debts of the corporation, is several, not joint.⁸⁰

(3) *Secondary to That of Corporation.*—The liability is secondary to that of the corporation for the corporate debts.⁸¹

(4) *Conflict of Laws and State Decisions as Binding Federal Courts.*—See the titles CONFLICT OF LAWS, vol. 3, p. 1066; COURTS, vol. 4, pp. 1077, 1078.

(5) *Extent.*—The extent of the liability is ordinarily the par value of the stock held.⁸²

b. *Construction.*—Individual liability is repugnant to the law of corporations, and qualifies in this case an exemption which would otherwise exist. Stockholders in such cases are liable according to the plain meaning of the terms employed by the legislature, and not otherwise.⁸³

Exceptions Strictly Construed.—Under a state constitution exempting from the double liability corporations organized to carry on any kind of manufacturing or mechanical business, it has been decided, following the supreme court of the state, that unless it unquestionably appears that a corporation claiming to be a manufacturing corporation was organized for the exclusive purpose of engaging in manufacturing and such incidental business as might be reasonably necessary for effecting that purpose, the exception in the constitution to which reference has been made would not apply, and the double liability would result.⁸⁴

pair the obligation of the contract between the corporation and its debtor made under the first constitution, although under it new stockholders under an increase of stock are not subject to the double liability. *Ochiltree v. Railroad Co.*, 21 Wall. 249, 22 L. Ed. 546. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 837, 871, 872.

Change in remedy.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 870.

80. *Godfrey v. Terry*, 97 U. S. 171, 180, 24 L. Ed. 944; *Terry v. Little*, 101 U. S. 216, 218, 25 L. Ed. 864; *Flash v. Conn.*, 109 U. S. 371, 377, 27 L. Ed. 966; *United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216. See post, "Parties," VIII, D, 4, f, (7).

81. *New Lamp Chimney Co. v. Ansonia Brass, etc., Co.*, 91 U. S. 656, 666, 23 L. Ed. 336. See, also, *Manufacturing Co. v. Bradley*, 105 U. S. 175, 181, 26 L. Ed. 1034.

82. **Extent.**—*United States v. Knox*, 102 U. S. 422, 26 L. Ed. 216. But where each stockholder is bound for the debts "in proportion" to his stock, his liability is not limited to the par value, neither is he bound absolutely for the payment of the full amount of that. *Pollard v. Bailey*, 20 Wall. 520, 524, 22 L. Ed. 376. See the title BANKS AND BANKING, vol. 3, p. 130, et seq.

83. *Carrol v. Green*, 92 U. S. 509, 512, 23 L. Ed. 738; *Brunswick, etc., Co. v. National Bank*, 192 U. S. 386, 390, 48 L. Ed. 491; *Terry v. Little*, 101 U. S. 216, 218, 25 L. Ed. 864.

84. **Exceptions strictly construed.**—*First Nat. Bank v. Converse*, 200 U. S.

425, 434, 50 L. Ed. 537. See, also, *Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. Ed. 1163; *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S. 332, 344, 44 L. Ed. 793. See the title COURTS, vol. 4, pp. 1077, 1078. See, also, the title BANKS AND BANKING, vol. 3, pp. 77, 80.

But if it did so appear, as under the Minnesota constitution, the stockholders of the company would not be liable for its debts. *First Nat. Bank v. Converse*, 200 U. S. 425, 434, 50 L. Ed. 537.

But where the company was organized to embark in the purely speculative business of buying and selling the stock and assets of an existing and insolvent corporation, with power, but without the obligation, to engage as an independent enterprise in a manufacturing business, it was not within the exemption. *First Nat. Bank v. Converse*, 200 U. S. 425, 438, 50 L. Ed. 537.

Immunity of stockholders from liability on succession or consolidation.—The question is as to the intention of the legislature, and in ascertaining that intention, where the act, under which the immunity claimed existed, did not grant immunity to the stockholders of the old company from liability, but the immunity resulted because liability was not imposed, this legal right of the stockholders of that corporation cannot be said to have been transmitted to the stockholders of the new corporation created by the act of 1881 by the grant to it of the "immunities heretofore granted to the Minneapolis and St. Louis Railway Company." The inference is against such exemption. *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S. 332, 344, 44 L. Ed. 793.

c. *Evidence of Stockholder's Assent*.—See post, "Binding on Stockholders," VIII, D, 4, f, (1), (a).

d. *Who Liable as Stockholders*—(1) *Nonresident Stockholder*.—The right of a state is acknowledged to affix to the holding of stock in a domestic corporation a liability on a nonresident as well as a resident stockholder in personam in favor of the ordinary creditors of the corporation.⁸⁵

(2) *Assignees in Bankruptcy of Stockholder*.—Where the assignees in bankruptcy of a stockholder never accepted the stock, and never consented to become stockholders, or acted in any way as such, it follows that neither they nor the assets in their hands are subject to the individual liability of stockholders for the debt of the corporation.⁸⁶

(3) *Liability on Stock Held as Security or in Trust*.—A party who, by way of pledge or collateral security for a loan of money, accepts stock of a corporation which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder, and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred.⁸⁷ But not so where put in the pledgee's name as pledgee.⁸⁸

Statutory Provisions Defining Liability.—But if the law declares that stock held as collateral security or in a fiduciary capacity shall not make the holder liable, it is competent to show that it is so held. And when this fact is once established, there is an end of the application of estoppel, unless it can be invoked by some party who has been specially misled by the conduct of the defendants.⁸⁹ So as to stock held as collateral security, or as trustee, although his holding is not perfectly passive and he receives the dividends in the same capacity and votes on the stock. He is not estopped.⁹⁰

85. *Corry v. Baltimore*, 196 U. S. 466, 477, 49 L. Ed. 566; *Flash v. Conn.*, 109 U. S. 371, 27 L. Ed. 966; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. Ed. 587; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 230, 47 L. Ed. 782, and cases cited; *Platt v. Wilmot*, 193 U. S. 602, 612, 48 L. Ed. 809.

86. *American File Co. v. Garrett*, 110 U. S. 288, 295, 28 L. Ed. 149. See the title *BANKRUPTCY*, vol. 2, p. 792.

87. *Stock held as security and transferred on books*.—*National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448.

Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818, "and like decisions abound in the English courts, and in numerous American cases." *National Bank v. Case*, 99 U. S. 628, 631, 25 L. Ed. 448.

"That the original holders and the transferees of the stock are thus liable we held in *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220, and *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384, and the reasons that controlled our judgment in those cases are of equal force in the present." *Pullman v. Upton*, 96 U. S. 328, 330, 24 L. Ed. 818.

"For this several reasons are given. One is, that he is estopped from denying his liability by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made; another is, that by taking the legal title he has released the former

owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder." *National Bank v. Case*, 99 U. S. 628, 631, 25 L. Ed. 448.

88. *Transfer to pledgee's name as such*.—It was held in *Pauly v. State Loan, etc., Co.*, 165 U. S. 606, 41 L. Ed. 844, that where stock was transferred in pledge, and the pledgee, for the purpose of protecting his contract, caused the stock to be put in his name on the books as pledgee, such a registry did not amount to a transfer to the pledgee as owner, and that he therefore was not liable, although the pledgor might continue to be so. *Robinson v. Southern Nat. Bank*, 180 U. S. 295, 309, 45 L. Ed. 536.

89. *Statutory provision against liability*.—*Burgess v. Seligman*, 107 U. S. 20, 32, 27 L. Ed. 359.

The Missouri statute provides that a person holding stock executor, administrator, guardian, or trustee, or as collateral security, shall not be personally liable, but the person pledging the same shall be considered the holder and so liable, and likewise the estate or interest represented by the fiduciary so holding the stock shall be liable. *Burgess v. Seligman*, 107 U. S. 20, 32, 27 L. Ed. 359.

90. *Acting as stockholder as to dividends and voting*.—*Burgess v. Seligman*, 107 U. S. 20, 29, 27 L. Ed. 359.

Stock Pledged by Corporation.—The fact that the statute contains the proviso that the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, does not show that stock pledged by the corporation itself must be regarded as belonging to the pledgee, though no other pledgee of stock is treated in this way.⁹¹

(4) *Effect of Transfer.*—A stockholder's transfer of his stock, for the mere purpose of avoiding his liability as such, is fraudulent and void, and he still remains liable, although the English rule is different.⁹² The purchaser of corporate stock, as such shareholder, becomes subject to the individual liability prescribed by the statute. This liability attaches to him until, without fraud as against the creditors of the corporation for whose protection the liability was imposed, he relieves himself from it. He can do so by a bona fide transfer of the stock.⁹³ But the transfer must be out and out.⁹⁴

Statute Exempting Transferrer unless Notified by Creditor of Intention to Hold Him Construed.—A state statute exempting the transferrer of stock from his individual liability thereon under the charter, unless he be notified by a creditor of intention to hold him liable within a stated time, provided transferrer give a specified notice of the transfer, is intended to exempt from, not to impose a liability, and for it to apply, there must be a creditor to be affected thereby.⁹⁵

Liability Dependent on Ownership, Real or Apparent.—See the title BANKS AND BANKING, vol. 3, p. 134, et seq.

e. *Waiver or Release of Liability.*—**Release of Liability.**—An agreement between the stockholders on subscribing for bonds issued by their corporation, that their further liability for the corporate debts and for these bonds should be extinguished, cannot affect transferees of such bonds for value and without no-

91. Stock pledged by corporation.—*Burgess v. Seligman*, 107 U. S. 20, 37, 27 L. Ed. 359.

Although entered on the transfer book inaccurately as "held in escrow." *Burgess v. Seligman*, 107 U. S. 20, 28, 27 L. Ed. 359.

Within contract defining relation may be shown.—*Burgess v. Seligman*, 107 U. S. 20, 30, 27 L. Ed. 359.

Estoppel by representations.—No estoppel shown.—*Burgess v. Seligman*, 107 U. S. 20, 32, 27 L. Ed. 359. As to liability on subscription, see ante, "Liability of Persons Holding Stock in Fiduciary Capacity, or as Security," VII, D, 5.

92. Effect of transfer.—*Earle v. Carson*, 188 U. S. 42, 50, 47 L. Ed. 373; *National Bank v. Case*, 99 U. S. 628, 631, 25 L. Ed. 448; *Peters v. Bain*, 133 U. S. 670, 691, 33 L. Ed. 696; *McDonald v. Dewey*, 202 U. S. 510, 521, 50 L. Ed. 1128; *Bowden v. Johnson*, 107 U. S. 251, 261, 27 L. Ed. 386. See, also, *Pullman v. Upton*, 96 U. S. 328, 330, 24 L. Ed. 818.

The rule on this subject was clearly stated in *Bowden v. Johnson*, 107 U. S. 251, 27 L. Ed. 386, where in declining to follow the English rule upholding a real or out and out sale, even if the purpose was to avoid impending liability, the court said that "the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by statute to creditors," a principle which has been since expressly reiterated

in *Matteson v. Dent*, 176 U. S. 521, 531, 44 L. Ed. 571; *Earle v. Carson*, 188 U. S. 42, 55, 47 L. Ed. 373. See ante, "Transferability," VI, A.

Setting aside fraudulent transfer.—See the title DISCOVERY, vol. 5, p. 352.

93. Bona fide transfer.—The transferee might be liable as a shareholder succeeding to the liabilities because he has voluntarily assumed that position; but that is no reason why transferrer should not, at the election of creditors, still be treated as a shareholder, he having, to escape liability, perpetrated a fraud on the statute. *Bowden v. Johnson*, 107 U. S. 251, 261, 27 L. Ed. 386.

But a mere assignment of his share by a subscriber does not relieve him from liability until the assignee is substituted in his place. *Burke v. Smith*, 16 Wall. 390, 400, 21 L. Ed. 361.

94. Transfer not out and out.—Where the transfer was not an out and out transfer, but the stock remained the property of the transferrer, and transferee was bound to retransfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the transferrer, no case holds that such a transfer relieves the transferrer from his liability as a stockholder. *National Bank v. Case*, 99 U. S. 628, 632, 25 L. Ed. 448; *Bowden v. Johnson*, 107 U. S. 251, 261, 27 L. Ed. 386.

95. Brunswick, etc., Co. v. National Bank, 192 U. S. 386, 391, 48 L. Ed. 491.

tice of the agreement affirmatively shown, or prevent them from enforcing such liability.⁹⁶

f. *Enforcement*—(1) *Regulations Generally, and Means of Enforcement*—

(a) *Binding on Stockholders*.—By becoming a member of a state corporation, and assuming the liability attaching to such membership, a stockholder became subject to such regulations as the state might lawfully make to render the liability effectual.⁹⁷

(b) *Exclusiveness of Remedy Provided*.—A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed.⁹⁸

(c) *Constitutional Provisions as Self-Executing*.—A constitutional provision

96. Release of liability.—*American File Co. v. Garrett*, 110 U. S. 288, 293, 28 L. Ed. 149. See, also, *Korn v. Mutual Assur. Society*, 6 Cranch 192, 3 L. Ed. 195, where it is said that a member cannot be released from his obligations as such except in the manner prescribed by the rules of the society.

Assignees of bonds without notice of any agreement for release may enforce liability.—*American File Co. v. Garrett*, 110 U. S. 288, 294, 28 L. Ed. 149, citing *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Oates v. National Bank*, 100 U. S. 239, 25 L. Ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61.

It is insisted, secondly, that, conceding the assignees of the bonds to be bona fide holders for value without notice of any equities or defenses as against the first holders, they have nevertheless lost their right to enforce the individual liability of the stockholders by reason of the agreement between them and the assignees in bankruptcy of the stockholder by whom the bonds were pledged with a creditor, whereby they assumed the liability of stockholders and made themselves liable through the assignees to contribute to the other stockholders the money which they might collect from them on the bonds of the company (the agreement being to "indemnify the said assignees against loss or damage of any kind as holders of the stock aforesaid," i. e., as holders of the stock of the corporation as assignees of the bankrupt stockholder and debtor, and against loss or damage of any kind to result from this release of their claim to said bonds). It was held that they did not by this contract agree to become stockholders of the corporation or to indemnify the former holder against his individual liability as a stockholder. The agreement will bear no such interpretation. The contract was made for the benefit of the assignees in bankruptcy, by which they took an indemnity for themselves and the bankrupt estate. If, therefore, the assignees in bankruptcy themselves are not liable as stockholders, the assignees of the bonds by this contract of indemnity assumed no liability, and they hold the bonds in question unfettered by any equities or condi-

tions, and it is well settled that under the circumstances of the case neither the assignees nor the assets in their hands are subject to the individual liability which attaches to stocks held by the bankrupt. *American File Co. v. Garrett*, 110 U. S. 288, 294, 28 L. Ed. 149.

97. Bernheimer v. Converse, 206 U. S. 516, 533, 51 L. Ed. 1163. See the title **CORPORATIONS**, vol. 4, pp. 634, 675.

98. Exclusiveness of remedy provided.—*Pollard v. Bailey*, 20 Wall. 520, 526, 527, 22 L. Ed. 376; *Hale v. Allinson*, 188 U. S. 56, 60, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901; *Terry v. Little*, 101 U. S. 216, 217, 25 L. Ed. 864; *Finney v. Guy*, 189 U. S. 335, 340, 47 L. Ed. 839; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 563, 44 L. Ed. 587.

Where the constitutional provision refers in terms to the securing of dues from corporations by the individual liability of stockholders and by such other means as may be prescribed by law, the constitution evidently looks to the legislature for providing means. A statute which is passed in pursuance of such a provision and which itself provides for the procedure and states the remedy, even though imposing no limit or conditions in regard to such liability other than such as are found in the constitutional provision itself, is, nevertheless, a statute providing a remedy which is to be followed within the principle sustained by the authorities cited below. The statute under such circumstances may be said to so far provide for the liability and to create the remedy, as to make it necessary to follow its provisions and to conform to the procedure provided for therein. *Middletown Nat. Bank v. Toledo, etc., R. Co.*, 197 U. S. 394, 405, 49 L. Ed. 803. See *Pollard v. Bailey*, 20 Wall. 520, 526, 22 L. Ed. 376; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 756, 758, 30 L. Ed. 825, where the rule is applied in a suit in the federal court. See *Blair v. Gray*, 104 U. S. 769, 26 L. Ed. 922. See post, "Form of Remedy and Exhaustion of Recourse on Corporation," VIII, D, 4, f, (3); "Where Enforceable," VIII, D, 4, f, (6).

that: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law;" has been held, to a certain extent, at least, self-executing.⁹⁹ But such a provision has been held at least not so far self-executing that it may be enforced outside of the jurisdiction of said state without compliance with the requirements of statutes of said state on the subject.¹

(d) *Additional Remedies to Enforce Liability*.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 870, et seq. If additional remedies may be provided by legislation, then the validity of such additional enactments depends, not necessarily upon the personal service upon the stockholder, but upon the fact whether the remedy provided is a well-recognized means of enforcing such obligations and not in violation of constitutional rights.²

(2) *Jurisdiction*.—(a) *In Equity*.—The stockholder's statutory liability may undoubtedly be enforced by a suit in equity, and in many cases such a proceeding would seem to be the only appropriate one.³ This is the case where the liability is in proportion to the stock held, so that each stockholder is only liable for his proportion of the debts.⁴

(b) *At Law*.—But where the amount of the statutory liability is fixed, or

99. *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 562, 44 L. Ed. 587. See *quere* in *Middletown Nat. Bank v. Toledo, etc.*, R. Co., 197 U. S. 394, 404, 49 L. Ed. 803.

And see *Bernheimer v. Converse*, 206 U. S. 516, 529, 51 L. Ed. 1163, where it is said that "while a remedy might have been worked out in the courts of equity in the state, it was proper, if not necessary, that a statute should be passed to make more effectual the liability thus secured by the constitution."

1. *Middletown Nat. Bank v. Toledo, etc.*, R. Co., 197 U. S. 394, 49 L. Ed. 803.

2. *Bernheimer v. Converse*, 206 U. S. 516, 532, 51 L. Ed. 1163. See post, "Necessity for Personal Service," VIII, D, 4, i.

3. *Equity jurisdiction*.—*Mills v. Scott*, 99 U. S. 25, 29, 25 L. Ed. 294.

"As was held by this court in *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376." *Mills v. Scott*, 99 U. S. 25, 29, 25 L. Ed. 294. See, also, *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Carrol v. Green*, 92 U. S. 509, 512, 23 L. Ed. 738.

Where all the shareholders are individually bound to all the creditors, any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity. Besides this, it must be admitted that a court of equity would be entitled, upon the general principles of its jurisdiction, to entertain a bill by one or more creditors whose suit would necessarily be for the benefit of all, against the association and its officers and managers, and all those participating in its voluntary liquidation, for the purpose of preventing and redressing any maladministration or

fraud against creditors, contemplated or executed. *Richmond v. Irons*, 121 U. S. 27, 48, 30 L. Ed. 864; *Terry v. Little*, 101 U. S. 216, 218, 25 L. Ed. 864, citing *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376. See, also, *Manufacturing Co. v. Bradley*, 105 U. S. 175, 181, 26 L. Ed. 1034.

And also the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state. *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 756, 30 L. Ed. 825, citing *Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Patterson v. Lynde*, 106 U. S. 519, 27 L. Ed. 265; *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966; *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376. See, also, *Blair v. Gray*, 104 U. S. 769, 26 L. Ed. 922; *Chase v. Curtis*, 113 U. S. 452, 460, 28 L. Ed. 1038. See the title BANKS AND BANKING, vol. 3, p. 153, et seq.

4. *Liability proportionate to stock held*.—In the cases of *Pollard v. Bailey*, 20 Wall. 520, 22 L. Ed. 376; *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537, * * * the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of his debts. This proportion could only be ascertained upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders. This, the court held, could only be done by a suit in equity." *Flash v. Conn*, 109 U. S. 371, 380, 27 L. Ed. 966; *Mills v. Scott*, 99 U. S. 25, 29, 25 L. Ed. 294. See, also, *Hatch v. Dana*, 101 U. S. 205, 213, 25 L. Ed. 885; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 181, 26 L. Ed. 1034.

capable of being fixed by computation from known data, an action at law will lie.⁵

Where Whole Liability Is Demanded.—Where the amount demanded is the full amount of the par value of the shares held by each defendant, the proceeding must be at law, and equity has no jurisdiction on the ground of preventing a multiplicity of suits.⁶

(3) *Form of Remedy and Exhaustion of Recourse on Corporation*.—(a) *Motion in Case against Corporation, or Direct Action*.—The legislature may prescribe the mode of enforcement, that it may be by motion in a case against the corporation, or by direct action.⁷

(b) *Action of Debt*.—Where the extent of the stockholder's liability is fixed, and the amount with which he should be charged is a matter of mere arithmetical calculation, actions for debt will lie as always they do where the amount sought to be recovered is certain, or can be ascertained from fixed data by computation.⁸

(c) *Case*.—It has been held that, as the liability of the stockholders arises from their acceptance of the act creating the corporation and their implied promises to fulfill its requirements, by taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly, and if a remedy at law were necessary, clearly it must have been case.⁹

(d) *Recovery of Judgment against Corporation*.—Under a statute imposing a personal liability upon stockholders for the debts of a corporation, and providing that it shall be enforced in equity or by an action of debt upon the judgment obtained against such corporation, the debt must be established by a judgment recovered against the corporation before the creditor can proceed against the stockholder.¹⁰ And the same rule applies where the liability is sought to be enforced in the courts of another state, even though the corporation has been adjudged bankrupt.¹¹ And a plaintiff, after the recovery of a judgment against a state cor-

5. Amount of liability fixed or ascertainable.—*Mills v. Scott*, 99 U. S. 25, 29, 25 L. Ed. 294; *Flash v. Conn*, 109 U. S. 371, 380, 27 L. Ed. 966. See, also, the title BANKS AND BANKING, vol. 3, p. 153, et seq. And see post, "Form of Remedy and Exhaustion of Recourse on Corporation," VIII, D. 4, f, (3).

6. When whole liability demanded.—*Hale v. Allinson*, 188 U. S. 56, 78, 47 L. Ed. 380. See, also, *Kennedy v. Gibson*, 8 Wall. 498, 505, 19 L. Ed. 476. And see post, "Where Enforcible," VIII, D. 4, f, (6).

As ancillary proceeding.—See post, "Where Enforcible," VIII, D. 4, f, (6).

7. Whitman v. Oxford Nat. Bank, 176 U. S. 559, 563, 44 L. Ed. 587, citing *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338. See, also, ante, "Exclusiveness of Remedy Provided," VIII, D. 4, f, (1), (b).

8. Action of debt.—*Mills v. Scott*, 99 U. S. 25, 29, 25 L. Ed. 294; *Carrol v. Green*, 92 U. S. 509, 513, 23 L. Ed. 738, where it is said that debt could not have been maintained. It will only lie for a sum certain or capable of being easily made certain. See the title BANKS AND BANKING, vol. 3, p. 153. See, also, ante, "At Law," VIII, D. 4, f, (2), (b).

9. Case.—*Carrol v. Green*, 92 U. S. 509, 513, 23 L. Ed. 738.

10. Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 755, 30 L. Ed. 825, citing *Smith v. Railroad Co.*, 99 U. S. 498, 25 L. Ed.

437; *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004.

Action against president.—*Van Weel v. Winston*, 115 U. S. 228, 29 L. Ed. 384. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 994.

11. Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. Ed. 825.

The case of *Flash v. Conn*, 109 U. S. 371, 27 L. Ed. 966, is in principle quite in line with the other cases, and was decided in favor of the plaintiff because of essential differences between it and the case at bar, for the statute of New York, there in question, did not require the action to be upon a judgment against the corporation, but allowed any creditor, after suing the corporation and having an execution returned unsatisfied, to bring an independent action against the stockholder upon his original liability. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 757, 30 L. Ed. 825.

Neither of the statutes of Rhode Island gives any action at law against the stockholder upon his original liability, or any right whatever of proceeding against him at law, except by execution or action upon a judgment recovered against the corporation. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 757, 30 L. Ed. 825.

It was held in *Flash v. Conn*, 109 U. S. 371, 379, 27 L. Ed. 966, that the recovery of a judgment against the company in the state

poration in the courts of the state, and the return of an execution unsatisfied, can maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock;¹² and so after judgment recovered in the courts of another state.¹³

Estoppel of Stockholder to Complain of Alienation of Property.—See the title CORPORATIONS, vol. 4, p. 643.

(c) *Necessity for Personal Service.*—Personal service upon the stockholder in the proceeding wherein the assessment against him is made, to which the corporation is a party, is not essential to make it binding on him, provided no personal judgment is rendered against him therein.¹⁴

(4) *By Whom Enforcible.*—It has been held that the statutory liability is, under some statutes, not an asset of the corporation, which can be recovered by a receiver thereof, but an asset which the creditor alone could recover, for his individual benefit,¹⁵ or, if such receiver can recover, that he must collect it for the benefit of all creditors, and must, under the system provided by the statute, first bring suit against the corporation and all resident stockholders, in order to fix the sum required to pay the corporate debts, before he has any authority to make any demand against a stockholder.¹⁶ But the usual rule is that it may be en-

of its incorporation (New York) on the debt due the plaintiffs, and the issue of an execution thereon, returned unsatisfied, is not a necessary condition to the liability of the defendant; and where the declaration only avers the recovery of a judgment in the state of Florida, where liability is sought to be enforced, it is sufficient, where it appears from the declaration that before the year allowed by § 24 of the statute, for bringing suits against the company on the debts due the plaintiffs, had expired, the company had been adjudicated a bankrupt by the district court of the United States for the southern district of New York; that all its property had been sold, and the proceeds thereof were insufficient to pay the costs and expenses of the bankruptcy proceedings.

"The object of § 24 was to compel the creditor to exhaust the assets of the company before seeking to enforce the liability of the stockholder. When the declaration shows that this was done, and that a literal performance of the condition would have been vain and fruitless, the performance of the condition may well be held to have been excused." *Flash v. Conn*, 109 U. S. 371, 380, 27 L. Ed. 966, followed in *Adams & Co. v. Conn*, 109 U. S. 381, 27 L. Ed. 970.

12. Conclusiveness of judgment.—*Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 641, 44 L. Ed. 619; *Ward v. Joslin*, 186 U. S. 142, 152, 46 L. Ed. 1093; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 563, 44 L. Ed. 587. See the title CONFLICT OF LAWS, vol. 3, p. 1074. See ante, "Parties," VII, D, 8, c, (6); "Representation by Corporation in Litigation," VIII, C, 4, c, (2), (2).

But it is not held, in *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. Ed. 619, that it was not open for a stockholder to show that the judgment was not

enforcible against him when rendered against the corporation on a contract beyond its power to make. It was not error to permit the stockholder to go behind the judgment so far as to show, or, at all events, to insist, for the judgment record introduced below disclosed the invalidity of the guaranties, that he was not liable under the constitution and laws. *Ward v. Joslin*, 186 U. S. 142, 152, 46 L. Ed. 1093. See post, "For What Claims Enforcible," VIII, D, 4, f, (5); "Where Enforcible," VIII, D, 4, f, (6).

13. Judgment against corporation in another state.—*Burgess v. Seligman*, 107 U. S. 20, 22, 26, 27 L. Ed. 359.

14. Necessity for personal service.—*Bernheimer v. Converse*, 206 U. S. 516, 532, 51 L. Ed. 1163, citing *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 336, 40 L. Ed. 986. See ante, "Parties," VII, D, 8, c, (6), and references made.

See *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 563, 44 L. Ed. 587, where it is said that the remedies provided by the Kansas statute, of motion in pending case or direct action, could not be made effectual in the Kansas courts unless the stockholder was brought, by due service of process, within the jurisdiction.

15. By whom enforcible.—*Evans v. Nellis*, 187 U. S. 271, 277, 47 L. Ed. 173; *Hale v. Allinson*, 188 U. S. 56, 60, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901; *Finney v. Guy*, 189 U. S. 335, 340, 47 L. Ed. 839. See, also, *Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. Ed. 1163.

Minnesota.—*Hale v. Allinson*, 188 U. S. 56, 60, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901; *Finney v. Guy*, 189 U. S. 335, 340, 47 L. Ed. 839.

16. Previous suit against stockholders and corporation.—*Evans v. Nellis*, 187 U.

forced through a receiver acting for the benefit of creditors under the orders of a court in winding up the corporation in case of its insolvency.¹⁷

For Equal Benefit of All Creditors.—When the liability is expressed to be that the stockholders are "bound respectively for all debts in proportion to their stock holden," there must be a pro rata distribution of the fund so arising among the different creditors, and one cannot appropriate the whole to himself.¹⁸

Pledgee of Bonds.—See the title CORPORATIONS, vol. 4, p. 739. See, also, ante, "Waiver or Release of Liability," VIII, D, 4, e.

(5) *For What Claims Enforcible.*—"Dues" **Construed.**—The word "dues" in a constitutional provision imposing an extraordinary liability for "the dues of the corporation," is one of general significance, and includes all contractual obligations. Whether broad enough to include liabilities for torts, either before or after judgment, not decided.¹⁹ But an obligation which a corporation had no right to incur cannot be a contractual obligation and the basis of "dues," as that word is used in the state constitution. It appears that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken, merely because the corporation may be so situated as to be estopped from denying their validity.²⁰ And a judgment by default against the corporation will not bind the stockholder and prevent him from showing such want of power in defense to his stockholder's liability.²¹

(6) *Where Enforcible.*—As this statutory liability is one which is contractual in its nature, it is clear that an action therefor can be maintained in any court of competent jurisdiction, whether state or federal, out of the state by whose laws it is imposed;²² and the expenses incident to the enforcement in other states may be included in the assessment, if within the amount of the original liability.²³ But the requirements of the statute and judicial decisions of the state of incorporation must be complied with, and the remedy sought there first, if it so provides.²⁴

S. 271, 279, 47 L. Ed. 173. See, also, *Hale v. Allinson*, 188 U. S. 56, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901, and *Finney v. Guy*, 189 U. S. 335, 340, 47 L. Ed. 839.

17. *Bernheimer v. Converse*, 206 U. S. 516, 532, 51 L. Ed. 1163.

18. **For equal benefit of all creditors.**—*Pollard v. Bailey*, 20 Wall. 520, 527, 22 L. Ed. 376. See, also, *Terry v. Little*, 101 U. S. 216, 217, 25 L. Ed. 864.

Enforcement by receiver in another state.—See post, "Where Enforcible," VIII, D, 4, f, (6).

19. "Dues" in constitutional provision construed.—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 563, 44 L. Ed. 587, construing the Kansas provision, followed in *Ward v. Joslin*, 186 U. S. 142, 151, 46 L. Ed. 1093.

20. **Ultra vires contract of corporation.**—*Ward v. Joslin*, 186 U. S. 142, 150, 46 L. Ed. 1093; *Schrader v. Manufacturers' Nat. Bank*, 133 U. S. 67, 33 L. Ed. 564.

If properly construed, it imposes the liability in question only in respect of corporate indebtedness lawfully incurred, that is to say, in respect of dues resulting in regular course of business and in the exercise of powers possessed. *Ward v. Joslin*, 186 U. S. 142, 153, 46 L. Ed. 1093. See, also, the title CORPORATIONS, vol. 4, p. 747, et seq.

21. **Judgment against corporation not conclusive.**—*Ward v. Joslin*, 186 U. S. 142, 46 L. Ed. 1093. See ante, "Recovery of Judgment against Corporation," VIII, D, 4, f, (3), (d).

22. **Where enforcible.**—*Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 567, 44 L. Ed. 587; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123; *Bernheimer v. Converse*, 206 U. S. 516, 529, 51 L. Ed. 1163; *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 756, 30 L. Ed. 825; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437.

Not a penal law, and therefore enforceable.—*Flash v. Conn*, 109 U. S. 371, 377, 27 L. Ed. 966. See the title CONFLICT OF LAWS, vol. 3, p. 1074.

23. **Expense of enforcement.**—*Bernheimer v. Converse*, 206 U. S. 516, 534, 51 L. Ed. 1163, citing *League v. Texas*, 184 U. S. 156, 46 L. Ed. 478; *Richmond v. Irons*, 121 U. S. 27, 30 L. Ed. 864.

24. **Compliance with state statute, essential.**—*Middletown Nat. Bank v. Toledo, etc., R. Co.*, 197 U. S. 394, 405, 49 L. Ed. 803; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 758, 30 L. Ed. 825.

By the terms of the Ohio statute, properly construed, the remedy must be pursued in the courts of that state. The case of a plaintiff failing to obtain satis-

Enforcement by Receiver.—If a receiver cannot maintain this kind of an action in the courts of his own state, because its statute provides another in the name of a creditor, or permits it only after the performance of conditions precedent which he has not performed, he cannot, although appointed in the state, maintain such action in a foreign jurisdiction, and comity cannot avail in such case.²⁵ But if the statute confers the right, the action may be maintained.²⁶

faction of his judgment by following, in Ohio, the remedies given by the Ohio statute, is not before us, and we need not determine the character of any other remedy, or where it may be enforced." *Middletown Nat. Bank v. Toledo, etc., R. Co.*, 197 U. S. 394, 405, 49 L. Ed. 803. See ante, "Exclusiveness of Remedy Provided," VIII, D, 4, f, (1), (b); "Constitutional Provisions as Self-Executing," VIII, D, 4, f, (1), (c). See, also, the title *CONFLICT OF LAWS*, vol. 3, p. 1066, as to law applicable.

25. Enforcement by receivers.—"This we have decided at this term in *Evans v. Nellis*, 187 U. S. 271, 47 L. Ed. 173." *Hale v. Allinson*, 188 U. S. 56, 65, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901, and *Finney v. Guy*, 189 U. S. 335, 47 L. Ed. 839; *Bernheimer v. Converse*, 206 U. S. 516, 524, 51 L. Ed. 1163.

A receiver appointed by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the court without any other right or title, cannot maintain this suit in equity in a foreign state by virtue of his appointment, and the direction to sue contained in the decree in the case in which he was appointed a receiver. *Hale v. Allinson*, 188 U. S. 56, 67, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901.

Multiplicity of suits or ancillary remedy.—Nor can the jurisdiction in equity be maintained of such suit by the receiver in another state against all of the stockholders of the Minnesota corporation in that state for the statutory liability of each defendant as a stockholder, on the ground of thus preventing a multiplicity of suits; nor can such an action be maintained as an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree in an action brought in Minnesota, in which such nonresident stockholders had been named as defendants with all the other stockholders. *Hale v. Allinson*, 188 U. S. 56, 78, 80, 47 L. Ed. 380, reaffirmed in *People's Nat. Bank v. Saville*, 201 U. S. 641, 50 L. Ed. 901.

And this does not constitute a failure to give full faith and credit to the laws and judgments of Minnesota, under the federal constitution. *Finney v. Guy*, 189 U. S. 335, 47 L. Ed. 839.

In the case of *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, although the receiver did maintain the action (for unpaid subscriptions) in an-

other state, no objection to the jurisdiction was made. *Great Western Min., etc., Co. v. Harris*, 198 U. S. 561, 577, 49 L. Ed. 1163.

"Nor is this case controlled or covered by *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. Ed. 587, and *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. Ed. 619. In the former case the special provisions of the Kansas statutes were referred to. It was stated to be the law in Kansas that it only required a judgment against the corporation and an unsatisfied execution returned, after which any creditor could sue any shareholder wherever he could be found. There was no suit in equity in the nature of a partnership accounting necessary. The liability of the shareholder, although statutory in origin, was held contractual in its nature, and under the statute the cause of action was transitory and could be maintained in any tribunal having jurisdiction where process could be served upon the individual shareholder, and in such an action the latter could set off debts due him from the company." *Finney v. Guy*, 189 U. S. 335, 345, 47 L. Ed. 839.

"In the second case it was again held that under the statute and the decisions of the Kansas courts, after a judgment had been obtained against the corporation and an execution returned unsatisfied, the individual creditor could maintain an action against a single stockholder in any court of competent jurisdiction. Having the right to maintain such action, it was held that when it was commenced in another state and in a proper court thereof, the judgment which was obtained in Kansas must have the same faith and credit given it in the courts of another state that was given it in Kansas. Neither case is applicable to the one before us. The statutes are radically different, and no one creditor can maintain the action under the Minnesota statute, and if all unite, they must sue in the courts of that state." *Finney v. Guy*, 189 U. S. 335, 345, 47 L. Ed. 839. See ante, "Recovery of Judgment against Corporation," VIII, D, 4, f, (3), (d); "By Whom Enforceable," VIII, D, 4, f, (4).

26. Right conferred by statute.—Although a chancery receiver, having no other authority than that which would arise from his appointment as such, could not maintain an action in another jurisdiction, yet, where the statute confers the right upon the receiver, as a quasi assignee, and representative of the creditors, and as such vested with the authority to maintain an action, in such case the receiver

(7) *Parties.—Joinder.*—Each stockholder being bound for his own share and no more, no judgment can be rendered against him for what another should pay, and it follows that in an action at law each stockholder must be separately sued. In equity it is different, for there the decree can be moulded to suit the exigencies of the case, and each stockholder can be held liable and proceeded against for what he is bound to pay, and no more. Undoubtedly, under the provisions of some charters, suits at law may be maintained by one creditor against one or more of the stockholders. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability.²⁷

g. Defenses.—(1) *Capital Stock Not All Subscribed.*—This is not a defense to the statutory liability to creditors.²⁸

(2) *Statute of Limitations and Laches.*—**Application in Equity.**—When the statute bars the remedy at law, it is also a good defense in equity.²⁹

Accrual of Cause of Action.—The cause of action accrues upon an assessment against the stockholder's liability when the assessment is made payable, and does not depend on whether there are any outstanding claims against the corporation or not.³⁰

To Receiver.—The cause of action as to the receiver, seeking to enforce the liability, does not accrue until he can sue upon the assessment after the stockholder fails to pay.³¹

Period of Limitation.—The limitation is that applicable to implied contracts, or liabilities imposed by statute, and not to a contract in writing.³²

may sue in a foreign jurisdiction to collect the statutory liability of stockholders. *Bernheimer v. Converse*, 206 U. S. 516, 534, 51 L. Ed. 1163.

27. Joinder of parties.—*Terry v. Little*, 101 U. S. 216, 218, 25 L. Ed. 864. See *Godfrey v. Terry*, 97 U. S. 171, 180, 24 L. Ed. 944. See, also, ante, "Several," VIII, D, 4, a, (2); "By Whom Enforceable," VIII, D, 4, f, (4).

28. Capital stock not all subscribed.—It will not do to say, after a company has been organized and gone into business, and dealt with the public, that its stockholders may withdraw their capital and be exempt from statutory liability to creditors, if they can show that the capital stock of the company was not all subscribed. *Aspinwall v. Butler*, 133 U. S. 595, 608, 33 L. Ed. 779. See ante, "Necessity for Subscription and Payment of Certain Amount," VII, A, 3.

29. Application in equity.—As the liability of the stockholders arose from their acceptance of the act creating the corporation, and their implied promises to fulfill its requirements, the proper remedy was an action upon the case; and that, as the statute barred such an action at law, it was also a good defense in equity. *Carrol v. Green*, 92 U. S. 509, 510, 23 L. Ed. 738.

30. Accrual of cause of action.—*McDonald v. Thompson*, 184 U. S. 71, 72, 46 L. Ed. 437, reaffirmed in *Smith v. Brown*, 187 U. S. 637, 47 L. Ed. 344; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184; *Glenn v. Marbury*, 145 U. S. 499, 36 L. Ed. 790; *Scovill v. Thayer*, 105 U. S. 143, 145, 26 L. Ed. 968. See the title BANKS AND BANKING, vol. 3, p. 162, et seq.

Quære, whether, if a suit can be maintained upon the general equitable principles recognized in the cases which hold that the capital stock of a corporation is a trust fund which may be followed by creditors into the hands of those who have notice of the trust; the right of a circuit court of the United States to give relief, according to the received principles of equity, can be controlled by any limitation prescribed by the state in actions of assumpsit or upon the case founded on contract or liability, express or implied. *Taylor v. Bowker*, 111 U. S. 110, 113, 28 L. Ed. 368.

31. Accrual of cause of action to receiver.—The cause of action did not accrue until the receiver could sue upon the assessment after the stockholder had failed to pay, as required by the order of the Minnesota court of December 22, 1902. Under the New York statute of limitations there was six years in which to bring the action after it accrued, under § 382 of the code, the Minnesota Thresher Manufacturing Company not being a "moneyed corporation or banking association" within § 394. *Platt v. Wilmot*, 193 U. S. 602, 603, 48 L. Ed. 809. The present suits were brought a little more than one year after the causes of action accrued. *Bernheimer v. Converse*, 206 U. S. 516, 534, 51 L. Ed. 1163. See, also, *McDonald v. Thompson*, 184 U. S. 71, 75, 46 L. Ed. 437. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1011, et seq.

32. Not a contract in writing.—*McDonald v. Thompson*, 184 U. S. 71, 74, 46 L. Ed. 437.

"In none of the numerous cases upon

Government by State Statutes and State Construction Thereof.—The state statutes of limitations govern, as construed by the state courts of last resort.³³

Application to Foreign Corporations.—The statute of the state of New York, limiting to two years the right to bring an action for a debt of a corporation after the defendant ceased to be a stockholder (§ 55, ch. 588, N. Y. Laws, 1892), evidently refers to domestic corporations provided for in reference to the stockholder's liability created by the preceding section of the same chapter, and not to foreign corporations and actions by a receiver thereof.³⁴

Suspension by Commencement of Action or Suit.—In a suit for the enforcement of a personal liability of the defendant stockholders to pay the debts of the corporation, in which the creditors are the complainants, each creditor has a right to be considered as a party complainant, from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stockholder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a complainant, and the statute of limitations ceases to run against creditors from the date of the filing of the bill, under which they subsequently establish their right to come in as participants in the benefits of the decree.³⁵

STOCKBROKER.—See the title **BROKERS**, vol. 3, p. 531.

STOCK DIVIDEND.—See the title **STOCK AND STOCKHOLDERS**, ante, p. 182.

STOCK EXCHANGE.—See the title **EXCHANGES**, vol. 6, p. 77.

STOCK TRANSFER TAX.—See the title **REVENUE LAWS**, vol. 10, p. 1013.

the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association. *Carrol v. Green*, 92 U. S. 509, 512, 23 L. Ed. 738; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Concord First Nat. Bank v. Hawkins*, 174 U. S. 364, 43 L. Ed. 1007; *Matteson v. Dent*, 176 U. S. 521, 44 L. Ed. 571; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 44 L. Ed. 587." *McDonald v. Thompson*, 184 U. S. 71, 74, 46 L. Ed. 437.

33. Government by state statutes and state construction thereof.—Suits, either at law or in equity, in the circuit court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the state. *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756, 30 L. Ed. 825. See the titles **COURTS**, vol. 4, p. 1092; **CONFLICT OF LAWS**, vol.

3, p. 1089; **EQUITY**, vol. 5, p. 812, et seq. **As to whether penal or not.**—See the title **COURTS**, vol. 4, p. 1071.

34. Application to foreign corporations.—*Bernheimer v. Converse*, 206 U. S. 516, 534, 51 L. Ed. 1163.

But § 394 of the New York code of civil procedure, which provides a limitation of three years for actions against stockholders of moneyed corporations for a common-law or statutory liability, does apply to stockholders of foreign corporations. *Platt v. Wilmot*, 193 U. S. 602, 607, 48 L. Ed. 809. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, pp. 918, 919.

35. Suspension by commencement of action or suit.—*Richmond v. Irons*, 121 U. S. 27, 54, 30 L. Ed. 864. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 1004, et seq.

Interruption by death of stockholder.—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 6, p. 994.

STOCKYARDS.

CROSS REFERENCES.

As to the duty to provide stockyards, see the title **CARRIERS**, vol. 3, p. 619. As to sufficiency of delivery at own stockyards, see the title **CARRIERS**, vol. 3, p. 620. As to charge for use of stockyards, see the title **CARRIERS**, vol. 3, p. 620. As to contract by carrier with stockyard company as to use of yard, see the title **CARRIERS**, vol. 3, p. 620. As to measure of damages for breach of contract to deliver stock as agreed, see the title **DAMAGES**, vol. 5, p. 182. As to slaughter houses, see the title **CONSTITUTIONAL LAW**, vol. 4, pp. 376, 409, 483. As to buying and selling live stock at stockyards being interstate commerce, see the titles **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, pp. 292, 293; **NUISANCES**, vol. 8, p. 937; **POLICE POWER**, vol. 9, p. 536. As to the power of the state to make reasonable charges for services rendered by a stockyard company, see the title **POLICE POWER**, vol. 9, p. 540.

The union stockyards of Chicago have been held to answer all the purposes of an exchange or board of trade.¹

STOLEN GOODS.—See the title **RECEIVING STOLEN GOODS**, vol. 10, p. 586.

STOPPAGE IN TRANSITU.—See the title **SALES**, vol. 10, p. 1045.

STORAGE.—As to charges by collector of customs for, see the title **REVENUE LAWS**, vol. 10, p. 1009.

STORE ORDER ACTS.—See the title **POLICE POWER**, vol. 9, p. 530.

STRANDED.—See the titles **GENERAL AVERAGE**, vol. 6, p. 555; **MARINE INSURANCE**, vol. 8, p. 172.

STRANDING.—See the titles **GENERAL AVERAGE**, vol. 6, p. 555; **MARINE INSURANCE**, vol. 8, p. 196.

STRANGERS.—As to parties not directly interested in subject matter of a suit being strangers, see the title **RES ADJUDICATA**, vol. 10, p. 743.

STREAMS.—See the titles **NAVIGABLE WATERS**, vol. 8, p. 805; **WATERS AND WATERCOURSES**. As to streams in act denoting running waters, see the title **NAVIGABLE WATERS**, vol. 8, p. 850.

1. **Stockyards.**—*Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786. See the title **EXCHANGES**, vol. 6, p. 77. See, generally, the title **REVENUE LAWS**, vol. 10, p. 1012.

STREET RAILWAYS.

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As to capacity to transfer franchise to use streets, see the title CORPORATIONS, vol. 4, p. 757. As to disposition of property after cessation of use, see the title DUE PROCESS OF LAW, vol. 5, p. 566, n. 48. As to taking tracks of one street railway for another, see the title EMINENT DOMAIN, vol. 5, p. 760. As to the taking of property by railroad being considered as a public necessity, see the title EMINENT DOMAIN, vol. 5, p. 764. As to contracts with street railroads, protected by federal constitution, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815. As to state authorizing a city to make irrevocable contracts, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 816, n. 23. As to right of stockholder to sue in equity where legislature repeals corporate charter and corporation refuses to sue, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 886. As to licensing of

street railways, see the title **LICENSES**, vol. 7, p. 883. As to what may be presumed acceptance of an ordinance extending the franchise of a railroad company, see the title **ORDINANCES**, vol. 8, p. 1010, n. 6. As to constructions of city ordinances, see the title **ORDINANCES**, vol. 8, p. 1012. As to exemption from taxation passing upon sale of the franchise, see the title **TAXATION**. As to railroad franchise being subject to taxation, see the title **TAXATION**.

I. Franchise for Use and Occupation of Street.

A. In General.—The right to operate a railway in the streets of a city is a franchise.¹

B. Grant of Franchise—1. **AUTHORITY TO GRANT**—a. *In General.*—The ultimate authority to grant to a street railway company the franchise to the use and occupation of the streets of a municipal corporation rests in the state legislature, but it may exercise such authority either by direct legislation or through duly established agencies.² The authority may be delegated to a municipal corporation.³

b. *With Consent of Local Authorities.*—The grant of a franchise to operate a street railway with the consent of a municipal corporation is upon a condition precedent that such consent be obtained and does not constitute a perfect contract within the impairment of the obligation of contract clause of the United States constitution.⁴

2. **TO WHOM GRANTED.**—By statute in California, a street railway franchise is to be granted to the successful bidder, and to the next highest bidder in case of failure of the successful bidder to comply with the provision of the statute as to payment within a prescribed period.⁵

3. **CONDITIONAL GRANT.**—A provision in a grant of a street railway franchise that the company should remove its double tracks and replace the pavement within twenty days, is to be treated in the nature of a penalty and not a condition

1. *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 107, 34 L. Ed. 898.

2. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 563, 41 L. Ed. 1114; *Wright v. Nagle*, 101 U. S. 791, 794, 25 L. Ed. 921.

3. *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 533, 48 L. Ed. 1102; *Blair v. Chicago*, 201 U. S. 400, 488, 50 L. Ed. 801; *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 541, 50 L. Ed. 854; *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 130, 51 L. Ed. 399. See the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 407, 412; **CORPORATIONS**, vol. 4, p. 621; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 758; **MUNICIPAL CORPORATIONS**, vol. 8, p. 585.

Such power must be given in language explicit and express, or necessarily to be implied from other powers. *Detroit Citizens' St. R. Co. v. Detroit Railway*, 171 U. S. 48, 53, 43 L. Ed. 67.

Independently of special authority, a municipality though invested with the power to lay out, open, alter, repair, and amend streets within the corporate limits, is not authorized by virtue of those powers, without more, to grant the right to construct and maintain a railway in one of the streets of the municipality for private gain, and this authority cannot be derived from the authority to contract. *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 52, 19 L. Ed. 814.

But in Illinois, under the power of exclusive control over streets, it is very well settled that the municipal authorities may do anything with, or allow any use of, streets which is not incompatible with the ends for which streets are established, and that it is a legitimate use of a street to allow a street railroad track to be laid in it. *Blair v. Chicago*, 201 U. S. 400, 487, 50 L. Ed. 801.

4. Where a city accepted bids made by an unincorporated company for the construction of a street railway, but no contract was signed, the company was permitted to incorporate and a franchise was granted to it subject to the condition precedent that the incorporated company should obtain the consent of the city to the use of its streets, it was held that the contract was conditional upon the incorporated company's obtaining the consent of the city to the use of its streets. *People's Railroad v. Memphis Railroad*, 10 Wall. 38, 19 L. Ed. 844; *Blair v. Chicago*, 201 U. S. 400, 460, 50 L. Ed. 801. See the titles **CORPORATIONS**, vol. 4, pp. 659, 662, n. 24; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 815.

As to consent of local authorities required by constitution of Texas, 1876, see the title **CORPORATIONS**, vol. 4, p. 662, n. 24.

5. *Pacific Elec. R. Co. v. Los Angeles*, 194 U. S. 112, 119, 48 L. Ed. 896.

the breach of which would divest the company of its franchise to lay a single track, where the facts of the case and the conduct of the parties so require.⁶

4. *DURATION OF FRANCHISE*.—a. *Power of Municipal Corporation to Determine*.—An act of a state legislature incorporating certain street railways and empowering a municipal corporation to authorize the use of its streets by such companies, empowered such corporation to determine the time for which the streets may be used.⁷

b. *Coextensive with Life of Granting Power*.—It seems that the grant of a street railway franchise for an indefinite period by a municipal corporation, terminates with the life of the municipal corporation conferring it.⁸

c. *Determined by Other Grants*.—The omission in an ordinance of a municipal corporation granting the use of its streets to a street railway company, to designate the term of the grant, does not confer a perpetual right, where there is no intention to depart from the plan of limiting the use of the streets to a definite period, as found in prior ordinances.⁹

d. *Of Additional or Extended Lines*.—The grant of a street railway franchise in one street until the expiration of a grant to the company to lay its tracks in another street, or until a specified date, terminates with the grant of the franchise to the latter street where the date of its termination differs from the date specified in the former grant.¹⁰ It terminates at the date the grant to the main line was to terminate under the then existing grant and not as subsequently extended.¹¹ Where in a grant of a franchise to lay an additional track in a street in which a railway company operated a line which in part ran over the tracks of another line of the company in another street, the franchise of the additional line was limited to terminate with the grant to the main line, the grant is to be construed as to terminate with the grant of the franchise to operate its lines in the street to which it was additional.¹²

e. *Of Consolidated and United Lines*.—An ordinance consolidating different street railway companies does not impliedly extend the franchise of the consolidated companies until the expiration of the grant to one of them for the longest time, although the ordinance requires that but one fare should be charged for a continuous ride.¹³ The right to exercise a street railway franchise cannot be

6. *Baltimore v. Baltimore Trust, etc.*, 166 U. S. 673, 685, 41 L. Ed. 1160.

7. It was so held in construing the acts of Illinois of February 14, 1859, and February 21, 1861, which incorporated certain street railway companies in the city of Chicago for a term of twenty-five years, and provided that the companies must be "authorized" by the city council before they could lay tracks or operate railways in the street. *Blair v. Chicago*, 201 U. S. 400, 457, 50 L. Ed. 801.

8. The life of the franchise granted by the city of Lake View to a street railway company terminated by the annexation of the city of Lake View to the city of Chicago. *Blair v. Chicago*, 201 U. S. 400, 488, 50 L. Ed. 801.

9. The "compromise ordinance" of the common council of the city of Chicago of August 17, 1864, granting the use of its streets to railway companies in the west side, is not to be construed as granting a perpetual right therein, but as granting a right for the term of twenty-five years only. *Blair v. Chicago*, 201 U. S. 400, 481, 50 L. Ed. 801.

10. An ordinance of the city of Cleveland granted a street railway company a franchise to lay an additional track in a

part of Quincy street "to be valid until the expiration of the grants for said company's tracks on said Quincy street east of Lincoln avenue, to wit, July 13, 1913." The grant for the tracks on East Quincy street expired March 22, 1905. It was held that the particular grant in question terminated March 2, 1905. *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399.

11. *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 139, 51 L. Ed. 399.

12. A franchise granted a street railway company by the city of Cleveland in Euclid avenue was granted to expire July 13, 1903, and in Garden street March 22, 1905. The Garden street line in part ran on the Euclid avenue line, but was an independent and not a branch line. In a grant of a franchise of a line additional to the Garden street line the ordinance used the words "terminate with the grant for the main line." It was held that the ordinance did not mean the Euclid avenue line but the Garden street line, which is the main line so far as concerns the extension. *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399.

13. *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399.

terminated by a municipal corporation by exercising the right to purchase property of such companies by reason of the unity of their systems, where a franchise was granted to some of the companies to terminate upon the purchase of their property by the municipality, but as to other companies no such provision was made.¹⁴

f. *On Acceptance of Subsequent Grants.*—The rights of a street railway to the use of the streets in the city of Chicago after the expiration of the time limitation in the "power ordinances" were not lost by the acceptance of the privileges conferred in those ordinances.¹⁵

5. EXTENSION OF FRANCHISE.—a. *Before Termination of Original Grant.*—A municipal corporation may grant an extension of the life of a street railway franchise prior to the expiration of the original grant.¹⁶

b. *With Consent of Local Authorities.*—Where the consent of a supervisor is required by statute to the extension of a street railway in the highways of a township, and such office is abolished during the corporate life of a railway company, the abolition of the office does not authorize the extension of the company's franchise without official consent.¹⁷ The provision is satisfied by the consent of the board of township trustees created under a subsequent act and of which the supervisor is a member.¹⁸

c. *Beyond Corporate Life of Company.*—See elsewhere.¹⁹

d. *By Extension of Corporate Life of Company.*—The right of a street railway company to use the streets of a municipal corporation is not extended to ninety-nine years by an act of a state legislature extending the corporate life of the company for such time, where all rights, privileges and franchises as conferred and existing between the municipality and the company were continued in force.²⁰

14. It was so held in construing the ordinances enacted by the council of Chicago granting street railway franchises to different companies, under the acts of Illinois of February 14, 1859, and February 6, 1865. *Blair v. Chicago*, 201 U. S. 400, 477, 50 L. Ed. 801.

15. The rights confirmed by the act of Illinois of February 6, 1865, amending the act of February 14, 1859, were not lost to the street railway companies by their acceptance of the privileges conferred in the "power ordinances" of June 7, 1886, and March 30, 1888. Prior to the passage of those ordinances was the so-called "compromise ordinance" of July 10, 1883, as amended August 6, 1883, settling certain controversies as to license fees and street paving, and extending the time of operation for twenty years, and further providing: "But nothing in this section contained, or the acceptance hereof, shall in any manner impair, change or alter the existing rights, duties and obligations of the city, or of said companies, respectively, from and after the expiration of the said term of years hereinbefore mentioned." In view of this reservation it was held, that whatever rights and privileges the company had in the streets after the expiration of the time limitation in the "power ordinances," were not lost by the acceptance of privileges conferred in those ordinances. *Blair v. Chicago*, 201 U. S. 400, 482, 50 L. Ed. 801.

16. This power is not taken away by

§ 2501 of the Revised Statutes of Ohio permitting renewals at the expiration of original grants. *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 50 L. Ed. 854.

17. *Blair v. Chicago*, 201 U. S. 400, 484, 50 L. Ed. 801.

18. The act of February 14, 1859, required the consent of the supervisor to the extension of the railways into the townships of Cook county outside of the city of Chicago. The act of February 16, 1865, amended by the act of March 5, 1867, incorporated a board of trustees for the town of Lake View of which the supervisor is a member. It was held that the board of trustees are empowered to consent to the extension of the railway lines into the town of Lake View. *Blair v. Chicago*, 201 U. S. 400, 485, 50 L. Ed. 801.

19. See the title CORPORATIONS, vol. 4, p. 672, n. 59.

20. Under the acts of Illinois of February 14, 1859, and February 21, 1861, the city of Chicago, was empowered to designate the period of time for which the railway companies could use its streets. In pursuance of these acts its council passed numerous ordinances restricting the time for which the railway companies could use such streets. The act of February 6, 1865, extending the corporate life of the companies to a period of ninety-nine years, provides that "any and all acts or deeds of transfer of rights, privileges or franchises between the corporations * * * and all contracts, stipulations, licenses and undertak-

e. *Of Additional or Extended Line.*—Where the officers of a township consent to the extension of the lines of a street railway from a city into the township, without a specification of the time for which the franchise was to extend, the grant is not perpetual, but is restricted to that of the main part of the line.²¹

f. *On Consolidation of Lines.*—Under the statutes of Ohio restricting the grant of a franchise to a street railway by a municipal corporation or renewal thereof for a greater period than twenty-five years, where the company to which the grant was made was consolidated with another company, the municipality has power to extend the life of the franchise to that of the main line with which it is consolidated.²²

g. *Consideration for Extension.*—The continued operation of the street railroad may itself be regarded as sufficient consideration for the extension of the franchise.²³

h. *Acceptance of Extension.*—No formal resolution of acceptance by the company of an ordinance extending the life of a street railway franchise is necessary in any case, if the facts show an actual, practical acceptance, or acts which would be only explicable in case the ordinance were accepted. A previous request for an ordinance by the general manager of the company obviates the necessity of a subsequent acceptance.²⁴ An acceptance may be presumed from the fact that the ordinance is beneficial to the company and from the further fact that it has issued its bonds, as contemplated when the ordinance was applied for, and made them fall due at the expiration of the enlarged franchise.²⁵

ings, made, entered into or given, and as made or amended by and between the said common council and in one or more of the said corporations, respecting the location, the use or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force during the life thereof." It was held that the right to the use of streets by the railway companies was not extended for the period of ninety-nine years. *Blair v. Chicago*, 201 U. S. 400, 462, 50 L. Ed. 801.

21. The supervisors of Lake Township acting under the act of February 14, 1859, authorized the extension of a street railway of the city of Chicago to extend its lines in the highways of a township, without limitation of time. It was held that the grant was not perpetual, but was limited to twenty-five years, the time of the right of the user of the main part of the line. *Blair v. Chicago*, 201 U. S. 400, 485, 50 L. Ed. 801.

22. An original grant to a railway company by the city of Cleveland by ordinance of August 25, 1879, to expire September 20, 1904, was extended until February, 1908, by an ordinance passed in April, 1887, consolidating the company with another company and providing that its franchise "shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908." *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 50 L. Ed. 854.

Where different street railway companies of Cleveland, by an ordinance passed in 1887, were consolidated, and an ordinance was passed authorizing the consolidated companies to lay an additional track beginning at the intersection of its main and branch tracks on condition that

no increase of fare should be charged and only one fare between points of the company's main and extended lines, and it was provided that the right granted should terminate with the grant of the main line, it was held that by this ordinance the life of the franchise of the branch line to which the extended line was an addition was extended to the length of the life of the franchise of the main line. *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 50 L. Ed. 854. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815.

23. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 41 L. Ed. 1114. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815.

No question was made respecting the validity of the original ordinance of January 18, 1864, but the amended ordinance of April 7, 1880, was attacked, principally upon the ground of a want of consideration for the extension of the franchise for seven years. The continued operation of the road may itself be regarded as sufficient consideration for the extension of the franchise. This extension was not a mere gratuity or bounty within the case of *Grand Lodge v. New Orleans*, 166 U. S. 143, 41 L. Ed. 951, recently decided, but was an agreement to prolong the privilege of occupying the streets of the city, in consideration that the company should continue the facilities already afforded to its citizens. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 566, 41 L. Ed. 1114.

24. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 568, 41 L. Ed. 1114.

25. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 568, 41 L. Ed. 1114.

6. **CONSTRUCTION OF GRANT.**—The grant of a street railway franchise by the legislature is to be strictly construed.²⁶ A franchise to lay an additional track to terminate at the time of the main line, is to be construed with reference to the franchise of the main line at that time, and not as subsequently extended.²⁷

II. Right to Property after Termination of Franchise.

See elsewhere.²⁸

III. Rights of Abutting Owners.

If a street railroad company abuses its rights and so operates its road as to create a nuisance, the abutting landowners have a remedy by injunction or by action for damages.²⁹

IV. Control and Regulation.

A. Power to Control and Regulate.—The power of a municipal corporation to regulate the operation of a street railway exists by virtue of a grant from the state.³⁰ Such power is a continuing power and is not exhausted by being once exercised and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper.³¹ The state may reserve this power to itself.³² A legislative grant to a corporation to carry passengers in cars over the streets of a municipal corporation does not necessarily involve exemption from liability to municipal regulations, the right granted being neither greater nor less than that possessed by a natural person.³³

B. Regulation of Rates.—The right to increase or diminish the rate of fare reserved by a municipal ordinance may be relinquished in subsequent ordi-

26. *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399. See the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 586.

27. *Cleveland Elec. R. Co. v. Cleveland*, 204 U. S. 116, 51 L. Ed. 399.

28. See the title **DUE PROCESS OF LAW**, vol. 5, p. 566.

29. *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. Ed. 739. See the titles **EMINENT DOMAIN**, vol. 5, p. 774; **STREETS AND HIGHWAYS**.

30. Chapter 370, of the Maryland act of 1890, distinctly granted to the mayor and city council of Baltimore the power to regulate the use of the streets by railway companies. In the absence of any such positive legislation, there could be no well-founded doubt of this power, and any contract entered into by the city with a railroad company would be subject to its exercise, so long as it did not materially modify or impair the rights granted by the contract. *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 681, 41 L. Ed. 1160.

The city of Chicago, by the charter of 1851 and the amendment of 1863, had general power to control the use and occupation of the streets of the city and to regulate the use of horse railways therein and the laying of tracks thereon. *Blair v. Chicago*, 201 U. S. 400, 454, 50 L. Ed. 801.

An ordinance requiring passenger cars to be numbered and pay a stipulated sum when licensed is a valid police regulation, and such an ordinance may be passed under an act authorizing

a municipal corporation to pass ordinances for the licensing of omnibuses and other vehicles of conveyance of a like nature. *Railway Co. v. Philadelphia*, 101 U. S. 528, 535, 25 L. Ed. 912. See the title **POLICE POWER**, vol. 9, p. 468.

As to the control of street railroads being a continuing power, see the title **POLICE POWER**, vol. 9, p. 497, n. 67. As to city's power to remove double track railway and substitute single track railway, see the title **DUE PROCESS OF LAW**, vol. 5, p. 584.

31. It was held that a municipal corporation could require a street railway company to change its double tracks to a single track after having required the laying of a double track. The court said: "The use of the street may be subjected to one condition today and to another and additional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously." *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 684, 41 L. Ed. 1160.

32. *Railway Co. v. Philadelphia*, 101 U. S. 528, 536, 25 L. Ed. 912; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 107, 34 L. Ed. 898. See the title **CORPORATIONS**, vol. 4, p. 695.

As to power of legislature under Iowa Code, § 1909, to impose conditions upon the enjoyment of a street railroad franchise, see the title **CORPORATIONS**, vol. 4, p. 698, n. 51.

33. *Railway Co. v. Philadelphia*, 101 U. S. 528, 534, 25 L. Ed. 912.

nances.³⁴ Under the laws of Ohio the municipal council of the city of Cleveland has no power to increase the rate of fare on the extension of a street railway.³⁵

C. Regulation of Motive Power.—The action of the common council of the city of Indianapolis in authorizing the use of electricity of street railways as a motive power was ratified by an act of the Indiana legislature.³⁶

V. Paving and Repair of Streets.

A street railway company should pay for the repair and paving of a street which its tracks make necessary.³⁷ Under an act of congress authorizing the repavement of Pennsylvania Avenue in the District of Columbia and requiring a street railway company to bear the expense of paving a two-foot way alongside its exterior rails, the company is compelled to bear the expense of paving the particular two-foot way and not a proportionate part of the expense of paving the whole street.³⁸ An agreement by a street railway company to grade, pave, macadamize and keep in good repair streets upon which it constructs its railways, does not make the company liable for curbing, grading and paving of the streets with an entirely new pavement.³⁹

VI. Injuries and Liability Therefor.

While a street railway company running its cars through a city is charged with caution, and strict caution, as far as their movements may affect adversely the rights of the public, the responsibility of the highway is not theirs alone and every person who enters upon it is under the obligation to exercise a certain judgment in the preservation of his own life.⁴⁰ Where a driver of a horse car negligently attempts to cross a steam railroad track it is immaterial in an action for personal injuries by a passenger that he had no ground to expect the railroad company to negligently lower its gates.⁴¹

34. "In *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, * * * suit was brought to enjoin the enforcement of an ordinance passed October 17, 1898, reducing the fare on the Kinsman Street Railroad to four cents, under a right reserved to 'increase or diminish the rate of fare' on said road as the city might 'deem justifiable and expedient.' The Cleveland City Railway Company, successor of the Kinsman Street Company, contended that the power had been given up in subsequent ordinances, and the decision sustained the contention." *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 540, 50 L. Ed. 854.

35. *Cleveland v. Cleveland Elec. R. Co.*, 201 U. S. 529, 541, 50 L. Ed. 854; *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102. See the title CORPORATIONS, vol. 4, p. 708.

36. The act of Indiana of March 3, 1891, authorizing a street or horse railway with the consent of the city council to use electricity for motive power should be construed, not only as conferring a new authority upon the city of Indianapolis, but as a ratification of what the city had already done in that direction by the ordinance of December 18, 1889, amending the ordinance of January 18, 1864. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill-becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months there-

after. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 569, 41 L. Ed. 1114.

37. *Washington, etc., R. Co. v. District of Columbia*, 108 U. S. 522, 27 L. Ed. 807. See the title DUE PROCESS OF LAW, vol. 5, p. 584.

38. By the act of Congress of July 17, 1876, it was provided that the Washington and Georgetown Railroad Company should be liable for the paving of Pennsylvania Avenue between its tracks and for two feet exterior to this on both sides, with more expensive material, required by reason of the tracks, than for the whole of the avenue. It was held that the company could not claim an apportionment. *Washington, etc., R. Co. v. District of Columbia*, 108 U. S. 522, 524, 27 L. Ed. 807.

39. *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815.

40. The respective obligations of street railway companies on the one hand and of persons (including children) crossing the tracks on which rail-cars run, on the other, are stated in the charge of the court below and declared by the federal supreme court in a general approval of it. *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114. See the titles CROSSINGS, vol. 5, p. 148; NEGLIGENCE, vol. 8, p. 890, n. 76; INSTRUCTIONS, vol. 7, p. 55, n. 6.

41. *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 526, 41 L. Ed. 1101.

STREETS AND HIGHWAYS.

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CROSS REFERENCES.

See the titles **BOUNDARIES**, vol. 3, p. 461; **BRIDGES**, vol. 3, p. 516; **CONSTITUTIONAL LAW**, vol. 4, p. 1; **COUNTIES**, vol. 4, p. 825; **CROSSINGS**, vol. 5, p. 148; **DAMAGES**, vol. 5, p. 157; **DEDICATION**, vol. 5, p. 235; **DRAINS AND SEWERS**, vol. 5, p. 492; **DUE PROCESS OF LAW**, vol. 5, p. 499; **EMINENT DOMAIN**, vol. 5, p. 746; **MUNICIPAL CORPORATIONS**, vol. 8, p. 546; **NUISANCES**, vol. 8, p. 933; **SPECIAL ASSESSMENTS**, ante, p. 11; **STREET RAILWAYS**, ante, p. 252; **TAXATION**; **TURNPIKES AND TOLLROADS**.

As to refusal of charge relative to the city of Washington being liable for injuries received through defects in streets bringing statute of United States in question, see the title **APPEAL AND ERROR**, vol. 1, p. 909. As to charge that certain uses of the streets were authorized by a railroad and certain uses not, bringing the statutes of United States in question, see the title **APPEAL AND ERROR**, vol. 1, pp. 909, 910. As to status of town proprietor in fee of streets when he has disposed of all his interest, see the title **BOUNDARIES**, vol. 3, p. 484. As to boundaries on streets and highways, see the title **BOUNDARIES**, vol. 3, pp. 483, 484. As to legislative authority of county to build bridges across boundary line to connect with another county, see the title **BRIDGES**, vol. 3, p. 520. As to taking canal property for highway, see the title **CANALS**, vol. 3, p. 551, note 25. As to use of streets in front of railway station by hack and cab drivers, see the title **CARRIERS**, vol. 3, pp. 577, 578. As to ordinance requiring special permission of mayor or certain other officers to move buildings across streets, etc., being constitutional, see the title **CONSTITUTIONAL LAW**, vol. 4, pp. 368, 370. As to requiring public service companies to bear expense incident to abolition of crossings, bridges, removal of tracks, pipes, etc., see the titles **CONSTITUTIONAL LAW**, vol. 4, pp. 405, 407; **DUE PROCESS OF LAW**, vol. 5, pp. 583, 584. As to power of municipality to prohibit use of locomotives in a certain street, the street being occupied by a steam railroad under proper authority, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 361, note 94. As to power of legislature to confer on counties the power to borrow money to pay debts contracted for street improvements without the consent of the people, though a statute requires

that no bonds be issued without the previous assent of voters, see the title *COUNTIES*, vol. 4, p. 839. As to measure of damages for unauthorized obstruction of highway, see the title *DAMAGES*, vol. 5, p. 169, note 48. As to dedication of streets and highways, see the title *DEDICATION*, vol. 5, p. 235. As to interest purchaser of lot acquires in street where land is dedicated as street by recording plat, see the title *DEDICATION*, vol. 5, p. 241. As to dedication for streets by agent of United States by making plat of ground belonging to United States, see the title *DEDICATION*, vol. 5, p. 241. As to presumption as to dedication, see the title *DEDICATION*, vol. 5, pp. 240, 242. As to the United States selling lands and recording plats dedicating streets to public use, see the titles *DEDICATION*, vol. 5, p. 241; *EMINENT DOMAIN*, vol. 5, p. 770. As to necessity for giving notice of the taking of lands for streets to property owners who may thereafter possibly be assessed for the improvement to their property by the opening of a street, see the title *DUE PROCESS OF LAW*, vol. 5, p. 646. As to city requiring removal from street of previously authorized double track railway and substitution of single track, see the title *DUE PROCESS OF LAW*, vol. 5, p. 605. As to power to grade being a continuing power, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 603, 604. As to liability of municipality for damages caused by repair of streets and change of grade, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 603, 604. As to opening street across railroad track, see the titles *DUE PROCESS OF LAW*, vol. 5, p. 584; *EMINENT DOMAIN*, vol. 5, pp. 761, 783, 784. As to railroad in street obstructing means of ingress and egress, see the title *DUE PROCESS OF LAW*, vol. 5, p. 607. As to depot being erected on streets of town, see the titles *DUE PROCESS OF LAW*, vol. 5, p. 606; *RAILROADS*, vol. 10, p. 471. As to construction of elevated viaduct over street by a municipality entitling abutting owners to damages, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 607, 608. As to soil and freehold of streets passing to United States under term "appurtenances," see the titles *DEEDS*, vol. 5, p. 271; *EMINENT DOMAIN*, vol. 5, p. 794. As to municipality changing grade of street and destroying access to wharves erected in conformity with municipal ordinances, being a taking of property without compensation or due process, see the title *DUE PROCESS OF LAW*, vol. 5, p. 604. As to recovery for damages to easements of light and air caused by construction of elevated railroad, see the titles *DUE PROCESS OF LAW*, vol. 5, pp. 606, 607; *EASEMENTS*, vol. 5, p. 692; *EMINENT DOMAIN*, vol. 5, p. 774. As to taking property rights in streets and highways without compensation, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 603, 607. As to occupation of streets for railroad where the fee of street is in abutting owner, see the title *DUE PROCESS OF LAW*, vol. 5, p. 607. As to injuries from railroads and other structures in streets depriving abutting owners of property without due process, see the title *DUE PROCESS OF LAW*, vol. 5, pp. 605, 606. As to railway being a highway, so as to permit a telegraph company to construct lines over and along railway, see the titles *EMINENT DOMAIN*, vol. 5, p. 760; *TELEGRAPH AND TELEPHONES*. As to elevated railroad being an obstruction for which abutting owner is entitled to compensation, see the title *EMINENT DOMAIN*, vol. 5, p. 774. As to deduction of benefits from just compensation for railroads in street, see the title *EMINENT DOMAIN*, vol. 5, p. 785. As to measure of damages landowner sustains by construction of railroad in street, see the title *EMINENT DOMAIN*, vol. 5, p. 783. As to temporary occupation of street for building railroad being "taking" of property, see the title *EMINENT DOMAIN*, vol. 5, p. 774. As to municipality opening streets through a military reservation of United States, see the titles *DEDICATION*, vol. 5, p. 241; *EMINENT DOMAIN*, vol. 5, p. 761. As to damages for injuries to property abutting on streets and highways, see the title *EMINENT DOMAIN*, vol. 5, p. 774. As to taking of property for streets and turnpikes, see the title *EMINENT DOMAIN*, vol. 5, p. 765. As to injuries to property abutting on streets being a taking, see the title *EMINENT DOMAIN*, vol. 5, p. 774. As to taking toll bridge for public highway, see the title *EMINENT DOMAIN*, vol. 5, p. 761. As to occupation of street by railroads in Iowa being a taking of

property, see the title EMINENT DOMAIN, vol. 5, p. 774, note 23. As to gas box in streets causing damages, see the title GAS, vol. 6, p. 548. As to impairment of contract granting exclusive privilege to construct and maintain gas and electric light works in the streets of a city, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 802. As to legislature abrogating contract between municipality and street railway as to paving streets, without the consent of the municipality, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 845; STREET RAILWAYS. As to impairment of contracts with railroads as to grading and leveling streets, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815. As to ordinance changing grade of street and destroying railroad bridges impairing contract clause of constitution, see the titles DUE PROCESS OF LAW, vol. 5, p. 583; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815. As to contracts bartering away right of city to grade streets, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 813. As to law requiring telegraph company, previously authorized to put in electrical subways, to submit plans, and specifications to a board of subway commissioners instead of a single commissioner, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 820. As to impairing municipal contracts with railroad as to paving between tracks, see the titles DUE PROCESS OF LAW, vol. 5, p. 584; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 815. As to restraining by injunction the use of streets by steam railroad, see the titles EMINENT DOMAIN, vol. 5, p. 772; INJUNCTIONS, vol. 6, pp. 1042, 1043. As to power of congress to construct, maintain and remove obstructions from highways, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 324, 325. As to municipality imposing license fee upon telegraph poles in the street, see the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 426, 427; LICENSES, vol. 7, p. 880; TELEGRAPHS AND TELEPHONES. As to laborer on streets being injured by bank of gravel falling, see the title MASTER AND SERVANT, vol. 8, p. 292. As to city obstructing streets by drain or sewer, see the titles DRAINS AND SEWERS, vol. 5, p. 492; MUNICIPAL CORPORATIONS, vol. 8, p. 606, note 19; NUISANCES, vol. 8, p. 936, note 18. As to paving contract, see the title MUNICIPAL CORPORATIONS, vol. 8, p. 596. As to municipality being liable for negligence of its officers having the care of the streets, when appointed and paid by the legislative power, see the title MUNICIPAL CORPORATIONS, vol. 8, pp. 605, 606. As to liability of municipality for negligence as to its streets and highways, see the title MUNICIPAL CORPORATIONS, vol. 8, p. 604. As to bridge being public highway, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 623. As to municipal aid to construct plank road, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 622. As to river being highway within meaning of South Carolina constitution, see the title NAVIGABLE WATERS, vol. 8, p. 861. As to seeing steam roller in street being notice of the obstruction, see the title NOTICE, vol. 8, p. 931. As to obstructing highway being a nuisance, see the title NUISANCES, vol. 8, p. 936. As to obstructions and defects in streets being nuisances, see the title NUISANCES, vol. 8, pp. 936, 937. As to deposit of building materials on street, see the title NUISANCES, vol. 8, p. 937. As to establishment, etc., of highways being within police power, see the title POLICE POWER, vol. 9, p. 516. As to electric company having charter right to place lines under street being liable to subsequent regulations as to placing same, see the title POLICE POWER, vol. 9, p. 504. As to statute making owner of cattle liable for all injuries to highways from driving herds of cattle thereon, see the titles ANIMALS, vol. 1, p. 322; POLICE POWER, vol. 9, p. 516. As to establishment, maintenance and care of highways being within police power, see the title POLICE POWER, vol. 9, p. 516. As to territorial legislature changing or closing streets and alleys in public lands, see the title PUBLIC LANDS, vol. 10, p. 109. As to being question for jury whether railroad track elevated two feet is within regulation requiring grade crossings to be closed with fence, see the title RAILROADS, vol. 10, p. 479. As to title of streets of Washington, see the title RAIL-

ROADS, vol. 10, p. 471. As to steam railroad on street being an additional servitude, see the title RAILROADS, vol. 10, p. 471. As to duty of railroad occupying street to make highway safe, see the title RAILROADS, vol. 10, p. 471. As to departure by railroad from streets prescribed to other streets, see the title RAILROADS, vol. 10, p. 471. As to source of authority to use streets of Washington for railroads, see the title RAILROADS, vol. 10, p. 471. As to mortgaging franchise to use streets for street railway, see the title RAILROADS, vol. 10, p. 455. As to mortgage sale of franchise to use streets for railroad, see the title RAILROADS, vol. 10, pp. 488, 501, 515. As to suit for condemnation of land for street being removable as a separable controversy, see the title REMOVAL OF CAUSES, vol. 10, p. 682. As to power of congress to confer on city of Washington authority to assess cost of repairing streets with a new and different pavement, see the title SPECIAL ASSESSMENTS, ante, p. 1. As to questions pertaining to special assessments for streets, see the title SPECIAL ASSESSMENTS, ante, p. 1. As to construction of railway charter as to paving of streets by street railway, see the title STREET RAILWAYS, ante, p. 252. As to occupation of streets by street railroads, see the title STREET RAILWAYS, ante, p. 252. As to taxation for making of streets and highways, see the title TAXATION. As to authority of municipality to grant right to use streets for street railway without legislative authority, see the titles MUNICIPAL CORPORATIONS, vol. 8, p. 586; STREET RAILWAYS, ante, p. 252. As to grant of exclusive privilege to use streets and highways for water pipes, see the title WATER COMPANIES AND WATERWORKS.

I. What Constitutes Street or Highway.

Railroads,¹ navigable streams,² bridges,³ and turnpikes are public highways, notwithstanding the exaction of toll for passing on them.⁴

II. Establishment, Improvement and Repair.

A. Establishment—1. METHOD OF ESTABLISHMENT—*a. By Dedication.*—See the title DEDICATION, vol. 5, p. 235.

b. By Prescription.—The right to an easement of common and public highway may be acquired by prescriptive use.⁵ But mere use of land as a street or highway will not constitute it a public highway; the use must be adverse and not permissive only.⁶ And "if the right to the highway depends solely upon

1. **Railroad as highway.**—County Comm'rs *v.* Chandler, 96 U. S. 205, 208, 24 L. Ed. 625. See the title RAILROADS, vol. 10, p. 455.

When a railroad is spoken of in a law as a "public highway," it refers to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars. Lake Superior, etc., R. Co. *v.* United States, 93 U. S. 442, 451, 23 L. Ed. 965.

The term public highway as used in the act of congress of May 5, 1864, to Minnesota, granting lands to aid in the construction of a railroad and providing that "said railroad shall be, and remain, a public highway for the use of the government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States," secures to the government the free use of the road, but does not entitle the government to have troops or property transported over the road by the railroad company free of charge for transporting the same. Lake Superior, etc., R. Co. *v.* United States, 93 U. S. 442, 23 L. Ed. 965.

2. **Navigable stream as highway.**—Georgetown *v.* Alexandria Canal Co., 12 Pet. 91, 9 L. Ed. 1012. See the title NAVIGABLE WATERS, vol. 8, p. 805.

3. **Bridge as highway.**—Washer *v.* Bullitt County, 110 U. S. 558, 564, 28 L. Ed. 249. See the title BRIDGES, vol. 3, p. 516.

Toll bridge as highway.—All bridges intended and used as thoroughfares are public highways, whether subject to toll or not. County Comm'rs *v.* Chandler, 96 U. S. 205, 209, 24 L. Ed. 625. See the title BRIDGES, vol. 3, p. 516.

4. **Turnpike as highway.**—County Comm'rs *v.* Chandler, 96 U. S. 205, 208, 24 L. Ed. 625. See the title TURNPIKES AND TOLLROADS.

5. **Prescription.**—District of Columbia *v.* Robinson, 180 U. S. 92, 45 L. Ed. 440. See the title PRESCRIPTION, vol. 9, p. 610.

6. **Use must be adverse.**—District of Columbia *v.* Robinson, 180 U. S. 92, 45 L. Ed. 440. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900.

user, then the width of the way and the extent of the servitude is measured by the character of the user; the easement cannot be broader than the user."⁷

c. *By Condemnation*.—See the title EMINENT DOMAIN, vol. 5, p. 765.

2. PLACE OF LOCATING STREETS AND HIGHWAYS.—Public officers of a town have no power to lay out a town way between high water and the channel of a navigable river.⁸

3. BY WHOM.—CONGRESS.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 324.

4. APPEAL.—The review of the confirmation of a road, though not taken notice of in the act of assembly, is a matter of right in Pennsylvania.⁹

B. Improvement and Repair—1. POWER TO IMPROVE—*a. In General*.—Power to lay out, open, alter, repair, and amend streets within the corporate limits is generally expressly conferred upon municipal corporations.¹⁰ And where the duty to improve streets has been imposed upon a municipality, the necessity for improvement is a matter of which the municipal authorities are the exclusive judges, and their judgment is not to be interfered with by the courts, except in cases of fraud or gross abuse of power.¹¹ And the public having control over a highway may determine the manner in which it shall be improved, and, as a general rule, such improvement cannot be enjoined by an abutting lot or landowner.¹²

b. *Widening and Altering Streets*.—Among the powers entrusted to a municipal corporation is the power to widen or alter streets.¹³

c. *Changing Grade*.—See the title DUE PROCESS OF LAW, vol. 5, pp. 603, 604.

2. DAMAGES—*a. In General*.—See the title DUE PROCESS OF LAW, vol. 5, pp. 603, 605.

b. *Waiver of Compensation*.—A statutory requirement, that notice of a claim for damages by reason of contemplated improvements must be given to the municipal authorities or else such party will be barred from filing a claim or receiving damages, is mandatory.¹⁴

III. Regulation, Control and Use.

A. Regulation and Control—1. IN WHOM VESTED.—The legislature of the state generally has supreme control over the streets and it may delegate to mu-

7. *Character of user determines extent*.—District of Columbia *v.* Robinson, 180 U. S. 92, 100, 45 L. Ed. 440.

8. *Place of locating highway*.—Richardson *v.* Boston, 19 How. 263, 15 L. Ed. 639; S. C., 24 How. 188, 193, 16 L. Ed. 625.

9. *Appeal*.—King's Road, 1 Dall. 11, 1 L. Ed. 15 (Pennsylvania).

10. *Improvement of roads*.—People's Railroad *v.* Memphis Railroad, 10 Wall. 38, 52, 19 L. Ed. 844; Wabash R. Co. *v.* Defiance, 167 U. S. 88, 101, 42 L. Ed. 87; Nebraska City *v.* Campbell, 2 Black 590, 591, 17 L. Ed. 271.

Washington.—The city of Washington has the trust confided to it, and the duty imposed upon it, not only of opening the streets of Washington, but of keeping them in repair. Smith *v.* Washington, 20 How. 135, 148, 15 L. Ed. 858.

11. *Municipalities are exclusive judges of necessity for improvement*.—Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 624, 48 L. Ed. 1142.

Paving.—Power to the proper authorities to make repairs to the streets is a

continuing one, and the mere fact that a pavement has been once laid does not require the interference of the courts when the governing body of the city, in the exercise of its judgment, has determined that the necessity for repaving has arisen. Where the law has vested this power in the representatives of the city, the courts are not at liberty to determine whether the judgment is exercised wisely or unwisely. Field *v.* Barber Asphalt Paving Co., 194 U. S. 618, 624, 48 L. Ed. 1142. See, also, Baltimore *v.* Baltimore Trust, etc., Co., 166 U. S. 673, 684, 41 L. Ed. 1160.

12. *Injunction to restrain improvements*.—Burlington Gas Light Co. *v.* Burlington, etc., R. Co., 165 U. S. 370, 372, 41 L. Ed. 749. See the title INJUNCTIONS, vol. 6, p. 1022.

13. *Widening and altering street*.—Van Ness *v.* Washington, 4 Pet. 232, 281, 7 L. Ed. 842.

14. *Waiver of compensation*.—Wabash R. Co. *v.* Defiance, 167 U. S. 88, 103, 42 L. Ed. 87. See the title EMINENT DOMAIN, vol. 5, p. 746.

nicipal corporations such measure thereof as it deems best.¹⁵ As a general thing, in this country, roads are within the control and supervision of the township, county, and other local authorities.¹⁶

2. **NATURE AND EXTENT OF POWER TO REGULATE AND CONTROL.**—The power of the sovereign over the streets of a city, is limited. He cannot alien them, nor deprive the inhabitants of their use, because such use is essential to the enjoyment of urban property.¹⁷ But the power to regulate streets is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the proper authorities may think proper.¹⁸ The power to control and improve its streets, when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to an individual or corporation.¹⁹

B. Use of Streets and Highways—1. **EASEMENTS.**—Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.²⁰

2. **BY ELECTRIC COMPANIES.**—An electric company possessing the right to place electric wires beneath the surface of the streets, possesses that right subject to such reasonable regulations as the city deems best to make for the public safety and convenience, and the duty rests on the company to comply with them.²¹ And the exemption of the company from requirements inconsistent

15. **Legislature has supreme control.**—*St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 467, 37 L. Ed. 810.

It is one of the functions of government to provide public highways for the convenience and comfort of the people, and instead of undertaking that work directly, the state can invest one of its governmental agencies, a city, with power to care for it, and whether done by the state directly or by one of its instrumentalities, the work is of a public, not private, character. *Atkin v. Kansas*, 191 U. S. 207, 222, 48 L. Ed. 148.

16. *Ritchie v. Franklin County*, 22 Wall. 67, 75, 22 L. Ed. 825.

Regulation of streets municipal duty.—The care and superintendence of the streets, alleys, and highways, the regulation of grades and the opening of new and closing of old streets, are peculiarly municipal duties. *Barnes v. District of Columbia*, 91 U. S. 540, 547, 552, 23 L. Ed. 440. See, also, *Fair Haven, etc., Co. v. New Haven*, 203 U. S. 379, 390, 51 L. Ed. 237.

17. **Nature and extent of power.**—*New Orleans v. United States*, 10 Pet. 662, 720, 9 L. Ed. 573.

18. **Power to regulate streets is a continuing one.**—*Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 684, 41 L. Ed. 1160. See, also, *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 624, 48 L. Ed. 1142.

The use of the street may be subjected to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and

the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously. *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 684, 41 L. Ed. 1160; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672, 29 L. Ed. 516; *New York, etc., R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. Ed. 269; *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465, 469, 37 L. Ed. 810.

Reduction of right to lay two tracks in street.—Where an ordinance provides generally for double tracks through the streets mentioned therein, the reduction of the right to use two tracks and the granting of the right to use but one for a comparatively short distance in one particularly crowded and narrow thoroughfare is not a regulation inconsistent with the terms of the original ordinance. *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, 683, 41 L. Ed. 1160.

19. **Power to regulate overrides license.**—*Wabash R. Co. v. Defiance*, 167 U. S. 88, 97, 42 L. Ed. 87.

20. **Easements in streets and highways.**—*Detroit, etc., St. R. Co. v. Detroit Railway*, 171 U. S. 48, 55, 43 L. Ed. 67.

21. **Right of electric company subject to reasonable regulation.**—*Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 99, 42 L. Ed. 955. See the title **POLICE POWER**, vol. 9, p. 504.

New York—Rights of electric company not absolute.—The rights conferred upon electric companies by the New York laws to construct lines in the streets, the law providing that the lines shall not be constructed so as to incommode the pub-

with its charter as to the placing of the wires under the streets could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose.²²

3. BY TELEGRAPH AND TELEPHONE COMPANY.—As to telegraphs and telephones in street, see the titles *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 426; *LICENSES*, vol. 7, p. 880; *TELEGRAPHS AND TELEPHONES*.

4. FOR WATER PIPES AND GAS PIPES.—Whether the fee of streets is in a private individual or in the public, the street is legally open and free for the public passage, and for such other public uses as are necessary in a city, and does not prevent its use as a thoroughfare, such as the laying of water pipes, gas pipes, and the like.²³

IV. Liability for Defective or Unsafe Streets and Highways.

A. Liability of Municipal Corporation—1. **GENERAL RULE**.—When a duty to keep streets in repair is enjoined on municipal corporations, either by a statute, or by a provision which authorizes them to pass ordinances for regulating streets and keeping them in repair, and gives power to levy taxes for that purpose, and presumably to obtain a fund for satisfying claims for damages, a right of action for damages caused by such neglect arises by the common law.²⁴ And an agreement to indemnify the city against all damages will not relieve the city of its liability.²⁵ The municipality is liable even though the fee of the street is not in the municipality, but in the adjacent landowner.²⁶ Such an action may be maintained in the courts of the District of Columbia;²⁷ or in the courts of a territory;²⁸ or in the circuit court of the United States held in a state whose courts maintain such an action;²⁹ but in a state where its highest court holds

lic use of the roads or highways, and providing that the consent of the proper authorities to use the streets must first be obtained, are not absolute rights, but the qualified right to construct their lines and operate them so as not to interfere with the public easements or the private rights of their grantees. *New York v. Squire*, 145 U. S. 175, 189, 36 L. Ed. 666.

22. **Electric company subject to police regulations**.—*Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 100, 42 L. Ed. 955.

23. **Uses for water pipes, etc.**—*Barney v. Keokuk*, 94 U. S. 324, 340, 24 L. Ed. 224.

24. **Liability of municipality for defects**.—*Cleveland v. King*, 132 U. S. 295, 303, 33 L. Ed. 334; *Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed. 416; *Water Co. v. Ware*, 16 Wall. 566, 573, 21 L. Ed. 485; *Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52; *Chicago City v. Robbins*, 2 Black 418, 17 L. Ed. 298; *Robbins v. Chicago City*, 4 Wall. 657, 18 L. Ed. 427; *Nebraska City v. Campbell*, 2 Black 590, 17 L. Ed. 271; *Barnes v. District of Columbia*, 91 U. S. 540, 551, 23 L. Ed. 440; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446; *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Manchester v. Ericsson*, 105 U. S. 347, 26 L. Ed. 1099; *Coughlin v. District of Columbia*, 106 U. S. 7, 27 L. Ed. 74; *District of Columbia v. Woodbury*, 136 U. S. 450, 456, 34 L. Ed. 472; *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 332, 40 L. Ed. 712; *Bauman v. Ross*, 167 U. S. 548, 597, 42 L. Ed. 270.

As to liability of municipality for defects in street where control of streets is vested in a board of public works, see the

title *MUNICIPAL CORPORATIONS*, vol. 8, p. 605.

25. An agreement to indemnify the municipality would not acquit the municipality of an obligation, otherwise attaching, to keep the streets safe and convenient for travellers, but it may well be held that a party injured through a defect or want of repair in a street, occasioned by the neglect or carelessness of such a contractor in doing the work, or of those for whose acts he is responsible, may, at his election, sue the contractor for redress or pursue his remedy against the municipality, as it is clear that the contractor, in case of a recovery against the latter, would be answerable to the municipality as stipulated in his agreement. *Water Co. v. Ware*, 16 Wall. 566, 575, 21 L. Ed. 485. See the title *INDEPENDENT CONTRACTOR*, vol. 6, p. 904, note 2.

26. *Barnes v. District of Columbia*, 91 U. S. 540, 546, 23 L. Ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. Ed. 446; *Coughlin v. District of Columbia*, 106 U. S. 7, 27 L. Ed. 74.

27. **District of Columbia**.—*Weightman v. Washington*, 1 Black 39, 17 L. Ed. 52; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440; *District of Columbia v. Woodbury*, 136 U. S. 450, 34 L. Ed. 472; *Bauman v. Ross*, 167 U. S. 548, 597, 42 L. Ed. 270.

28. **Territories**.—*Nebraska City v. Campbell*, 2 Black 590, 17 L. Ed. 271.

29. **Circuit court of United States**.—*Mayor v. Sheffield*, 4 Wall. 189, 18 L. Ed.

that a municipal corporation is not liable to such an action, no such action will lie in the circuit court of the United States.³⁰ They cannot defend themselves on the ground that the formalities of the statute were not pursued in establishing the streets originally.³¹ Likewise it is no defense that the municipality was changing from a town to a village organization.³² And the fact that the board of trustees of the village were unauthorized to make their annual appropriation for the year in which the plaintiff's injury occurred, and that the board and the other officers of the village were prohibited by law from adding to the corporate expenditures in any one year an amount above that provided for in the annual appropriation bill for that year, is immaterial.³³

2. **QUASI MUNICIPAL CORPORATION.**—Involuntary quasi municipal corporations, such as counties, towns, school districts and especially the townships of New England, are not liable unless expressly made so by statute.³⁴

3. **NEW ENGLAND RULE.**—In the New England States a municipal corporation is not liable unless the liability is imposed by statute, and this rule applies to cities as well as towns, and also to sidewalks where they constitute a part of the public highway.³⁵

B. To What Streets or Highways the Duty Extends.—If the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and an individual is injured in consequence of the negligent and careless manner in which this is done, the corporation cannot, when it is sued for such injury, throw the party upon an injury into the regularity of the proceedings by which the land became a street, or into the authority by which the street was originally established.³⁶ It is a question of fact for the jury to determine whether or not the city assumed such control of the street as to become liable for injuries.³⁷

416; (Illinois) *Chicago City v. Robbins* (1862), 2 Black 418, 17 L. Ed. 298; *Robbins v. Chicago City* (1866), 4 Wall. 657, 18 L. Ed. 427; *Evanston v. Gunn* (1878), 99 U. S. 660, 25 L. Ed. 306; (Virginia) *Manchester v. Ericsson* (1881), 105 U. S. 347, 26 L. Ed. 1099; (Ohio) *Cleveland v. King* (1889), 132 U. S. 295, 33 L. Ed. 334.

30. The local law of a state pertaining to the liability of a city for injuries caused by defects or obstruction in its streets, becomes also the law governing the courts of the United States sitting within the state. *Detroit v. Osborne*, 135 U. S. 492, 34 L. Ed. 260.

Michigan rule.—In Michigan a city is not responsible for injuries caused by negligence in repairing its streets or sidewalks though the duty is imposed upon the city by statute. *Detroit v. Osborne*, 135 U. S. 492, 498, 34 L. Ed. 260.

31. **Defect in establishment of street as defense.**—*Mayor v. Sheffield*, 4 Wall. 189, 657, 18 L. Ed. 416.

32. **Change from town to village organization as defense.**—*Evanston v. Gunn*, 99 U. S. 660, 667, 25 L. Ed. 306.

33. *Evanston v. Gunn*, 99 U. S. 660, 667, 25 L. Ed. 306.

34. *Barnes v. District of Columbia*, 91 U. S. 540, 547, 552, 23 L. Ed. 440. See, also, *District of Columbia v. Woodbury*, 136 U. S. 450, 456, 34 L. Ed. 472.

35. **New England rule.**—*Providence v. Clapp*, 17 How. 161, 167, 15 L. Ed. 72. See post, "Snow and Ice," IV, C, 2.

Rhode Island.—In *Providence v. Clapp*,

17 How. 161, 15 L. Ed. 72, the plaintiff was injured, in consequence of one of the principal streets of the city having been blocked up and encumbered with snow; and the principal question was, whether such an obstruction was one within the meaning of the statute of the state on which the action was founded, and the court held that the city was liable. Cities and towns are required by statute, in most or all of the northeastern states, to keep their highways safe and convenient for travellers by day and by night; and if they neglect that duty, and suffer them to get out of repair and defective, and anyone receives injury through such defect, either to his person or property, the delinquent corporation is responsible in damages to the injured party. *Weightman v. Washington*, 1 Black 39, 51, 17 L. Ed. 52.

36. *Mayor v. Sheffield*, 4 Wall. 189, 195, 18 L. Ed. 416.

37. *Manchester v. Ericsson*, 105 U. S. 347, 26 L. Ed. 1099.

Bridge—No proper guard or protection.—A city is not liable for damages sustained by a party falling at night from a causeway erected within the city limits by an incorporated bridge company, but which was not provided with a proper guard or protection, where it extended from the company's bridge to the level of a street, unless the city treated the causeway as a street, and assumed control of the locus in quo, and it is a question of fact for the jury to determine

C. Defects or Obstructions Involving Liability—1. **IN GENERAL**.—Objects which subserve the use of streets cannot be considered obstructions to them, although some portion of their space may be occupied.³⁸

2. **SNOW AND ICE**.—The liability imposed upon municipalities for injuries caused by snow and ice on the highway is dependent upon negligence.³⁹ These statutes, though in terms applicable to highways, extend to sidewalks, where they constitute a part of the public highway.⁴⁰ And, when a fall of snow takes place, it is the duty of the municipality to use ordinary care and diligence to restore the sidewalk to a reasonably safe and convenient state.⁴¹ It is for the jury to find whether or not this was accomplished, by treading down the snow; and, if not, whether the want of safety and convenience was owing to the want of ordinary care and diligence on the part of the city.⁴² But considering whether due diligence requires the city to remove the snow, the jury ought to take into consideration the ordinances enacted by the city, not as prescribing a rule binding on the city, but as evidence of the fact that a removal, and not a treading down of the snow, was reasonably necessary.⁴³

3. **STEPPING STONE**.—A stepping stone permitted on sidewalk near the curb is not an unlawful obstruction per se.⁴⁴ And a party injured thereby cannot claim anything from the general duty of the city to illuminate the streets.⁴⁵

4. **STEAM ROLLER**.—The liability of a municipality for negligently permitting a steam roller to remain within the limits of a highway, is primarily dependent upon the fact that it is unlawfully upon the highway.⁴⁶

5. **EXCAVATION**.—See ante, "Liability of Municipal Corporation," IV, A.

6. **TREE OR STUMP**.—See post, "Constructive Notice," IV, E, 2, b.

D. Defects Caused by Individuals—1. **MUNICIPAL LIABILITY**—a. *In General*.—"Where the duty to keep streets in safe condition rests upon a city,

whether or not the city assumed such control as to become liable, hence it is erroneous for the court to instruct that if the injury was caused by the absence of such a guard or protection the city was liable. *Manchester v. Ericsson*, 105 U. S. 347, 26 L. Ed. 1099.

38. **Defects involving liability**.—*Wolff v. District of Columbia*, 196 U. S. 152, 155, 49 L. Ed. 426.

39. **Snow and ice**.—*Providence v. Clapp*, 17 How. 161, 15 L. Ed. 72. See ante, "New England Rule," IV, A, 3.

40. *Providence v. Clapp*, 17 How. 161, 15 L. Ed. 72.

41. *Providence v. Clapp*, 17 How. 161, 15 L. Ed. 72.

42. *Providence v. Clapp*, 17 How. 161, 15 L. Ed. 72.

43. *Providence v. Clapp*, 17 How. 161, 15 L. Ed. 72.

44. **Stepping stone**.—Under § 222 of the Revised Statutes of the District of Columbia, which reads as follows: "No open space, public reservation, or other public grounds in the city of Washington, nor any portion of the public streets and avenues of said city, shall be occupied by any private person or for any private purpose whatever," a stepping stone permitted on sidewalk near the curb is not an unlawful obstruction per se. *Wolff v. District of Columbia*, 196 U. S. 152, 155, 49 L. Ed. 426.

45. *Wolff v. District of Columbia*, 196 U. S. 152, 157, 49 L. Ed. 426.

Duty to illuminate place where object is.—The duty of a city to especially illumi-

nate a place where an object is, or to put a policeman on guard by it to warn pedestrians, depends upon the object being an unlawful obstruction. *Wolff v. District of Columbia*, 196 U. S. 152, 157, 49 L. Ed. 426.

46. **Steam roller**.—*District v. Columbia v. Moulton*, 182 U. S. 576, 579, 45 L. Ed. 1237.

Steam roller on highway.—Where a steam roller was used by a city in connection with resurfacing the street and it broke down and was allowed to stand beside the curb for two days, covered by canvas cover, and a horse became frightened by the flapping of this cover, and upset the vehicle and injured the driver, the city was not liable in damages, as the use of the roller was a necessary means to a lawful end. If, in the legitimate and proper use of the roller, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*. *District of Columbia v. Moulton*, 182 U. S. 576, 579, 45 L. Ed. 1237.

View of obstruction is notice.—Where a steam roller is allowed to remain upon a municipal highway it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but a view of the obstruction itself in time to avoid it without injury amounts to notice. *District of Columbia v. Moulton*, 182 U. S. 576, 581, 45 L. Ed. 1237. See the title **NOTICE**, vol. 8, p. 929.

it is liable not only for injuries caused by its own neglect or omission to keep the streets in repair, but it is liable for defects occasioned by the wrongful acts of others."⁴⁷

b. *License as Defense*.—If a private individual makes an excavation in the street without license, he is responsible for any injury resulting, but the municipality is not liable, unless it had notice thereof, but if a permit is given the municipality must see that the work is properly conducted.^{47a}

c. *Action over against Wrongdoer*.—(1) *In General*.—Though the municipality has been held liable for injuries caused by defects or obstructions in the street caused by individuals, the municipality has a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless the city was also a wrongdoer.⁴⁸ It is competent, however, for the defendant to show that he was under no obligation to keep the streets in safe condition, and that it was not through his default that the accident happened.⁴⁹ But improvements of the kind, such as making excavations and laying pipes for gas or for sewers, are made by municipal corporations, under circumstances where the corporation is immediately responsible for the defect or want of repair in the street, without any other party being answerable over to them for any damages they may have to pay to a traveller who may be injured through such a defect or want of repair, where they appoint their own superintendent and the work is done by their order and directions.⁵⁰

(2) *Notice of Former Suit*.—An express notice by the municipality to the party causing the obstruction to defend the suit is not necessary in order to charge his liability. If he knew the suit was pending and could have defended it, he is concluded by the judgment against the municipality.⁵¹

2. *INDIVIDUAL LIABILITY*.—a. *In General*.—If the owner of real estate builds an area in front of his store, he must at his peril see that the street is as safe as if the area had not been built, and he cannot escape liability by letting the work out to an independent contractor where the injury results directly from the doing of the thing contracted to be done.⁵²

b. *License as Defense*.—Though a license to make an excavation in the streets be given, this will not relieve the licensee from responsibility and he must place proper guards and lights around the excavation.⁵³

47. *Liability of municipality for individual acts*.—Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 332, 40 L. Ed. 712; Chicago City v. Robbins, 2 Black 418, 17 L. Ed. 298; Robbins v. Chicago City, 4 Wall. 657, 670, 18 L. Ed. 427; Cleveland v. King, 132 U. S. 295, 33 L. Ed. 334. See ante, "General Rule," IV, A, 1.

47a. *License as defense*.—District of Columbia v. Woodbury, 136 U. S. 450, 464, 34 L. Ed. 472.

License as defense to municipality.—A building permit, authorizing persons to occupy one-half of the street for the purpose of depositing building materials thereon, and requiring them to indicate the locality of such materials by proper lights, during the whole of every night that they were left in the street, does not relieve the city of the duty of exercising such reasonable diligence as the circumstances required, to prevent the street from being occupied by those parties in such a way as to endanger passers-by in their use of it in all proper ways. Cleveland v. King, 132 U. S. 295, 303, 33 L. Ed. 334.

48. *Action over against wrongdoer*.—Chicago City v. Robbins, 2 Black 418, 422, 17 L. Ed. 298; Robbins v. Chicago City, 4 Wall. 657, 670, 18 L. Ed. 427; Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712.

49. *Evidence*.—Chicago City v. Robbins, 2 Black 418, 17 L. Ed. 298.

50. *When party not liable over*.—Water Co. v. Ware, 16 Wall. 566, 575, 21 L. Ed. 485. See the title INDEPENDENT CONTRACTORS, vol. 6, p. 904.

51. *Notice of former suit*.—Chicago City v. Robbins, 2 Black 418, 422, 17 L. Ed. 298; Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427.

52. *Individual liability*.—Chicago City v. Robbins, 2 Black 418, 427, 17 L. Ed. 298. See the title NUISANCES, vol. 8, pp. 942, 943.

Independent contractor.—As to when real estate owner is liable for defects or obstructions caused by independent contractor, see the titles NUISANCES, vol. 8, pp. 942, 943; INDEPENDENT CONTRACTORS, vol. 6, p. 904.

53. *License as defense*.—Chicago City v. Robbins, 2 Black 418, 17 L. Ed. 298,

E. Notice of Defects—1. **NECESSITY FOR NOTICE.**—No one can maintain an action against a municipal corporation grounded solely on the defect and want of repair of the highway.⁵⁴ But in such case the basis of the action is negligence, and notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability.⁵⁵ And the burden is on plaintiff to prove that a protection against an excavation was originally dangerous, or had become so long enough before the accident for the authorities to have known it.⁵⁶

2. **WHAT CONSTITUTES NOTICE**—a. *Actual Notice.*—A municipality is considered to have actual knowledge of defects or excavations in streets or highways where the city authorities knew of the defect or excavation,⁵⁷ or granted a permit to make an excavation.⁵⁸

b. *Constructive Notice.*—If a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper vigilance, the law imputes notice to them; in other words, they have notice in contemplation of law, and that is constructive notice.⁵⁹ But the mere fact that a street is in dangerous condition is not notice.⁶⁰

F. Contributory Negligence.—The knowledge of the existence of a defect is sufficient to compute contributory negligence per se, as a matter of law, if the

affirmed in 4 Wall. 657, 18 L. Ed. 427; District of Columbia v. Woodbury, 136 U. S. 450, 464, 34 L. Ed. 472.

License may be implied.—Authority to make an excavation in a city need not be expressly given. It may be implied from the fact that the city authorities knew of the excavation and made no objection. Chicago City v. Robbins, 2 Black 418, 422, 17 L. Ed. 298; Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427.

54. Necessity for notice.—Weightman v. Washington, 1 Black 39, 52, 17 L. Ed. 52; Mayor v. Sheffield, 4 Wall. 189, 195, 18 L. Ed. 416; District of Columbia v. Woodbury, 136 U. S. 450, 463, 34 L. Ed. 472.

No action by individual for mere neglect to repair.—Duty of repair, in such cases, is a duty owed to the public, and, consequently, if one person might sue for his proportion of the damages for the nonperformance of duty, then every member of the community would have the same right of action, which would be ruinous to the corporation; and, for that reason, it was held, at common law, that no action, founded merely on the neglect to repair, would lie. It was a sound rule of law, and prevails everywhere to the present time. Weightman v. Washington, 1 Black 39, 52, 17 L. Ed. 52.

55. Actual or constructive notice necessary.—Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 332, 40 L. Ed. 712; Weightman v. Washington, 1 Black 39, 52, 17 L. Ed. 52; District of Columbia v. Woodbury, 136 U. S. 450, 464, 34 L. Ed. 472; Mayor v. Sheffield, 4 Wall. 189, 195, 18 L. Ed. 416; Water Co. v. Ware, 16 Wall. 566, 573, 21 L. Ed. 485. See, generally, the title NOTICE, vol. 8, p. 928.

56. Burden of proof.—District of Co-

lumbia v. Woodbury, 136 U. S. 450, 466, 34 L. Ed. 472.

57. Actual notice.—Chicago City v. Robbins, 2 Black 418, 422, 17 L. Ed. 298.

58. Permit is notice.—District of Columbia v. Woodbury, 136 U. S. 450, 464, 34 L. Ed. 472.

59. Constructive notice.—District of Columbia v. Woodbury, 136 U. S. 450, 463, 34 L. Ed. 472; Cleveland v. King, 132 U. S. 295, 302, 33 L. Ed. 334; Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 332, 40 L. Ed. 712.

Stump in street for ten years.—Where the city authorities, in converting part of a park into a street, cut down a tree, and left the stump standing above the surface, and inside the curbstone, on the sidewalk, and was thus allowed to remain for ten years, which facts were contradicted, stronger proof of notice could not be given. The question of notice, as a fact, could not be disputed, and therefore did not arise as a matter on which the injury required instructions. Mayor v. Sheffield, 4 Wall. 189, 196, 18 L. Ed. 416.

60. Dangerous condition of street not itself notice.—No certain duration of a dangerous condition of a public highway operates of itself as a notice. The law does not require impossibilities of any person, natural or artificial, and it is impossible that all parties of all the streets should be under constant inspection. Consequently, it could not be maintained that at the instant an accident happens to a highway the authorities are charged with notice and held liable therefor if they do not put it instantly in repair. Every such case must be determined by its peculiar circumstances. District of Columbia v. Woodbury, 136 U. S. 450, 463, 34 L. Ed. 472.

hazard resulting therefrom to one seeking to pass over it is so great that no reasonably prudent person would have made the attempt.⁶¹

G. Notice of Claim for Damages.—It is not reversible error for the court to allow plaintiff in an action against a city for injuries caused by defects in the streets to put in evidence a bill or statement of her claim against the city, which she had served on the city council, to show that she made such a claim, or gave such a notice, whether required so to do by the law or not.⁶²

H. Actions for Injuries—1. **DECLARATION.**—In an action against a municipality for damages caused by defects in streets or highways, the plaintiff must both allege and prove notice of the defect or want of repair, and that he was injured either in person or property, in consequence of the unsafe state of the highway.⁶³

2. **EVIDENCE**—a. *Similar Accidents.*—In an action against a municipality for injuries caused by defects in the sidewalks, it is admissible to show that other persons had met with similar accidents at the same place and from the like cause.⁶⁴

b. *Municipal Code.*—In an action against a city for damages resulting from an injury caused a pedestrian by a defect in the sidewalk, it is not error to admit in evidence certain sections of the municipal code, showing municipal liability.⁶⁵

c. *Municipal Ordinance.*—In an action by a city against a wrongdoer to recover the amount of damages adjudged against it for injuries caused by excavation in sidewalk, a municipal ordinance limiting encroachments upon the sidewalk is admissible in evidence.⁶⁶

d. *Burden of Proof.*—See ante, "Necessity for Notice," IV, E, 1.

3. **INSTRUCTIONS.**—Where an instruction makes a city an insurer of the absolute safety of its streets, but is followed by an instruction as to notice and neglect after notice, and the right of recovery is made dependent upon the jury finding the municipality negligent in these particulars, it is not reversible error.⁶⁷

61. Contributory negligence.—*Mosheuv v. District of Columbia*, 191 U. S. 247, 265, 48 L. Ed. 170.

Knowledge of defect.—Where a defect existed in the sidewalk for a long time, rendering ingress and egress from plaintiff's house dangerous, and making it necessary to take a long step to cross over the defect, and plaintiff in endeavoring to cross over same, fell and was injured, held, it could not be said as a matter of law that plaintiff was guilty of contributory negligence in endeavoring to step over such defect in the sidewalk, as she had done safely many times before. *Mosheuv v. District of Columbia*, 191 U. S. 247, 265, 48 L. Ed. 170.

Rule in District of Columbia.—It is not the law in the District of Columbia that where a defect existed in a highway, and was known to one who elected to use such highway, such election, even if it were justified by the dictates of ordinary prudence, nevertheless must be held, as a matter of law, to entail the consequences of a want of ordinary care and prudence. *Mosheuv v. District of Columbia*, 191 U. S. 247, 257, 48 L. Ed. 170.

62. Notice of claim for damages.—*Lincoln v. Power*, 151 U. S. 436, 440, 38 L. Ed. 224.

63. Declaration.—*Weightman v. Washington*, 1 Black 39, 52, 17 L. Ed. 52. See ante, "Notice of Defects," IV, E.

Variance.—In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the de-

fendant "dug, opened, and made," the area is sustained by proof that he formed it partially by excavation and partially by raising walls. *Robbins v. Chicago City*, 4 Wall. 657, 18 L. Ed. 427.

64. Similar accidents as evidence.—*District of Columbia v. Armes*, 107 U. S. 519, 526, 27 L. Ed. 618.

65. Municipal code as evidence.—*Lincoln v. Power*, 151 U. S. 436, 440, 38 L. Ed. 224.

66. Chicago City v. Robbins, 2 Black 418, 422, 17 L. Ed. 298.

67. Instructions.—*Lincoln v. Power*, 151 U. S. 436, 440, 38 L. Ed. 224.

In an action against a city for injuries caused by defects in streets it is reversible error to instruct the jury that where a dangerous hole is left in a sidewalk in a public street of a city, over which there is a large amount of travel, the author will be liable for an injury resulting from the act, although other causes subsequently arising may contribute to the injury. *Lincoln v. Power*, 151 U. S. 436, 441, 38 L. Ed. 224.

Negligence.—An instruction that "If they (the corporate authorities) leave an opening in the sidewalk, which is sometimes done, and a person coming along in the night falls into it, without any want of proper care on his part, the defendants are liable for any injury that may be occasioned. So, if an obstruction in the face of a sidewalk, over which a person stumbles—a box if you please, left out on the sidewalk on a dark night, or barrels,

4. **DAMAGES.**—Damages for injuries caused by defective streets include loss of time, expenditures of money made necessary by the injury, and compensation for his suffering in body and mind, his whole condition and prospects being considered.⁶⁸

5. **PROVINCE OF COURT AND JURY.**—Whether a plaintiff was guilty of negligence in walking upon one part of the sidewalk rather than upon another, is not a question of law, but is a question for the jury.⁶⁹ Likewise it is a question for the jury as to whether boards placed over an excavation in a sidewalk were sufficiently strong to sustain the weight of an ordinary man in walking over them.⁷⁰ Whether the proper degree of diligence was exercised by a city, through its agents; whether its officers had such notice or knowledge of the use of the street, in a certain locality, by the parties to whom certain permits were granted, as was inconsistent with the safety of passers-by using it with due diligence; whether, in fact, the materials and obstructions placed by such parties on the street were sufficiently indicated by signal lights or otherwise, during the night time; and whether the plaintiff was himself guilty of such negligence as contributed to his injury, are questions for the jury.⁷¹

V. Ownership of Fee.

A. Ownership of Land.—By the common law the fee in the soil remains in the original owner, where a public road is made upon it, but the use of the

over which a person stumbles and falls in the absence of want of care on his part—the defendants are equally liable for the injury. The opening, in the one case, and the obstruction, in the other, constitute the negligence on the part of the authorities who have control of the matter, and, in order to escape from the charge of liability, the burden is thrown upon them to disprove the negligence," is not open to the objection that it precluded the defendants from any attempt to show that they were not guilty of negligence, because, if the obstruction constituted the negligence, the existence of the obstruction being proved, no defense could be offered. No one can read the charge without seeing that the jury must have understood the court as meaning that the existence of those obstructions was such evidence of negligence as required of the authorities explanation in order to escape liability. *Mayor v. Sheffield*, 4 Wall. 189, 195, 18 L. Ed. 416.

68. **Damages.**—*District of Columbia v. Woodbury*, 136 U. S. 450, 466, 34 L. Ed. 472, distinguished in *District of Columbia v. Bailey*, 171 U. S. 162, 176, 43 L. Ed. 120. See ante, "Steam Roller," IV, C, 4. See the title **DAMAGES**, vol. 5, p. 157.

69. **Negligence question for jury.**—*Lincoln v. Power*, 151 U. S. 436, 441, 38 L. Ed. 224. See ante, "Snow and Ice," IV, C, 2.

70. **Covering excavation.**—*District of Columbia v. Woodbury*, 136 U. S. 450, 465, 34 L. Ed. 472.

It is for the jury to decide whether boards placed over an excavation were sufficient to sustain the weight of an ordinary man traveling over them. It is not

only necessary that the protection should be sufficient to sustain the weight of persons passing along, but another element is the security of the covering in its place over the hole to sustain the weight of a heavy man walking over it. If it would be liable to be kicked out of place by persons passing along, it might not be deemed an adequate protection. But that is for the jury to decide. They must decide whether it was sufficient to sustain the weight of a person passing over it, and whether it was sufficiently secured, either by artificial appliances or by its own inherent weight, to hold it in its proper place. It was not necessary that the board placed over the hole should have been made absolutely safe against all interference, for no barrier or other safeguard could be put there which could not be removed by some force, but only that it should be safe against the consequences of the ordinary use of the street—such continuances as might fairly have been anticipated and foreseen. If it was such a precaution as proper care, diligence and foresight ought to have provided for, and the accident was not occasioned by any defect in the original appliance provided there, but that it was subsequently, by some unforeseen occurrence or agency, or the exertion of some individual, moved from its place and thereby made dangerous, then the rules as to notice apply. *District of Columbia v. Woodbury*, 136 U. S. 450, 465, 34 L. Ed. 472.

71. **Whether proper degree of diligence was exercised is question for jury.**—*Cleveland v. King*, 132 U. S. 295, 303, 33 L. Ed. 334.

road is in the public.⁷² Though in some states the fee is in the municipality.⁷³ There is no substantial difference, however, between streets in which the legal title is in private individuals and those in which it is in the public, as to the rights of the public therein.⁷⁴ The title to the streets of Washington is in the United States, and not in the city, or in the owners of the adjacent lots.⁷⁵ And where there is a solemn conveyance, which purports to grant an unlimited fee in the streets and squares, the court will not disregard the terms, or limit their import, where no mistake is set up and none is established.⁷⁶ If proceedings for the appropriation of certain land for streets were void, the title remains in the original owner, and he can recover possession of same if wrongfully withheld.⁷⁷

B. Ownership of Trees, Grass and Minerals.—While land is used as a highway, the owner of the fee is entitled to the timber and grass which may

72. Fee in abutting owners at common law.—*Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477.

In Massachusetts it is well settled, that where a mere easement is taken for a public highway, the soil and freehold remains in the owner of the land, encumbered only with the easement, and that upon the discontinuance of the highway, the soil and freehold revert to the owner of the land. *Harris v. Elliott*, 10 Pet. 25, 55, 9 L. Ed. 333.

In most of the cities in this country, the fee of the land belongs to the adjacent owner. *Barnes v. District of Columbia*, 91 U. S. 540, 556, 23 L. Ed. 440.

73. In Illinois the fee simple title to the streets is vested in the municipality. *Blair v. Chicago*, 201 U. S. 400, 487, 50 L. Ed. 801.

74. Public rights same whether fee in city or abutters.—*Barney v. Keokuk*, 94 U. S. 324, 341, 24 L. Ed. 224.

75. Title to streets of Washington.—*District of Columbia Comm'rs v. Baltimore, etc.*, R. Co., 114 U. S. 453, 460, 29 L. Ed. 216; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 27 L. Ed. 1070.

United States holds title to streets of Washington for own use.—The United States holds its title to the land over which the streets in the city of Washington were laid out, for its own use, and not in trust for any person or for any purpose. And it is immaterial that the ground laid out as a street was not in a condition to be used as a street, or that much labor was required to place it in that situation, or that, in fact, it had not been used as such for a long period of time. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 684, 27 L. Ed. 1070.

Conveyance of streets in Washington to the United States.—The transaction between Young and the United States authorities, as evidenced by the documents and circumstances, was equivalent in its result to a conveyance by him to the United States in fee simple of all his land described, with its appurtenances, and a conveyance back by the United States to him of a certain square, leaving in the

United States an estate in fee simple, absolute for all purposes, in the strip of land designated as Water street, intervening between the line of the squares as laid out and the Potomac river. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 680, 27 L. Ed. 1070.

76. Conveyance not disregarded where no mistake.—*Van Ness v. Washington*, 4 Pet. 232, 286, 7 L. Ed. 842. See the title DEEDS, vol. 5, p. 245.

Conveyance "to United States forever" vests fee simple in streets.—Although a preliminary agreement offering to dedicate certain lands for the streets upon certain terms to a city contains qualified terms as to the extent of title, a conveyance (for the use of the United States forever) in pursuance of such preliminary agreement vests a fee simple title in the United States in such streets. *Van Ness v. Washington*, 4 Pet. 232, 284, 7 L. Ed. 842.

77. Proceedings for appropriation void.—*Ewing v. St. Louis*, 5 Wall. 413, 419, 18 L. Ed. 657.

Title to land dedicated as highway or public park.—The title to land which has been dedicated to public use, as for a highway or public square in a city, is in the city as trustee for the public use, and it has been held, in the case of such a dedication of land in a proposed city, to be thereafter built, that the fee will remain in abeyance until the proper grantee or city comes in esse, when it will vest in such city. A dedication to the public may exist where there is no city or town or corporate entity to take as grantee, and in such case, while the fee may remain in the individual who dedicates the land, he will be estopped from setting it up as against the public who may be interested in the use of the land according to its dedication. Nevertheless when a dedication is made in an existing city, the city takes title as trustee. These statements are borne out by the following cases: *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521; *Cincinnati v. White*, 6 Pet. 431, 435, 436, 8 L. Ed. 452; *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477; *New*

grow upon the surface, and to all minerals which may be found below it.⁷⁸

C. Reversion on Vacation of Road.—When the road is vacated by the public, the owner resumes the exclusive possession of the ground.⁷⁹

VI. Street and Highway Officers.

Persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction and with care and skill.⁸⁰

VII. Railroads in Streets and Highways.

See the title **STREET RAILWAYS**, ante, p. 252, and specific cross references in this title.

STREETS AND SIDEWALKS.—See the title **STREETS AND HIGHWAYS**, ante, p. 259.

STRICTLY CONSTRUED.—See the titles **INTERPRETATION AND CONSTRUCTION**, vol. 7, p. 258; **STATUTES**, ante, p. 62.

STRIKES.—As to protection of property from acts of strikers by injunction, see the title **INJUNCTIONS**, vol. 6, p. 1039. As to protecting interstate commerce from strikes, see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 309. As to arbitration between Railroad Company and employees, see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 329. As to conspiracy to obstruct transportation, see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 329.

STRIKING OUT.—As to striking out evidence, see the title **EVIDENCE**, vol. 5, p. 1055. As to striking out pleadings, see the title **PLEADING**, vol. 9, p. 429. As to striking out assignments of error, see the title **APPEAL AND ERROR**, vol. 2, p. 269.

STRUCK JURIES.—See the title **JURY**, vol. 7, p. 768.

STUBBLE.—The roots from which sugar cane has been cut are called stubble.¹

STUFFING THE BALLOT BOX.—See note 2.

SUBAGENT.—See the title **PRINCIPAL AND AGENT**, vol. 9, pp. 664, 672, 694.

SUBCONTRACTOR.—See the title **WORKING CONTRACTS**.

SUBJACENT SUPPORT.—See the title **ADJOINING LANDOWNERS**, vol. 1, p. 117.

SUBJECT—SUBJECTS.—See the titles **ALIENS**, vol. 1, p. 213; **CITIZENSHIP**, vol. 3, pp. 789, 790. And see note 3.

Orleans v. United States, 10 Pet. 662, 9 L. Ed. 573; *Werlein v. New Orleans*, 177 U. S. 390, 401, 44 L. Ed. 817.

78. Trees and grass on highway.—*Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477.

79. *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477; *Harris v. Elliott*, 10 Pet. 25, 55, 9 L. Ed. 333; *Barnes v. District of Columbia*, 91 U. S. 540, 556, 23 L. Ed. 440.

Right of United States to sell land dedicated for public use.—When Washington was laid out, the land proprietors entered into an agreement stating that they would dedicate their lands to the government and providing that they should receive a certain sum per acre for lands for public uses, but there was to be no compensation for streets, which agreement was accepted. Subsequently conveyances were made of these lands to the government. Held, the agreement was functus officio upon the execution of the deeds and the dedication was governed by the terms of the deed and upon a conveyance in fee simple; the title of the lands used as streets but subsequently cut

up and sold as building lots did not revert, but the city could sell such lots for its personal benefit. *Van Ness v. Washington*, 4 Pet. 232, 277, 7 L. Ed. 842.

80. Highway officers.—*Transportation Co. v. Chicago*, 99 U. S. 635, 641, 25 L. Ed. 336, affirmed in *Chicago v. Taylor*, 125 U. S. 161, 164, 31 L. Ed. 638; *Smith v. Washington*, 20 How. 135, 15 L. Ed. 558. See the title **EMINENT DOMAIN**, vol. 5, p. 746.

1. Stubble.—*Viterbo v. Friedlander*, 120 U. S. 707, 734, 30 L. Ed. 776.

2. Stuffing the ballot box.—A charge that certain persons fraudulently and clandestinely put and placed in the ballot box ballots which had not been voted at said election, is for the offense commonly known as **stuffing the ballot box**. *Ex parte Siebold*, 100 U. S. 371, 378, 25 L. Ed. 717. See the title **ELECTIONS**, vol. 5, pp. 721, 728.

3. Subject.—In *Republica v. Chapman*, 1 Dall. 53, 60, 1 L. Ed. 33, the court said: "The word **subject** means a subjection to some sovereign power, and is not barely

SUBJECT MATTER.—As to “jurisdiction over the subject matter,” see the title JURISDICTION, vol. 7, p. 739.

SUBLETTING.—See the title LANDLORD AND TENANT, vol. 7, p. 836.

SUBMISSION.—See the title ARBITRATION AND AWARD, vol. 2, p. 468.

SUBMISSION OF CONTROVERSY.—See the title AGREED CASE, vol. 1, p. 204.

given; **WITNESSES.** As to subpœna duces tecum, see the title PRODUCTION OF DOCUMENTS, vol. 9, p. 788. As to fees of clerk for issuing, see the title CLERKS

SUBPŒNA.—See the titles SUMMONS AND PROCESS, and references there of COURT, vol. 3, p. 861.

connected with the idea of territory—it refers to one who owes obedience to the laws, and is entitled to partake of the elections into public office.”

“**Citizen**” is analogous to “**subject**.”—See the title CITIZENSHIP, vol. 3, p. 790.

“**Subjects**,” in a treaty construed in some sense as “**citizens**” or “**inhabitants**.” See the title CITIZENSHIP, vol. 3, p. 790.

Goods subject to execution mean goods not exempt by some general or special law. See *Webb v. Sharp*, 13 Wall. 14, 17, 20 L. Ed. 478.

Subject to jurisdiction of the United States held to mean completely subject to their political jurisdiction and owing them immediate allegiance. See the title CITIZENSHIP, vol. 3, p. 793.

As to this phrase meaning within the limits and under the jurisdiction of the United States, see *United States v. Wong Kim Ark*, 169 U. S. 649, 687, 42 L. Ed. 890.

As to meaning of this phrase as used in the provision as to who shall be citizens

of the United States, see the title CONSTITUTIONAL LAW, vol. 4, p. 481.

In the provision that “all persons born or naturalized in the United States, and **subject** to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,” the phrase “**subject** to its jurisdiction” was intended to exclude from its operation children of ministers, consuls, and citizens or **subjects** of foreign states born within the United States. *Slaughter-House Cases*, 16 Wall. 36, 73, 21 L. Ed. 394.

Subject to law.—See the title COLLEGES AND UNIVERSITIES, vol. 3, p. 868.

Subject to periodical overflow.—See OVERFLOW—OVERFLOWED, vol. 8, p. 1017.

Subject to taxation.—Where it was provided that a railroad should be immune from taxation for two years, when it should be “**subject** to taxation,” this obviously meant general taxation—such taxation as other property of like value is **subjected** to. *Bailey v. Magwire*, 22 Wall. 215, 227, 22 L. Ed. 850.

SUBROGATION.

BY A. P. WALKER.

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CROSS REFERENCES.

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As to necessity for cross bill to vacate void deed of subrogation, see the title **CROSS BILLS**, vol. 5, p. 137.

I. General Consideration of Right of Subrogation.

The right of subrogation is not founded on contract. It is a creature of equity; is in force solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relation between the parties.¹ Subrogation is an equitable right.² The doctrine is derived from the civil law.³

- 1. *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 301, 30 L. Ed. 595; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 550, 34 L. Ed. 537.
- 2. *Ketchum v. Duncan*, 96 U. S. 659, 667, 24 L. Ed. 868; *Richardson v. Traver*, 112 U. S. 423, 432, 28 L. Ed. 804.
- 3. *Ætna Life Ins. Co. v. Middleport*,

Subrogation is not assignment. The subrogated creditor by operation of law represents the person to whose right he is subrogated.⁴

A person who invokes the doctrine of subrogation must come into court with clean hands;⁵ therefore, persons whose claim to the right of subrogation arises from their own tortious conduct, are not entitled to invoke that doctrine.⁶

II. Subrogation of Creditors.

A creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt.⁷ The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to apply to the discharge of his demand the property deposited with the surety for that purpose if required by the default of the principal.⁸ In

124 U. S. 534, 550, 31 L. Ed. 537; *Prairie State Bank v. United States*, 164 U. S. 227, 231, 41 L. Ed. 412.

4. *New Orleans v. Gaines*, 138 U. S. 595, 606, 34 L. Ed. 1102.

5. *German Bank v. United States*, 148 U. S. 573, 581, 37 L. Ed. 564, citing *Railroad Co. v. Soutter*, 13 Wall. 517, 20 L. Ed. 543. See, generally, the title MAXIMS, vol. 8, p. 315.

6. *German Bank v. United States*, 148 U. S. 573, 580, 37 L. Ed. 564.

So held where a bank in which United States bonds impressed with a trust, were deposited, the bank being apprised of the fact that there was a trust, having been held liable to the owners of the bonds for having been parties to a transaction in which the register of the treasury canceled such bonds without authority of law, sought to be subrogated to the right of the owners of the bonds in a suit against the United States to recover the amount of the bonds so canceled. *German Bank v. United States*, 148 U. S. 573, 37 L. Ed. 564.

7. **Subrogation of creditor.**—*Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, 306, 23 L. Ed. 715; *Keller v. Ashford*, 133 U. S. 610, 622, 33 L. Ed. 667; *Hampton v. Phipps*, 108 U. S. 260, 263, 27 L. Ed. 719; *Cunningham v. Macon, etc., R. Co.*, 156 U. S. 400, 39 L. Ed. 471; *New Orleans v. Gaines*, 131 U. S. 191, 212, 33 L. Ed. 99; *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102.

True owner to rights of evicted grantee with guaranty.—Under the law of Louisiana the true owner having recovered property from a grantee to whom it was conveyed with guaranty of title, may compromise, settle with and discharge such evicted grantee from personal liability, and be subrogated to his rights against the grantor. *New Orleans v. Gaines*, 131 U. S. 191, 212, 33 L. Ed. 99; *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102.

Mortgage given by one surety to another.—The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for

the payment of the debt has no application to a mortgage given by one surety to another merely to indemnify him against being compelled to pay a greater share of the debt than the sureties had agreed between themselves that he should bear. *Hampton v. Phipps*, 108 U. S. 260, 27 L. Ed. 719; *Keller v. Ashford*, 133 U. S. 610, 622, 33 L. Ed. 667.

An agreement in a deed of land by which the grantee agrees to pay a mortgage made by the grantor, is a security of which the mortgagee may avail himself in equity against the grantee. *Keller v. Ashford*, 133 U. S. 610, 622, 33 L. Ed. 667. See the title VENDOR AND PURCHASER.

The holders of bonds indorsed by a state, cannot be subrogated to the rights of the state under a mortgage executed by the obligors of the bonds, for the security of the state. *Cunningham v. Macon, etc., R. Co.*, 156 U. S. 400, 420, 39 L. Ed. 471.

"If the statutory mortgage * * * was solely for the indemnification of the state and not for the security of the bondholders, the latter, whatever may be their indirect rights by subrogation, cannot directly avail themselves of the statutory mortgage. *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, 23 L. Ed. 715; *Tennessee Bond Cases*, 114 U. S. 663, 29 L. Ed. 281." *Cunningham v. Macon, etc., R. Co.*, 156 U. S. 400, 420, 39 L. Ed. 471.

Where land is conveyed to a state by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity or the application of the land to the payment of the bonds which can be enforced against the state, and her grantees take the property discharged of any claim of the bondholders. *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, 23 L. Ed. 715. See, also, *Cunningham v. Macon, etc., R. Co.*, 156 U. S. 400, 419, 39 L. Ed. 471, and *Hoyt v. Latham*, 143 U. S. 553, 559, 36 L. Ed. 259.

8. *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, 306, 23 L. Ed. 715.

A right of subrogation does not involve any direct lien in favor of the cred-

order to enforce equitable subrogation against a surety he must be made a party to the cause.⁹

III. Subrogation of Person Paying Debt Due Third Party.

A. In General.—The requirements of the doctrine of subrogation are: First, "that the person seeking its benefits must have paid a debt due to a third party before he can be substituted to that party's rights; and second, that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim, on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never afforded in equity to one who is a mere volunteer in paying a debt of one person to another."¹⁰

itor from his position as such. It only exists in consequence of his being, as a creditor, entitled to enjoy certain rights which are vested in the surety at the time the subrogation is claimed. As the creditors' right to subrogation depends on the existence, in the surety, of the rights to which subrogation is sought, it follows that after the surety has parted with the thing given to him for his protection, the creditor can have no subrogation to such thing. *Cunningham v. Macon, etc., R. Co.*, 156 U. S. 400, 419, 39 L. Ed. 471.

9. *Cunningham v. Macon, etc., R. Co.*, 156 U. S. 400, 419, 39 L. Ed. 471.

10. *Prairie State Bank v. United States*, 164 U. S. 227, 231, 41 L. Ed. 412; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 548, 31 L. Ed. 537; *O'Brien v. Wheelock*, 184 U. S. 450, 459, 46 L. Ed. 636.

Purchaser of coupons.—A purchaser of coupons who was not a debtor and was under no obligation to receive them or to pay them, paid for and took them without any intention to extinguish them. It was held that the right of such purchaser is a legal one and not a right of subrogation. *Ketchum v. Duncan*, 96 U. S. 659, 667, 24 L. Ed. 868.

Purchaser of municipal bonds.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 720, and see, in addition to the authorities there cited, *Illinois, etc., R. Co. v. Wade*, 140 U. S. 65, 67, 35 L. Ed. 342; *O'Brien v. Wheelock*, 184 U. S. 450, 459, 495, 46 L. Ed. 636.

The maker of a note for which he is primarily liable who passes the same, is not subrogated to rights under a mortgage given by accommodation indorsers to secure their indorsement; nor can such mortgage operate as security for a certificate of deposit which was not indorsed by the mortgagors. *Underwood v. Metropolitan Nat. Bank*, 144 U. S. 669, 676, 36 L. Ed. 586.

Where a mortgage debt was paid out of the proceeds of a sale of property.—Under the confiscation act of 1862 the mortgagee having intervened in the proceedings, for the protection of his interest in the property, neither the United States nor the purchaser at the confiscation sale

are subrogated to the rights of the mortgagee under his mortgage. *Waples v. Hays*, 108 U. S. 6, 9, 27 L. Ed. 632. See, also, *Shields v. Schiff*, 124 U. S. 351, 354, 31 L. Ed. 445.

Lender of money to railroad to preference against bondholders.—The lender of money to a railroad company which was expended in payment of interest on its first mortgage bonds or of operating expenses is not entitled to the assertion of a preference against the first mortgage bondholders by way of subrogation. *Morgan, etc., Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 196, 34 L. Ed. 625, citing *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868 and *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416, 32 L. Ed. 472. See the title RECEIVERS, vol. 10, p. 538.

Transferee of stock received for void municipal aid bonds to bondholders.—A railway company had received the bonds of a town in payment of a subscription to its stock and transferred the same for a consideration. The bonds being void, the town took them up from the transferee and delivered to him the certificates of stock received from the railroad company. It was held that the railroad company cannot object to such voluntary transfer on part of the town and that there is no matter of subrogation to be considered and no inquiry into the extent to which this doctrine could be applied in a bill against the town and railway company to compel a transfer of the stock to the transferee of the bonds. *Illinois, etc., R. Co. v. Wade*, 140 U. S. 65, 68, 35 L. Ed. 342. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 647.

Rents ordered to be paid by divorce decree pledged for advances.—Where a divorce decree ordered the wife to direct payment of one-third of her rents as they should become due, to her husband, the rents having been pledged before the decree for advances to the wife by the tenant and further pledged after the decree for other advances to her by the tenant; the husband is entitled to be subrogated to the wife's full rights against the tenant as existing at the time of the decree till his third with interest from the date of the decree is paid before advances sub-

B. Sureties, Guarantors, Insurers, Bail, etc.—A surety who discharges the debt for which he is bound in general succeeds to all rights and remedies of the creditor against the principal both direct and incidental.¹¹ This is clearly the rule where the principal obligation is the payment of money or the performance of a civil duty.¹²

Government Right to Priority of Payment.—The same right of priority which belongs to the government attaches to the claim of an individual who, as surety, has paid money to the government.¹³

Bail.—The subrogation to which the bail in a criminal case is entitled is subrogation to the means of enforcing the performance of the thing which the recognizance of bail is intended to secure the performance of, and not subrogation to the peculiar remedies which the government may have for collecting the penalty.¹⁴

C. Bona Fide Purchasers.—Where a bona fide purchaser of real estate pays money to discharge any existing encumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him.¹⁵

sequent to the decree are repaid. *Cheever v. Wilson*, 9 Wall. 108, 19 L. Ed. 604.

A person loaning money to an infant which is used to satisfy liens to which the infant's property is subject, is entitled to be subrogated to the rights of such lienors. *MacGreal v. Taylor*, 167 U. S. 688, 701, 42 L. Ed. 326.

So held as to where a person loaned money to an infant, taking a deed of trust on the infant's real estate, which the infant upon arriving at majority disaffirmed, the money loaned having been used to discharge prior mortgages and liens for taxes. *MacGreal v. Taylor*, 167 U. S. 688, 701, 42 L. Ed. 326.

A grantee upon trust to pay debts of the grantor, who advances money to purchase a mortgage upon part of the property conveyed to him, is entitled to be reimbursed for his advances for its purchase, not merely out of the mortgage proceeds, but out of the proceeds of the whole property conveyed to him. *Flagg v. Walker*, 113 U. S. 659, 28 L. Ed. 1072.

11. Sureties, guarantors, insurers, bail, etc.—*Lidderdale v. Robinson*, 12 Wheat. 594, 595, 6 L. Ed. 740; *United States v. Ryder*, 110 U. S. 729, 733, 28 L. Ed. 308; *Prairie State Bank v. United States*, 164 U. S. 227, 232, 41 L. Ed. 412.

"It is a well-settled principle that a surety who pays the debt of his principal, will in a clear case in equity be substituted in the place of the creditor to all the liens held by him to secure the payment of his debt; and the creditor is bound to preserve them unimpaired when he intends to look to the surety." *Leggett v. Humphreys*, 21 How. 66, 75, 16 L. Ed. 50.

Actual assignment not essential.—*Lidderdale v. Robinson*, 12 Wheat. 594, 595, 6 L. Ed. 740.

One of three joint mortgagors to indemnify drawer of bill forced to pay same, is subrogated to the rights of the creditors his comortgagors.—*Pratt v. Law*, 9

Cranch 456, 3 L. Ed. 792. And see *Campbell v. Pratt*, 5 Wheat. 429, 5 L. Ed. 126, explaining the decree in *Pratt v. Law*, *supra*.

Indorser.—By the statute of Maryland of 1763, ch. 23, § 8, an indorser has a right to pay the amount of the note or bill to the holder and be subrogated to all his rights, by obtaining an assignment of the holder's judgment against the maker. This statute is perhaps only declaratory of the common law. *Lenox v. Prout*, 3 Wheat. 520, 4 L. Ed. 449.

A surety on a building contract, in which the United States is the party of the first part who, in event of nonfulfillment, avails himself of the privilege of completing the work, is subrogated to the rights of the United States in a fund reserved to guarantee the faithful performance of the work by the contractor. The surety's right of subrogation arises from and relates back to the date of the original contract and is superior to a claim for advances, made the contractor without the surety's knowledge or consent and before he undertook the completion of the work. *Prairie State Bank v. United States*, 164 U. S. 227, 232, 41 L. Ed. 412.

12. *United States v. Ryder*, 110 U. S. 729, 733, 28 L. Ed. 308.

13. *Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86.

14. *United States v. Ryder*, 110 U. S. 729, 737, 28 L. Ed. 308.

The sureties on a recognizance to the United States in a criminal case, are not subrogated to the rights of the United States and cannot sue in the name of the United States. Recognizances in criminal cases are not embraced by § 3468, U. S. Rev. Stat. *United States v. Ryder*, 110 U. S. 729, 739, 28 L. Ed. 308.

15. *Davis v. Gaines*, 104 U. S. 386, 405, 26 L. Ed. 757. This is a principal of the Roman Law.

Purchaser at irregular or void judicial

D. Junior Mortgagees.—A junior mortgagee who pays the prior mortgage to protect the mortgage estate from a forced sale, is entitled to all the benefits under such lien that could have been claimed by the first mortgagee, and by reimbursing the amount so paid with legal interest.¹⁶ Such junior mortgagee is subrogated to the rights of the prior mortgagee existing at the time of the foreclosure proceedings.¹⁷ Although the junior mortgagee did not purchase the prior lien or become, technically, the assignee thereof, his lien will be regarded, in equity, as subsisting so far as is necessary for his protection.¹⁸ But the effect of this principle may be controlled by acts of the parties.¹⁹ Where property bound for the payment of a prior mortgage debt was in fact used to pay it, with the consent of the junior encumbrancer, no lien upon other property mortgaged for the security of such debt can be kept alive for the benefit of the releasing junior encumbrancer without the consent of those whose interests in the other property are to be affected. The payment of the mortgage debt discharged the debt and all that pertained to its continued existence.²⁰

E. Judgment Creditor.—It is a well-settled principle in equity that a judgment creditor when he is compelled to pay off prior encumbrances on land to obtain the benefit of his judgment may, by assignment, secure to himself the rights of the encumbrancers; but the effect of this principle may be controlled by acts of the parties.²¹

IV. Assignee in Bankruptcy.

An assignee in bankruptcy is subrogated to all the rights, legal and equitable, of the bankrupt.²²

or execution sale.—It has been held in some jurisdictions that a purchaser at an irregular or void judicial or execution sale is not subrogated to the rights of the judgment creditor, but the weight of authority is, however, against this position; and the supreme court of the United States has expressly held that an irregular judicial sale, made at the suit of a mortgagee, even though no bar to the equity of redemption, passes to the purchaser at such sale all the rights of the mortgagee as such. *Brobst v. Brock*, 10 Wall. 519, 19 L. Ed. 1002; *Davis v. Gaines*, 104 U. S. 386, 406, 26 L. Ed. 757.

Void sale of real estate.—The doctrine of the text has been applied to such sale of a decedent's real estate. *Davis v. Gaines*, 104 U. S. 386, 406, 26 L. Ed. 757.

16. Junior mortgagee.—*Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 301, 30 L. Ed. 595; *United States Bank v. Peter*, 13 Pet. 123, 10 L. Ed. 89; *Richardson v. Traver*, 112 U. S. 423, 28 L. Ed. 804; *Groves v. Sentell*, 153 U. S. 465, 38 L. Ed. 785. See, also, *Baldwin v. Black*, 119 U. S. 643, 30 L. Ed. 530.

So held as to trustees under a railroad mortgage, which was held to be subsequent to a lien securing a debt due the state. *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 301, 30 L. Ed. 595. See the title *RAILROADS*, vol. 10, p. 455.

Earnings of sequestered mortgaged property.—*Baldwin v. Black*, 119 U. S. 643, 30 L. Ed. 530.

What law governs rate of interest.—The law in force when the right of subrogation attaches determines the rate of interest. *Memphis, etc., Railroad v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

17. Groves v. Sentell, 153 U. S. 465, 38 L. Ed. 785. So held under the Louisiana Law. Case of indivisible mortgage.

18. Memphis, etc., Railroad v. Dow, 120 U. S. 287, 301, 30 L. Ed. 595.

A junior mortgagee who is obliged to satisfy prior mortgages, stands as the assignee of such mortgages, and may claim all the benefits under the lien that could have been claimed by his assignor. *United States Bank v. Peter*, 13 Pet. 123, 10 L. Ed. 89; *Richardson v. Traver*, 112 U. S. 423, 28 L. Ed. 804.

19. United States Bank v. Peter, 13 Pet. 123, 10 L. Ed. 89.

20. Richardson v. Traver, 112 U. S. 423, 433, 28 L. Ed. 804.

Nor can a junior mortgagee who voluntarily released his lien on a tract of land to enable another to raise money to take up notes hold such notes, keep them alive, and enforce a mortgage on another tract for their security, in place of the lien he voluntarily released. *Richardson v. Traver*, 112 U. S. 423, 432, 28 L. Ed. 804.

A party who puts his claim entirely on the ground of purchase and ownership of the notes secured by a mortgage and does not ask relief by way of subrogation in his pleadings, but who has paid the mortgage debt because he was bound to do so, is not entitled to hold the mortgage security by way of subrogation. *Richardson v. Traver*, 112 U. S. 423, 431, 28 L. Ed. 804.

21. United States Bank v. Peter, 13 Pet. 123, 10 L. Ed. 89.

22. Sanger v. Upton, 91 U. S. 56, 62, 23 L. Ed. 220; *Webster v. Upton*, 91 U.

V. Subrogation in Insurance.

A. In General.—From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss.²³ The general rule of law is the same, it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity.²⁴

B. Right to Damages against Party Responsible for Loss—1. **IN GENERAL.**—The mere payment of a loss by the insurer does not afford any defense, in whole or in part, to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured. It does not bar the right against another party originally liable for the loss.²⁵ But the insurer acquires by such payment a corresponding right in any damages to be recovered by the assured against the wrongdoer, or other party responsible for the loss.²⁶ In other words when property insured is lost, actually or constructively, by perils insured against, the insurer, upon paying to the assured the amount of the loss, is subrogated in a corresponding amount to the assured's rights of action against third persons who have caused or are responsible for the loss.²⁷

2. **RIGHT OF INSURER DERIVED FROM ASSURED'S CAUSE OF ACTION.**—The right

S. 65, 24 L. Ed. 384. See the title **BANKRUPTCY**, vol. 2, p. 887.

Right of insolvent corporation against stockholders.—See the titles **BANKRUPTCY**, vol. 2, p. 887; **STOCK AND STOCKHOLDERS**, ante, p. 182.

23. Subrogation in insurance.—*Phoenix Ins. Co. v. Erie, etc.*, Transp. Co., 117 U. S. 312, 321, 29 L. Ed. 873; *Liverpool, etc., Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788; *Comegys v. Vasse*, 1 Pet. 193, 214, 7 L. Ed. 108; *Fretz v. Bull*, 12 How. 466, 468, 13 L. Ed. 1068; *The Propeller Monticello v. Mollison*, 17 How. 152, 155, 15 L. Ed. 68; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 317, 15 L. Ed. 656; *Hall v. Railroad Companies*, 13 Wall. 367, 370, 371, 20 L. Ed. 594; *The Potomac*, 105 U. S. 630, 634, 635, 26 L. Ed. 1194; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 594, 28 L. Ed. 527.

24. *Chicago, etc., R. Co. v. Pullman, etc.*, Car Co., 139 U. S. 79, 88, 35 L. Ed. 97; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 595, 28 L. Ed. 527; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Hall v. Railroad Companies*, 13 Wall. 367, 369, 370, 20 L. Ed. 594.

25. Right to damages against party responsible for loss.—*The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Hall v. Railroad Companies*, 13 Wall. 367, 20 L. Ed. 594; *Chicago, etc., R. Co. v. Pullman, etc.*, Car Co., 139 U. S. 79, 86, 35 L. Ed. 97; *United States v. American Tobacco Co.*, 166 U. S. 468, 474, 41 L. Ed. 1081; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068; *The Propeller Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 656.

"The contract with the insurer is in

the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others. This is a doctrine well established at common law and received in courts of admiralty." *The Propeller Monticello v. Mollison*, 17 How. 152, 155, 15 L. Ed. 68. See the title **INSURANCE**, vol. 7, p. 66.

"None can recover compensation twice in respect of the same injury; but what the plaintiff recovers under his policy of insurance is not compensation for damages, but a payment under a contract independent of the claim against the wrongdoer." *The Atlas*, 93 U. S. 302, 310, 23 L. Ed. 863.

"Compensation by the wrongdoer after payment by the insurers is not double compensation, for the plain reason that insurance is an indemnity; and it is clear that the wrongdoers are first liable, and that the insurers, if they pay first, are entitled to be subrogated to the rights of the insured against the wrongdoer. *The Atlas*, 93 U. S. 302, 310, 23 L. Ed. 863.

26. *The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Hall v. Railroad Companies*, 13 Wall. 367, 20 L. Ed. 594; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Fretz v. BuM*, 12 How. 466, 13 L. Ed. 1068; *The Propeller Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 656; *Chicago, etc., R. Co. v. Pullman, etc.*, Car Co., 139 U. S. 79, 86, 35 L. Ed. 97.

27. *Phoenix Ins. Co. v. Erie, etc.*, Transp. Co., 117 U. S. 312, 320, 29 L. Ed. 873; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788.

of the insurer against such other person does not rest upon any relation of contract or of privity between them. His title arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can only be enforced in his right. The cause of action rests on the rights of the owner.²⁸ In any form of remedy the insurer can take nothing by subrogation but the rights of the assured; and if the assured has no right of action, none passes to the insurer and there can be no recovery for his benefit.²⁹ It follows that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.³⁰

3. TOTAL LOSS OR ABANDONMENT UNNECESSARY.—The right of the insurer is not contingent upon the loss having been total, or upon its having been followed by an abandonment.³¹

4. STIPULATION IN POLICY OR ASSIGNMENT UNNECESSARY.—No express stipulation in the policy of insurance, or formal assignment by the assured,

28. Right of insurer derived from assured's cause of action.—*St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873; *United States v. American Tobacco Co.*, 166 U. S. 468, 474, 41 L. Ed. 1081.

29. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 37 L. Ed. 1013; *United States v. American Tobacco Co.*, 166 U. S. 468, 474, 41 L. Ed. 1081, citing *Hall v. Railroad Companies*, 13 Wall. 367, 372, 20 L. Ed. 594.

"For instance, if two ships, owned by the same person, come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the owner of both ships, could not sue himself." *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873. See, to the same effect, *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 594, 28 L. Ed. 527.

An action against a railroad corporation, for the loss by fire of a cold storage warehouse and the goods therein, owned by a commercial partnership, caused by negligence in running its engines and trains lies in favor of insurers of the property who have paid to the partnership the greater part of the loss. The right of the insurers is acquired by way of subrogation, to recover against the railroad company to the extent of the amount so paid, and is but the same right that the partnership had. If there existed a valid agreement between the partnership and the railroad company exempting

the latter from liability for loss for any damage by fire from its locomotive engines although owing to its own negligence, there could be no recovery against the railroad by the insurer of the partnership property after having paid a loss thereon. *Hartford Fire Ins. Co. v. Chicago, etc., R. Co.*, 175 U. S. 91, 96, 42 L. Ed. 84; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873.

Fire not amongst "perils of the river."—Bills of lading of goods, shipped on board a river steamboat, provided that the carrier shall not be liable for losses from the "perils of the river." "Fire" was not included amongst those perils but the carrier was liable for losses by fire. It was held that an insurance company which paid fire losses had a right to recover from the owners of the boat. *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 636.

30. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873; *Hibernia Ins. Co. v. St. Louis Transp. Co.*, 120 U. S. 166, 30 L. Ed. 621. See post, "Stipulations Limiting Carrier's Liability," V.

31. *The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Hall v. Railroad Companies*, 13 Wall. 367, 371, 20 L. Ed. 594; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 320, 29 L. Ed. 873.

The right of the insurer rests upon the ground that his contract is in the nature of the contract of indemnity, and that he is therefore entitled, upon paying a sum for which others are primarily liable to the assured, to be proportionally subrogated to his right of action against them. *The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Hall v. Railroad Companies*, 13 Wall. 367, 371, 20 L. Ed. 594.

The effect of a payment of a loss is equivalent in this respect to that of abandonment. *Hall v. Railroad Companies*, 13 Wall. 367, 371, 20 L. Ed. 594.

is necessary to perfect the title of the insurer.³²

5. PROPORTION OF DAMAGES TO WHICH INSURER ENTITLED.—The insurers are entitled only to damages to be recovered for any injury for which they have paid, and to such proportion only of those damages as the amount insured bears to the valuation in the policies.³³

6. EFFECT OF COMPROMISE BY INSURED WITH INSURER.—See post, "Shipper Insured Party," V, B, 8, a.

7. ASSIGNMENT OF INSURER'S CLAIM TO PARTY RESPONSIBLE FOR LOSS.—The insurers have the right to release and assign to the parties responsible for the loss, the amount which, by the effect of the contract of insurance, and of the payment of a loss under it, they have the right to recover to their own use from such parties. The claim of such parties to a deduction on this account from the damages to be recovered against them by the assured does not arise out of any right of their own, but out of the right so derived from the insurers. It is error to hold that no part of this amount should be deducted from the assured's damages.³⁴

8. RIGHT OF SHIPPER AGAINST CARRIER—*a. Shipper Insured Party*—(1) *In General*.—The insurer of goods which are lost while in custody of a carrier, upon paying the loss, is subrogated to the claim of the insured against the carrier.³⁵

The payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the carrier for the recovery of its value.³⁶ As between a common carrier of goods and an underwriter upon them, the liability of the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary, not in order of time but in order of ultimate liability.³⁷ Whenever he has indemnified the owner for the loss, he is entitled to all the means

32. *Phoenix Ins. Co. v. Erie, etc.*, Transp. Co., 117 U. S. 312, 320, 29 L. Ed. 873; *The Potomac*, 105 U. S. 630, 26 L. Ed. 1194; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788.

The owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name. *United States v. American Tobacco Co.*, 166 U. S. 468, 474, 41 L. Ed. 1081.

33. *The Potomac*, 105 U. S. 630, 636, 26 L. Ed. 1194. See, also, *General Mut. Ins. Co. v. Sherwood*, 14 How. 351, 14 L. Ed. 452.

34. **Assignment of insurer's claim to party responsible for loss.**—*The Potomac*, 105 U. S. 630, 635, 26 L. Ed. 1194.

A vessel being insured on two-thirds of her valuation by valued policies, by which, in case the insurers should pay any loss, the assured agreed to assign to them all right to recover satisfaction from any other person, or to prosecute therefor at the charge and for account of the insurers, if requested, and that they should be entitled to such proportion of the damages recovered as the amount insured bore to the valuation in the policies, the assured filed a libel in admiralty against another vessel for damages suffered by a collision. The insurers paid the libellant two-thirds of that damage, and released and assigned to the owners of the li-

belled vessel all their right in any damages growing out of the collision. It appearing that the collision was owing to the fault of both vessels, the libellant could recover only half of the damages sued for. Held, that one-third of the sum paid by the insurers must be deducted from the amount to be recovered. *The Potomac*, 105 U. S. 630, 26 L. Ed. 1194.

35. **Shipper insured party.**—*Hall v. Railroad Companies*, 13 Wall. 367, 373, 20 L. Ed. 594; *Phoenix Ins. Co. v. Erie, etc.*, Transp. Co., 117 U. S. 312, 29 L. Ed. 873. See, also, *Phoenix Ins. Co. v. Erie, etc.*, Transp. Co., 118 U. S. 210, 30 L. Ed. 128.

"There is * * * no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land." Nor do the authorities make any distinction between the cases. *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 594, 28 L. Ed. 527; *Hall v. Railroad Companies*, 13 Wall. 367, 371, 20 L. Ed. 594. See the title MARINE INSURANCE, vol. 8, p. 149.

36. *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 594, 28 L. Ed. 527.

37. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 140, 32 L. Ed. 612; *Hall v. Railroad Companies*, 13 Wall. 367, 370, 20 L. Ed. 594; *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 132 U. S. 79, 87, 35 L. Ed. 97; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 106, 37 L. Ed. 1013;

of indemnity which the satisfied owner held against the party primarily liable. His rights are not dependent at all upon privity of contract,³⁸ but are to be worked out through the cause of action which the insured has against the common carrier.³⁹ The right, by way of subrogation of an insurer upon paying for a total loss of the goods insured, to recover over against the carrier, is only that right which the assured has, and if the assured has no right of action none passes to the insurer,⁴⁰ by law or contract, against third persons.⁴¹

Amount of Recovery.—In a suit brought by the owner of goods against a common carrier for the loss of the goods by fire, for the use of the insurer who has paid the insurance upon them, the recovery is not limited to the amount paid by the insurer to the owner, but the carrier is bound to respond for all the damages sustained by the breach of his contract.⁴²

No part of a letter written as an offer of compromise is admissible in evidence.⁴³

(2) *Stipulation Limiting Carrier's Liability.*—Any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier;⁴⁴ as, for instance, if the contract of

Fretz v. Bull, 12 How. 466, 469, 13 L. Ed. 1068.

"Although in the order of ultimate liability, that of the carrier is in legal effect primary and that of the insurer secondary, yet the insured can, in the absence of provisions otherwise controlling the subject, insist upon proceeding, under his contract, first, against the party secondarily liable, and when he does so is bound in conscience to give to the latter the benefit of the remedy against the party principal." *Inman v. South Carolina R. Co.*, 129 U. S. 128, 32 L. Ed. 612.

An insurer of goods, consumed and totally destroyed by accidental fire in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid, by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such a suit, to show any positive wrongful act by the carrier. *Hall v. Railroad Companies*, 13 Wall. 367, 20 L. Ed. 594.

38. *Hall v. Railroad Companies*, 13 Wall. 367, 370, 20 L. Ed. 594; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 107, 37 L. Ed. 1013.

39. *Hall v. Railroad Companies*, 13 Wall. 367, 370, 20 L. Ed. 594; *Wager v. Providence Ins. Co.*, 150 U. S. 99, 107, 37 L. Ed. 1013; *Chicago, etc., R. Co. v. Pullman, etc.*, Car Co., 139 U. S. 79, 87, 35 L. Ed. 97; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527. See, also, *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 320, 29 L. Ed. 873.

40. *Wager v. Providence Ins. Co.*, 150 U. S. 99, 108, 37 L. Ed. 1013; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154. See ante, "In General," V, B, I.

41. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 325, 29 L. Ed. 873.

42. *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527.

"If only part of the loss has been paid by the insurer, the insured is entitled to the residue. How the money recovered is to be divided between the insured and the insurer is a question which interests them alone, and in which the common carrier is not concerned." *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527; *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 139 U. S. 79, 87, 35 L. Ed. 97. See, also, *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 320, 29 L. Ed. 873.

The acceptance of a given amount from an insurance company in full discharge of its liability does not affect the right of a plaintiff to recover from a railroad company the whole amount of a loss for which the latter is responsible under a contract. The inquiry in such an action is as to the amount for which the railroad company is bound on the contract and the recovery is not limited or affected by the amount collected from the insurance company. "The plaintiff could recover only one satisfaction for the loss; and if the amount recovered from the railroad company, increased by the sum collected from the insurance companies, was more than sufficient for its just indemnity, the excess would be held by it in trust for the insurance companies. The inquiry in this action is as to the amount for which the railroad company is bound on its contract with the plaintiff, and the recovery is not affected or limited by the amount collected from the insurance companies." *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 139 U. S. 79, 86, 35 L. Ed. 97.

43. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 23 L. Ed. 868.

44. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873.

carriage expressly exempts the carrier from liability for losses by fire;⁴⁵ or requires claims against the carrier to be made within three months;⁴⁶ or fixes the value for which the carrier shall be responsible.⁴⁷ So a stipulation in bills of lading, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination.⁴⁸

(3) *Stipulation Giving Carrier Benefit of Insurance.*—Since a stipulation in a bill of lading that the carrier, when liable for the loss, shall have the full benefit of any insurance that may have been effected upon the goods by the assured, is valid, and limits the right of subrogation of the insurer upon paying the shipper the loss, to recover over against the carrier, a claim by the underwriter to be subrogated to the rights of the owner will not arise where the contract of carriage contains such stipulation.⁴⁹ The policy containing no express stipulation upon the subject and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier will afford no defense to an action on the policy.⁵⁰ A carrier cannot have the benefit of such stipulation unless it was intended that he should come within its terms;⁵¹ and the burden is upon a carrier setting up such a defense to show clearly that the insurance on the goods is one which, to the benefit of, by the terms of his contract, he is entitled.⁵²

No Defense to Action against Carrier.—Such stipulation does not compel the owner to insure for the carrier's benefit and is no defense to an action against the carrier for the loss of the goods.⁵³

Breach.—Under the terms of such stipulation if the owner had insurance at the time of the loss, which he could make available to the carrier or which, before bringing suit, he had collected, without condition, then if he had wrongfully refused to allow the carrier the benefit of the insurance, a counterclaim by way of recoupment or set-off might be sustained but not otherwise. Thus where unconditional payment of the insurance has been made to the owner, such a counterclaim cannot be sustained.⁵⁴

45. *York Co. v. Central Railroad*, 3 Wall. 107, 18 L. Ed. 170; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873.

46. *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873.

47. *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 28 L. Ed. 717; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873.

48. *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 322, 29 L. Ed. 873.

49. *Wager v. Providence Ins. Co.*, 150 U. S. 99, 108, 37 L. Ed. 1103; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788; *Queen of the Pacific*, 180 U. S. 49, 56, 45 L. Ed. 419. See, also, *The Germanic*, 196 U. S. 589, 599, 49 L. Ed. 610. See the title CARRIERS, vol. 3, p. 606.

Loss by stranding.—*Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29

L. Ed. 873; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788.

50. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 320, 29 L. Ed. 873; *Hall v. Railroad Companies*, 13 Wall. 367, 371, 20 L. Ed. 594.

51. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. Ed. 788.

So held where the stipulation in through bills of lading was held clearly to apply to a railroad but not to steamship company. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 463, 32 L. Ed. 788, citing *Railroad Co. v. Andros-cogin Mills*, 22 Wall. 594, 602, 22 L. Ed. 724.

52. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 463, 32 L. Ed. 788; *Inman v. South Carolina R. Co.*, 129 U. S. 128, 32 L. Ed. 612.

53. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 32 L. Ed. 612.

54. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 140, 32 L. Ed. 612. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1114.

After a loss of goods, the signing, by an insurance company, of memoranda by

Where Insurer Requires Owner to Pursue the Carrier.—Insurers can, under their contracts, require the owners to pursue the carrier in the first instance and decline to indemnify them until the question and the measure of the latter's liability is determined, and to their action in this regard the carrier is not so situated as to be entitled to object.⁵⁵

b. Carrier Insured Party.—Where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier.⁵⁶

C. Remnant of Goods.—The insurer having paid the loss is entitled to anything that may be received from the remnant of the goods.⁵⁷

D. Subrogation of Insurer to Mortgage and Other Lien Debts.—Upon payment of a loss to a mortgagee who has insured his interest, the mortgage debt not having been extinguished, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor; the payment of the insurance is not a discharge of the debt, but only charges the creditor.⁵⁸

E. Enforcement of Right.—An insurer who is entitled to subrogation because of the payment of a loss may enforce this right by action at common law in the name of the assured,⁵⁹ or in the joint names of the insurer and the insured;⁶⁰ or, when the case admits of proceeding in equity or admiralty, by suit in his own name,⁶¹ but even in a court of equity or of admiralty it is proper

which the face of the insurance is reinstated, proof of loss waived, and provision made for postponing the question of indemnity until the owners, if the carrier refuse to pay, have used effort to collect, without prejudicing the owner's claim against the insurance company, does not amount to a payment of the claim. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 32 L. Ed. 612.

55. *Inman v. South Carolina R. Co.*, 129 U. S. 128, 140, 32 L. Ed. 612.

56. *Wager v. Providence Ins. Co.*, 150 U. S. 99, 108, 37 L. Ed. 1013.

57. *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 594, 28 L. Ed. 527. See ante, "In General," V, A.

58. *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. 495, 10 L. Ed. 1044.

Where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of such sureties. They are insurers of the particular property only, and so long as that property is liable for the debt, so long its destruction by fire would be a loss to the creditor within the terms of the policy. A surety of the debt might complain if the creditor should surrender to the debtor collateral securities; but an insurer of property for the benefit of the mortgagee would have no just ground of complaint. True, after a loss has occurred and the insurance has been paid, sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor, and to any collateral securities

which the creditor may then hold and which are primarily liable for the debt before the insurers. But even then the creditor is not bound to take any active steps to realize the fruits of a collateral, or to keep it from expiring. *Insurance Co. v. Stinson*, 103 U. S. 25, 28, 26 L. Ed. 473.

59. **Enforcement of right.**—The Potomac, 105 U. S. 630, 634, 26 L. Ed. 1194; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154; *Hall v. Railroad Companies*, 13 Wall. 367, 20 L. Ed. 594; *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068; *The Propeller Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 656; *The Atlas*, 93 U. S. 302, 311, 23 L. Ed. 863; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 29 L. Ed. 873; *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788; *United States v. American Tobacco Co.*, 166 U. S. 468, 474, 41 L. Ed. 1018; *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 139 U. S. 79, 86, 35 L. Ed. 97.

60. *Chicago, etc., R. Co. v. Pullman, etc., Car Co.*, 139 U. S. 79, 35 L. Ed. 97.

61. *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154, citing *Hall v. Railroad Companies*, 13 Wall. 367, 370, 372, 20 L. Ed. 594; *Mobile, etc., R. Co. v. Jurey*, 111 U. S. 584, 593, 28 L. Ed. 527; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873; and *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788; *The Potomac*, 105 U. S. 630, 634, 26 L. Ed. 1194; *Comegys v. Vasse*,

for the insured to represent or sue for the use of the insurer,⁶² and it can only be asserted in his right.⁶³ An insurer may apply to equity whenever an impediment exists to the exercise of his legal remedy in the name of the assured.⁶⁴

Under some state codes, it may be asserted by the insurer in his own name.⁶⁵

Intervention of Insurer in Admiralty Court.—But the insurer may, at all times, intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages.⁶⁶

VI. Enforcement.

A. Jurisdiction.—See ante, "Enforcement of Right," V, E.

B. Parties.—See ante, "Subrogation of Creditors," II; "Enforcement of Right," V, E.

C. Pleading.—See ante, "Junior Mortgagees," II, D.

SUBSCRIBING WITNESSES.—See the titles DEEDS, vol. 4, p. 262; DOCUMENTARY EVIDENCE, vol. 5, p. 465; WILLS.

SUBSCRIPTIONS.—As to stockholders' subscription, see the title STOCK AND STOCKHOLDERS, ante, p. 182. As to subscriptions by municipalities and counties, see, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618.

SUBSEQUENT TERM.—See note 1.

SUBSTANTIAL—SUBSTANTIALLY.—As to substantial identity of patents, see the title PATENTS, vol. 9, p. 265. As to meaning of terms "substantially as described," "substantially as shown," and "substantially as set forth" in claims for patents, see the title PATENTS, vol. 9, p. 220.

SUBSTITUTED SERVICE.—See the title SUMMONS AND PROCESS.

SUBSTITUTION OF ATTORNEYS.—See the title ATTORNEY AND CLIENT, vol. 2, p. 710.

SUBSTITUTION OF PARTIES.—As to substitution of parties in admiralty, see the title ADMIRALTY, vol. 1, p. 161. As to substitution of parties in revival or continuance of suits or actions, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 44. As to effect of substitution in bankruptcy, see the title BANKRUPTCY, vol. 2, p. 959. As to effect of substitution of an administrator, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 178. As to substitution upon resignation of officer, see the title MANDAMUS, vol. 8, p. 87.

1 Pet. 193, 7 L. Ed. 108; *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068; *The Propeller Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68; *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 656.

In a court of admiralty the insurer may assert in his own name the right of the shipper against the carrier. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 462, 32 L. Ed. 788, citing *Phenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873, and *The Poto-mac*, 105 U. S. 630, 634, 26 L. Ed. 1194.

62. Where the cargo of a boat was partly insured, but not the boat itself, and the insurance company paid for that part of the cargo which was insured, it was competent for the owners of the boat to file a libel for the use of the insurance company. *Fretz v. Bull*, 12 How. 466, 13 L. Ed. 1068.

A person who is master and part owner of a vessel in which a cargo has been wrongly sunk by collision from another vessel, may properly represent the insur-

er's claim for the loss of the cargo, and proceed to enforce it in rem and in personam through admiralty. *Newell v. Norton*, 3 Wall. 257, 258, 18 L. Ed. 271.

63. *Phenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312, 321, 29 L. Ed. 873.

64. *Garrison v. Memphis Ins. Co.*, 19 How. 312, 317, 15 L. Ed. 656, citing *The Propeller Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68.

65. *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 35 L. Ed. 154.

Quære as to proper practice under the Code of Arkansas. See *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 239, 35 L. Ed. 154.

66. *The Propeller Monticello v. Mollison*, 17 How. 152, 15 L. Ed. 68.

1. **Subsequent term.**—As to construction of a provision that a party held to bail shall appear at the next regular term of the court and at any subsequent term thereafter, see the title BAIL AND RECOGNIZANCE, vol. 2, p. 775.

SUBTERRANEAN WATERS.—See the titles **WATERS AND WATERCOURSES.**
SUCCESSION.—See the title **DESCENT AND DISTRIBUTION**, vol. 5, p. 335.
See note 1.

SUCCESSION TAXES.

BY BEIRNE STEDMAN.

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As to effect of treaty between United States and a foreign country upon the right of a state to collect tax upon legacies to citizen of such foreign country, see the title **ALIENS**, vol. 1, p. 234. As to estoppel of alien to set up against succession tax that the devise is void, see the title **ALIENS**, vol. 1, p. 234. As to liability of citizen of Louisiana domiciliated abroad for inheritance tax imposed by law of such state, see the title **ALIENS**, vol. 1, p. 234. As to reviewability of decision of state court that tax was properly imposed upon succession by alien, see the title **APPEAL AND ERROR**, vol. 1, p. 742. As to whether the fact that an inheritance tax on United States bonds may remotely affect the bor-

1. Succession.—By the federal statute of 1864, 13 Stat. 287, imposing a tax upon the “**succession** to real estate,” the term “real estate” was defined to include all lands, tenements, and hereditaments, corporeal and incorporeal; and a **succession** was declared to denote “the devolution of title to any real estate.” *Clapp v. Mason*, 94 U. S. 589, 590, 24 L. Ed. 212.

Succession in Louisiana.—Estates, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property, are included by the term **succession**, as used in Louisiana. It only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has ac-

rued thereto since the opening of the **succession**, as also the new charges to which it becomes subject. Civil Code, § 1870, arts. 872-873. *Simmons v. Saul*, 138 U. S. 439, 449, 34 L. Ed. 1054.

“A **succession** is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it.” Civil Code, art. 1095. *Simmons v. Saul*, 138 U. S. 439, 449, 34 L. Ed. 1054.

The power to regulate succession is lodged solely in the several states. *Knowlton v. Moore*, 178 U. S. 41, 58, 44 L. Ed. 969.

Universal succession.—See the title **DESCENT AND DISTRIBUTION**, vol. 5, p. 335.

rowing power of the government is sufficient to invalidate the same, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 199. As to validity of act of congress imposing a tax upon bequests to municipal corporations, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 210. As to constitutionality of legacy and inheritance tax law containing progressive rate features, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 400. As to constitutionality of law imposing inheritance tax according to degree of kin and amount received, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 400, 401. As to the constitutionality of statutes applying inheritance tax to estates already in cause of administration, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 400, 429, 518. As to constitutionality of statute imposing an inheritance or transfer tax upon the power of appointment created by will of person already deceased, see the titles *CONSTITUTIONAL LAW*, vol. 4, pp. 400, 429, 430; *DUE PROCESS OF LAW*, vol. 5, p. 567; *POWERS*, vol. 9, p. 608. As to constitutionality of law imposing inheritance tax upon interest in remainders vested in right, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 401. As to constitutionality of statute which exempts from the operation of an inheritance tax law bequests to domestic, religious and educational institutions without extending such exemptions to similar foreign corporations, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 401. As to right of state to select time of imposition of inheritance tax, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 429. As to constitutionality of a statute enacted after the death of a testator imposing an inheritance tax and having a retroactive effect, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 429. As to when an inheritance subject to a succession tax becomes the property of the legatee, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 429. That states not required to conform to blood relationship in levying inheritance taxes, see the title *DUE PROCESS OF LAW*, vol. 5, p. 567. As to effect of treaty subsequently made upon right of state to collect inheritance tax already vested, see the title *TREATIES*.

I. Definitions and General Consideration.

Definitions.—See footnote.¹

Death Duties.—See footnote.²

History.—Legacy and inheritance taxes are not new in our laws.³ They have been enacted by congress,⁴ and in many of the states and foreign countries.⁵

II. Constitutionality, Nature and Power to Impose.

The constitutionality of legacy and inheritance taxes have been declared and the principles upon which they are based explained in many cases.⁶ They are based on two principles: 1. An inheritance tax is not one on property, but one

1. **Definitions.**—An inheritance tax has been defined to be "a debt exacted by the state for protection afforded during the lifetime of the decedent." *Plummer v. Coler*, 178 U. S. 115, 138, 44 L. Ed. 998.

A collateral inheritance tax is a bonus, exacted from the collateral kindred and others, as the conditions on which they may be admitted to take the estate left by a deceased relative or testator. *Plummer v. Coler*, 178 U. S. 115, 121, 44 L. Ed. 998.

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor)." *Knowlton v. Moore*, 178 U. S. 41, 48, 44 L. Ed. 969.

2. **Death duties.**—See *DEATH DUTY*, 11 U S Enc—19

vol. 5, p. 202. See, also, *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

3. **History.**—*Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 287, 42 L. Ed. 1037.

4. **Enacted by congress.**—See *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035; *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99; *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048; *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697; *Mason v. Sargent*, 104 U. S. 689, 26 L. Ed. 894; *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212; *Sturges v. United States*, 117 U. S. 363, 29 L. Ed. 920.

5. *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 287, 42 L. Ed. 1037. See, also, *Knowlton v. Moore*, 178 U. S. 41, 47, 44 L. Ed. 969.

6. **Constitutionality.**—*United States v.*

on the succession.⁷ 2. The right to take property by devise or descent is the

Perkins, 163 U. S. 625, 628, 41 L. Ed. 287; *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212; *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99; *Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 288, 42 L. Ed. 1037; *Plummer v. Coler*, 178 U. S. 115, 137, 44 L. Ed. 998; *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168. Cited in *Pollock v. Farmers', etc., Trust Co.*, 157 U. S. 429, 577, 39 L. Ed. 759; and see *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496; *South Carolina v. United States*, 199 U. S. 437, 50 L. Ed. 261; *Murdock v. Ward*, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 44 L. Ed. 1014.

Not direct taxes.—*Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99; *Knowlton v. Moore*, 178 U. S. 41, 48, 44 L. Ed. 969; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496. And see *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481.

Taxation of inheritances of aliens or nonresidents.—The law of Louisiana passed on the 26th of March, 1842, which provides that every person not being domiciliated in that state, and not being a citizen of any state or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the state of ten per cent. of the value thereof, is not repugnant to the constitution of the United States. *Prevost v. Greneaux*, 19 How. 1, 7, 15 L. Ed. 572; *Frederickson v. Louisiana*, 23 How. 445, 16 L. Ed. 577; *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168, cited in *Plummer v. Coler*, 178 U. S. 115, 125, 44 L. Ed. 998.

Acts of congress imposing succession taxes—**Acts of 1864, 1866.**—The "succession tax," imposed by the acts of June 30th, 1864, and July 13th, 1866, on every "devolution of title to any real estate," was not a "direct tax," within the meaning of the constitution; but an "impost or excise," and was constitutional and valid. *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99, cited in *Springer v. United States*, 102 U. S. 586, 601, 26 L. Ed. 253; *Knowlton v. Moore*, 178 U. S. 41, 78, 44 L. Ed. 969. And see *Pollock v. Farmers', etc., Trust Co.*, 157 U. S. 429, 577, 39 L. Ed. 759; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496; *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481.

"It is plainly an excise tax or duty." *Scholey v. Rew*, 23 Wall. 331, 346, 23 L. Ed. 99.

In *Pollock v. Farmers', etc., Trust Co.*, 157 U. S. 429, 39 L. Ed. 759; *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601,

39 L. Ed. 1108, the decision in *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99, was not overruled. On the contrary, the correctness of the decision in the latter case as to the particular matter which is actually decided in effect was reaffirmed. *Knowlton v. Moore*, 178 U. S. 41, 80, 44 L. Ed. 969.

The question as to whether the tax imposed by the acts of 1864 and 1866 is a direct tax is not affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction. *Scholey v. Rew*, 23 Wall. 331, 347, 23 L. Ed. 99.

Same—Act of 1894.—In the statute of August 27, 1894, 28 Stat. 509, c. 349, what was in effect a legacy tax was imposed by the provisions of § 28. This law was not enforced, being held unconstitutional in *Pollock v. Farmers', etc., Trust Co.*, 157 U. S. 429, 39 L. Ed. 759. *Knowlton v. Moore*, 178 U. S. 41, 52, 44 L. Ed. 969.

Same—Act of 1898.—The tax provided by act of congress, June 13, 1898, on legacies, etc., is not direct within the meaning of the constitution, but, on the contrary, is a duty or excise. *Knowlton v. Moore*, 178 U. S. 41, 83, 44 L. Ed. 969; *Murdock v. Ward*, 178 U. S. 139, 145, 44 L. Ed. 1009; *High v. Coyne*, 178 U. S. 111, 112, 44 L. Ed. 997; *Fidelity Ins., etc., Co. v. McClain*, 178 U. S. 113, 114, 44 L. Ed. 998.

Because such act exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, it is not repugnant to that portion of the first clause of § 8 of article 1 of the constitution, which provides, "the duties, imposts and excises shall be uniform throughout the United States." *Knowlton v. Moore*, 178 U. S. 41, 83, 44 L. Ed. 969.

7. Tax is on the succession.—*Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 288, 42 L. Ed. 1037; *Moore v. Ruckgaber*, 184 U. S. 593, 596, 46 L. Ed. 705; *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439. And see *Pollock v. Farmers', etc., Trust Co.*, 157 U. S. 429, 577, 39 L. Ed. 759; *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481; *South Carolina v. United States*, 199 U. S. 437, 458, 50 L. Ed. 261; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 516, 51 L. Ed. 901; *Snyder v. Bettman*, 190 U. S. 249, 250, 47 L. Ed. 1035; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496; *Buck v. Beach*, 206 U. S. 392, 408, 51 L. Ed. 1106.

An inheritance tax was defined in

creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it.⁸ From these principles it is deduced that the states may tax the privilege,⁹ discriminate between relatives and between these and strangers,¹⁰ and grant exemptions;¹¹ and are

United States v. Perkins, 163 U. S. 625, 41 L. Ed. 287, to be “not a tax upon the property itself, but upon its transmission by will or descent;” and in *Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 42 L. Ed. 1037, “not one on property, but one on the succession.” In *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, it was said that such taxes “rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.” *Cahen v. Brewster*, 203 U. S. 543, 550, 51 L. Ed. 310.

Acts of 1864, 1866.—*Scholey v. Rew*, 23 Wall. 331, 347, 23 L. Ed. 99.

Act of 1898.—The tax imposed by the war tax law of June 30, 1898, was not upon the property, but upon the succession. *Eidman v. Martinez*, 184 U. S. 578, 589, 46 L. Ed. 697.

States statutes.—It is held that an inheritance tax is not a tax upon the property itself, but upon its transmission by will or by descent. *United States v. Perkins*, 163 U. S. 625, 629, 41 L. Ed. 287; *Plummer v. Coler*, 178 U. S. 115, 131, 44 L. Ed. 998; *Knowlton v. Moore*, 178 U. S. 41, 54, 44 L. Ed. 969.

8. Taking property by devise or descent not natural right.—*Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 288, 42 L. Ed. 1037; *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998; *Snyder v. Bettman*, 190 U. S. 249, 47 L. Ed. 1035; *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196; *Chandler v. Kelsey*, 205 U. S. 466, 51 L. Ed. 882; *Billings v. Illinois*, 188 U. S. 97, 104, 47 L. Ed. 400; *Murdock v. Ward*, 178 U. S. 139, 146, 44 L. Ed. 1009; *United States v. Perkins*, 163 U. S. 625, 628, 41 L. Ed. 287.

In *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 1168, in holding that the law of Louisiana imposing a tax upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein, was constitutional and valid, the court said: “The law in question is thing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament or by inheritance; and of prescribing who shall and who shall not be capable of taking it.” See, also, *Frederickson v. Louisiana*, 23 How. 445, 447, 16 L. Ed. 577.

Burden cast upon recipient.—“A tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the state to regulate.” *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969.

9. Power of state to impose inheritance and legacy taxes.—*Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 288, 42 L. Ed. 1037; *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998. See *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287; *South Carolina v. United States*, 199 U. S. 437, 458, 50 L. Ed. 261.

10. Discrimination between beneficiaries.—*Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 288, 42 L. Ed. 1037, cited in *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 133, 44 L. Ed. 998. See *Billings v. Illinois*, 188 U. S. 97, 101, 47 L. Ed. 400; *Campbell v. California*, 200 U. S. 87, 50 L. Ed. 382.

11. Exemptions.—*Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 288, 42 L. Ed. 1037, cited in *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 133, 44 L. Ed. 998. See, generally, the title TAXATION.

In laying an inheritance tax the legislature may consider the relation which the person or corporation given the right of succession sustains to the deceased, to the property or to the state, and may regulate the amount of the tax to be required in view of such relation, and in exercising this power may lay a tax on the right of one class of persons or corporations to take, and may deem it wise to impose no tax upon the right of other classes of persons or corporations to take. *Board of Education v. Illinois*, 203 U. S. 553, 562, 51 L. Ed. 314.

California inheritance tax law.—In *Campbell v. California*, 200 U. S. 87, 90, 95, 50 L. Ed. 382, it was held that the law of California was not repugnant to the fourteenth amendment because it subjects to the burden of an inheritance tax brothers and sisters of a decedent and exempts therefrom such strangers to the blood as the wife or widow of a son, or the husband of a daughter of a decedent.

Illinois inheritance tax law.—In *Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283, 299, 42 L. Ed. 1037, it was held that the exemptions of the Illinois inheritance tax statute did not render its

not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.¹²

Power of Congress to Impose.—Congress has the power to tax successions.¹³

III. Power to Impose Tax upon Particular Property.

Debts Owed by Citizens.—A state may impose a succession tax on debts owed by its citizens to nonresidents.¹⁴

Deposit Made by Nonresident.—A state has the right to tax the transfer by will of a deposit made in a bank in the state by a nonresident.¹⁵

operation unequal within the meaning of the fourteenth amendment.

Condition imposed on exempt property.—If a state exempts property bequeathed for charitable or educational purposes from inheritance taxation, it is not unreasonable or arbitrary to require the charity to be exercised or the education to be bestowed within her borders and for her people, whether exercised through persons or corporations. *Board of Education v. Illinois*, 203 U. S. 553, 563, 51 L. Ed. 314.

Amount of exemption a legislative question.—*Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 298, 42 L. Ed. 1037.

12. Constitutionality.—*Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 288, 42 L. Ed. 1037; *Plummer v. Coler*, 178 U. S. 115, 133, 44 L. Ed. 998; *Knowlton v. Moore*, 178 U. S. 41, 55, 44 L. Ed. 969.

13. Power of congress to impose inheritance and legacy taxes.—*Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Snyder v. Bettman*, 190 U. S. 249, 254, 47 L. Ed. 1035, quoted in *South Carolina v. United States*, 199 U. S. 437, 458, 50 L. Ed. 261.

"In considering the power of congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states and not in congress." *Knowlton v. Moore*, 178 U. S. 41, 58, 44 L. Ed. 969.

The exercise of the power does not conflict with the proposition that neither the federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property. *Snyder v. Bettman*, 190 U. S. 249, 254, 47 L. Ed. 1035, quoted in *South Carolina v. United States*, 199 U. S. 437, 458, 50 L. Ed. 261.

"The power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power." *Snyder v. Bettman*, 190 U. S. 249, 251, 252, 47 L. Ed. 1035; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969. See, also, *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287; *Ma-*

goun v. Illinois Trust, etc., Bank, 170 U. S. 283, 42 L. Ed. 1037.

14. Debts owed by citizens.—*Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. Ed. 439, wherein the court said: "Power over the person of the debtor confers jurisdiction, we repeat, and this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other."

15. Deposit made by nonresident.—Notwithstanding the deposit as a part of the succession has already been taxed in the state of the decedent's domicile. *Blackstone v. Miller*, 188 U. S. 189, 207, 47 L. Ed. 439. See, generally, the title TAXATION.

A tax was levied under a statute of New York on the transfer by will of certain property of a testator, who died domiciled in Illinois. The property consisted of a debt due to the deceased by a firm, and of a sum held on a deposit account by a bank of New York. The whole succession had been taxed in Illinois, the New York deposit being included. It was held that the fact that two states, dealing each with his own law of succession, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715; *Knowlton v. Moore*, 178 U. S. 41, 53, 44 L. Ed. 969. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *Brown v. Houston*, 114 U. S. 622, 635, 29 L. Ed. 257. It does not violate the fourteenth amendment. See *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 42 L. Ed. 1037; *Blackstone v. Miller*, 188 U. S. 189, 202, 203, 206, 47 L. Ed. 439.

"Succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from

Bequests to United States.—It is within the power of the state to impose an inheritance tax upon bequests to the United States.¹⁶

Legacies Consisting of United States Bonds.—Under the inheritance tax laws of a state, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form.¹⁷ Bonds of the United States and the income therefrom are lawfully taxable under an inheritance tax law of the United States though exempted by contract from such tax.¹⁸

IV. Property Subject to Taxation under Particular Statutes.

Like in character to the act of 1797, the act of 1862 imposed a tax on legacies and distributive shares of personal property, and also a probate duty chargeable against the mass of the estate.¹⁹ The act of 1864 in effect re-enacted both the probate duty or tax on the whole estate and the legacy tax on each particular legacy or distributive share,²⁰ and added a succession duty on real es-

the law of the domicile, or that by the law of the domicile the chattel is part of a universitas and is taken into account again in the succession tax there. *Eidman v. Martinez*, 184 U. S. 578, 586, 587, 592, 46 L. Ed. 697. See *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 168; *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 42 L. Ed. 1037; *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174; *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701." *Blackstone v. Miller*, 188 U. S. 189, 204, 44 L. Ed. 439.

16. Bequests to United States.—*United States v. Perkins*, 163 U. S. 625, 627, 41 L. Ed. 287; *Knowlton v. Moore*, 178 U. S. 41, 54, 44 L. Ed. 969; *Plummer v. Coler*, 178 U. S. 115, 129, 44 L. Ed. 998; *Snyder v. Bettman*, 190 U. S. 249, 254, 47 L. Ed. 1035; see *South Carolina v. United States*, 199 U. S. 437, 458, 50 L. Ed. 261.

The act of the state of New York imposing a tax upon inheritances is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it. *United States v. Perkins*, 163 U. S. 625, 630, 41 L. Ed. 287, cited in *Plummer v. Coler*, 178 U. S. 115, 132, 44 L. Ed. 998; *Knowlton v. Moore*, 178 U. S. 41, 54, 44 L. Ed. 969.

In *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, the right of the state of New York to levy a tax on a legacy bequeathed to the government of the United States was in part rested on the privilege enjoyed by the state of New York to regulate successions. Some state courts, on the other hand, have held that, despite the power of regulation, no greater privilege of taxation exists as to inheritance and legacy taxes than as to other property. *Knowlton v. Moore*, 178 U. S. 41, 58, 44 L. Ed. 969.

The United States are not a corporation "exempt by law from taxation," within the meaning of the New York statutes imposing a tax on inheritances. *United States v. Perkins*, 163 U. S. 625, 630, 41 L. Ed. 287.

17. Legacies consisting of United States bonds.—*Plummer v. Coler*, 178 U. S. 115, 117, 44 L. Ed. 998, citing *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 516, 51 L. Ed. 901.

"In *Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998 we held the incidental fact that the property bequeathed is composed in whole or in part of federal securities, did not invalidate the state tax or the law under which it was imposed, although it was accepted as undeniable that the state could not, in the exercise of the power of taxation, tax obligations of the United States, and, correlatively, that bonds issued by a state, or under its authority by its municipal bodies, were not taxable by the United States." *Snyder v. Bettman*, 190 U. S. 249, 250, 47 L. Ed. 1035.

Does not impair obligation of contracts.—A transfer or succession tax, not being a direct tax upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the constitution of the United States. *Orr v. Gilman*, 183 U. S. 278, 289, 46 L. Ed. 196.

18. Murdock v. Ward, 178 U. S. 139, 44 L. Ed. 1009; *Sherman v. United States*, 178 U. S. 150, 151, 44 L. Ed. 1014.

19. Property taxable under particular statutes—Acts of 1797, 1862.—*Knowlton v. Moore*, 178 U. S. 41, 51, 44 L. Ed. 969. The legacy tax imposed by the act of July 6, 1797, was charged upon the legacies and not upon the residue of the personal estate. *Knowlton v. Moore*, 178 U. S. 41, 50, 44 L. Ed. 969. See *Snyder v. Bettman*, 190 U. S. 249, 253, 47 L. Ed. 1035.

20. Act of 1864.—*Knowlton v. Moore*, 178 U. S. 41, 51, 44 L. Ed. 969. See, also, *Eidman v. Martinez*, 184 U. S. 578, 589,

tate.²¹ The statute of June 14, 1870, repealed the taxes imposed by the act of 1864 on legacies and successions after the first day of August, 1870.²² The tax imposed by the act of congress of June 13, 1898, is on particular legacies or distributive shares passing upon a death and not on the whole amount

46 L. Ed. 697; *Mason v. Sargent*, 104 U. S. 689, 690, 26 L. Ed. 894.

The act of 1864 taxed, not the whole estate, but each particular legacy or distributive share. *Knowlton v. Moore*, 178 U. S. 41, 71, 44 L. Ed. 969.

Estates in expectancy.—Under the act of congress of 1864 not only vested estates but estates which were not vested—those in expectancy merely—were within the statute, and taxable. *Clapp v. Mason*, 94 U. S. 589, 591, 24 L. Ed. 212. See, also, *Scholey v. Rew*, 23 Wall. 331, 348, 23 L. Ed. 99; *Wright v. Blakeslee*, 101 U. S. 174, 177, 25 L. Ed. 1048.

A., who died in October, 1846, devised his real estate to his daughter for life, with remainder in fee to her son B., should he survive her. She died in September, 1865. B. appeared, and claimed "that the estate was not liable to assessment for a succession tax." Thereupon the assessor assessed a tax of one per cent upon the full value of the property, which B. paid under protest. Held, that the tax was properly assessed. *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048.

21. Real estate.—*Knowlton v. Moore*, 178 U. S. 41, 51, 44 L. Ed. 969; *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99; *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212.

A devise of an equitable interest in real estate, in which personal property had been invested by the trustee with the assent of the devisor, before the making of the will, was a devolution of real estate within the meaning of the acts of June 30th, 1864, and July 13th, 1866, and the devisee is liable to the succession tax imposed thereby, in respect of it, if he has received its value, although in proceedings for partition he has had assigned to him only personal property. *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99.

By § 127 of the statute of 1864, it was provided that any disposition by will, or deed, or descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate or any interest therein upon the death of any person, shall be deemed to confer a succession. *Clapp v. Mason*, 94 U. S. 589, 590, 24 L. Ed. 212; *Wright v. Blakeslee*, 101 U. S. 174, 176, 25 L. Ed. 1048.

So where one devised his real estate to his daughter for life and the remainder in fee to her issue surviving her, it was held that the devolution of the property to such issue was a "succession," within the meaning of § 127 of the act of 1864 (June 30), 13 Stat. 287, and taxable. *Wright v. Blakeslee*, 101 U. S. 174, 176, 25 L. Ed. 1048.

Meaning of terms.—A "succession" was

declared to denote "the devolution of title to any real estate." *Clapp v. Mason*, 94 U. S. 589, 590, 24 L. Ed. 212; *Scholey v. Rew*, 23 Wall. 331, 346, 23 L. Ed. 99.

Real estate was defined to include all lands, tenements, and hereditaments, corporeal and incorporeal. *Clapp v. Mason*, 94 U. S. 589, 590, 24 L. Ed. 212.

Successor was employed in the act as the correlative to predecessor. *Scholey v. Rew*, 23 Wall. 331, 347, 23 L. Ed. 99.

Predecessor denoted the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived. *Scholey v. Rew*, 23 Wall. 331, 346, 23 L. Ed. 99, cited in *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 654, 39 L. Ed. 1108 (dissenting opinion—rehearing).

22. Act of 1870 repealing act of 1864.—*Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212.

As the statute of July 14, 1870, repealed the taxes imposed by the act of June 30, 1864, on legacies and successions, after the first day of August, 1870, a tax cannot be legally assessed under that act upon a succession accruing after such date. *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212; *Mason v. Sargent*, 104 U. S. 689, 26 L. Ed. 894; *Sturges v. United States*, 117 U. S. 363, 29 L. Ed. 920.

A., who died December 4, 1867, devised his real estate to his widow for her life, with remainder over to B. She died June 17, 1872, when B. entered. Held, that an internal revenue tax could not be legally assessed May 15, 1873, on B.'s succession, as the successor did not become entitled to the possession or enjoyment of the estate until the death of the widow, and the duty imposed extended only to successions accruing prior to August 1, 1870. *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 212.

M. died December 4, 1867. By his will certain personal property was bequeathed to plaintiffs in trust for his widow for her life, and upon her death to the children of the testator. The widow died on June 17, 1872. In April, 1873, a legacy tax was assessed upon such property; and May 13, 1873, plaintiffs paid said tax under protest to avoid distraint or other forcible process to collect the same. May 19, 1873, plaintiffs duly made claim upon the commissioner of internal revenue for the refunding of said tax, for the reason that the said property did not vest in possession in the plaintiffs' cestui que trust, until the death of the testator's widow, which occurred after October 1, 1870, the date at which the repeal of the legacy succession tax went into effect, and that the tax had not accrued at said date so as

of the personal property of the deceased;²³ under such act a legacy to one conditioned on his attaining a certain age is not taxable, with the exception of his present right to receive the income of such estate, until he attains the age specified, prior to the time when, if ever, such right or interests shall become absolutely vested in possession or enjoyment.²⁴ All legacies not exceeding ten thousand dollars are not taxed.²⁵

V. Materiality of Place of Residence of Decedent.

The inheritance tax law of congress of June 30, 1898, did not apply to non-residents who died intestate or testate under a will executed abroad,²⁶ nor did

to come within the saving clause of the act of repeal. Act of July 14, 1870, § 17. It was held that the tax was illegally demanded and collected. *Mason v. Sargent*, 104 U. S. 689, 692, 26 L. Ed. 894. To the same effect, see *Sturges v. United States*, 117 U. S. 363, 364, 365, 29 L. Ed. 920.

23. Act of 1898.—*Knowlton v. Moore*, 178 U. S. 41, 65, 44 L. Ed. 969, cited in *Sherman v. United States*, 178 U. S. 150, 151, 44 L. Ed. 1014.

24. Legacy conditional on legatees attaining specified age.—Sections 29, 30, ch. 448, act of June 13, 1898; *Vanderbilt v. Eidman*, 196 U. S. 480, 488, 49 L. Ed. 563. And this was not altered by the amendment of 1901.

In construing the act of congress of July 13, 1898, the court said: "In view of the express provisions of the statute as to possession or enjoyment and beneficial interest and clear value, and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment was subordinated to an uncertain contingency, it would, we think, be doing violence to the statute to construe it as taxing such an interest before the period when possession or enjoyment had attached. And such is the construction which has been affixed to some state statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a present right to possess or enjoy." *Vanderbilt v. Eidman*, 196 U. S. 480, 495, 49 L. Ed. 563.

"It is undoubtedly true that both under the act of 1862 and the act of June 30, 1864, 13 Stat. 223, 285, there was an administrative construction by which vested interests, although unaccompanied with the right of immediate possession or enjoyment, were treated as at once taxable. Without entering into details on the subject, we content ourselves with saying that it is also true that the correctness of that construction was in effect repudiated by legislative action (act of July 13, 1866, 14 Stat. 98, 140), and was, moreover, in substance, treated as unsound by the reasoning of the opinion in *Clapp v. Mason*, 94 U. S. 589, 24 L. Ed. 219." *Vanderbilt v. Eid-*

man, 196 U. S. 480, 501, 49 L. Ed. 563.

25. Legacies not taxed.—*Knowlton v. Moore*, 178 U. S. 41, 78, 44 L. Ed. 969, cited in *Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009.

26. Materiality of place or residence of decedent.—*Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697; *Moore v. Ruckgaber*, 184 U. S. 593, 46 L. Ed. 705.

The inheritance tax law of the United States did not apply in 1899, to the intangible personal property of a nonresident alien, who never had a domicile in the United States and died abroad—such personal property being within the United States and having passed to his son, also an alien domiciled abroad, as sole legatee and next of kin of the deceased, partly under a will executed abroad and partly under the intestate laws of Spain. *Eidman v. Martinez*, 184 U. S. 578, 580, 46 L. Ed. 697.

The inheritance tax law of the United States, June 30, 1898, c. 448, applies to property "passing by will or by the intestate laws of any state or territory." It is the locality of the property within the jurisdiction of the United States which subjects it, if at all, to the legacy or succession tax. *Eidman v. Martinez*, 184 U. S. 578, 582, 46 L. Ed. 697.

The words "passing by will" are limited to wills executed in "any state or territory" under whose laws the property would pass, if the owner had died intestate. The whole scheme of the act evidently contemplates the application of the tax only to the property of a person domiciled in a state or territory of the United States whose property is transmitted under our laws. *Eidman v. Martinez*, 184 U. S. 578, 581, 590, 46 L. Ed. 697.

The actual situs of the property in cases of taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country, cuts but a small figure, while in the case of general taxes upon such property it is now considered determinative of the whole business. *Eidman v. Martinez*, 184 U. S. 578, 589, 46 L. Ed. 697.

The New York cases seem rather to accentuate the general principle that general statutes imposing taxes upon legacies do not apply to the personal property of nonresident testators, and that a special inclusion of such is necessary to subject

it apply to deceased persons domiciled abroad who left property by will executed in this country.²⁷

VI. Assessment, Rate and Payment.

A. Assessment.—In assessing a tax upon the right to take property by will or descent, the state may lawfully measure or fix the amount of the tax by referring to the value of the property passing.²⁸ The tax must be measured by the amount of each legacy and not by the amount of the entire estate.²⁹

When Made.—By the act of 1866 an assessment was to be made within 30 days from the time the party became entitled to the possession of the estate.³⁰

B. Rate.—The rate of the tax imposed by act of congress, June 13, 1898, is primarily determined by the classifications and progressively increased according to the amount of the legacies or shares.³¹

C. Payment.—When Tax Payable.—By the express terms of § 125 of the act of 1864, as amended by the act of 1866, the tax or duty became due and payable only when "the party interested in such legacy, etc., shall become entitled to the possession or enjoyment thereof."³²

Excessive Payment.—Where the taxes actually levied and paid on legacies left by will are computed upon the mistaken assumption that the amount of the whole estate is the measure of the tax, and not the amount of the respective legacies, the legatee is entitled to be repaid the excess thus imposed upon his legacy.³³

it to taxation. *Eidman v. Martinez*, 184 U. S. 578, 587, 46 L. Ed. 697.

The North Carolina inheritance act imposed a tax upon "all personal property or goods bequeathed to strangers or collateral kindred, or which shall be distributed to, or amongst the next of kin, of any intestate, when such next of kin are collateral relations of such intestate." The act was held to apply to property in North Carolina descending to a brother from an intestate domiciled in Canada. The court was satisfied that the true principle, both in regard to real and personal property, was the situs of the property. The North Carolina case was decided in 1854, and has not been followed in any other state. *Eidman v. Martinez*, 184 U. S. 578, 588, 46 L. Ed. 697.

The English cases clearly appear to hold that, under a general act imposing a duty upon legacies, the law of the domicile of the testator controls, and if he be domiciled abroad, whether an alien or a British subject, his legacies are exempt, whether the property be in England at the time of his death, or be subsequently remitted there by his executors for local administration and distribution. The state decisions upon the same subject, with one or two exceptions, tend in the same direction. *Eidman v. Martinez*, 184 U. S. 578, 586, 46 L. Ed. 697.

27. *Moore v. Ruckgaber*, 184 U. S. 593, 598, 46 L. Ed. 705.

28. Tax measured by value of property passing.—*Plummer v. Coler*, 178 U. S. 115, 44 L. Ed. 998, cited in *Murdock v. Ward*, 178 U. S. 139, 146, 44 L. Ed. 1009.

29. *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009.

30. When assessment made.—*Clapp v. Mason*, 94 U. S. 589, 592, 24 L. Ed. 212.

31. Rate of tax.—*Knowlton v. Moore*, 178 U. S. 41, 77, 44 L. Ed. 969.

By the act of congress, June 13, 1898, § 29, ch. 448, all legacies not exceeding ten thousand dollars are not taxed, and those above that amount are taxed primarily by the degree of relationship or absence thereof, specified in the five classifications contained in the statute, and the rate of tax is progressively increased by the amount of each separate legacy or distributive share. *Knowlton v. Moore*, 178 U. S. 41, 78, 44 L. Ed. 969, cited in *Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009.

32. When tax payable.—*Mason v. Sargent*, 104 U. S. 689, 692, 26 L. Ed. 894.

Under the statute of 1864 contemplating the payment of one succession duty only upon the death of an owner of real estate, the succession was not deemed taxable until such time as the successor should be entitled to its possession. *Clapp v. Mason*, 94 U. S. 589, 591, 24 L. Ed. 212.

Under the laws of Louisiana imposing tax on property inherited in that state by any person not domiciliated there, and not being a citizen of any state or territory of the United States, the right to the tax is complete, and vests in the state upon the death of the person from whom the property is inherited. *Prevost v. Grencaux*, 19 How. 1, 6, 15 L. Ed. 572.

33. Excessive payment.—*Sherman v. United States*, 178 U. S. 150, 152, 44 L. Ed. 1014. See *Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009; *Fidelity Ins., etc., Co. v. McClain*, 178 U. S. 113, 44 L.

Duty of Executor to Pay.—See footnote.³⁴

Mode of Collection.—See footnote.³⁵

VII. Lien of Succession Tax.

See footnote.³⁶

VIII. Penalty—Failure to Make Return.

See footnote.³⁷

IX. Recovery of Taxes Wrongfully Imposed.

Tax on Exempt Legacies.—See footnote.³⁸

Where Tax Excessive.—See post, "Payment," VI, C.

SUCESION LEGITAMA.—See note 1.

Ed. 998; *High v. Coyne*, 178 U. S. 111, 112, 44 L. Ed. 997.

34. Duty of executor to pay.—Before payment and distribution to the legatees, etc., an executor, administrator or trustee is required to pay "the amount of the duty or tax assessed upon such legacy or distributive share." Section 30, Act of Congress June 13, 1898; *Knowlton v. Moore*, 178 U. S. 41, 67, 44 L. Ed. 969; *Vanderbilt v. Eidman*, 196 U. S. 480, 494, 49 L. Ed. 563. See *Mason v. Sargent*, 104 U. S. 689, 691, 26 L. Ed. 894.

35. Mode of collection.—In the act of 1797, imposing a legacy tax, the mode of collection provided was by stamp duties laid on the receipts evidencing the payment of the legacies or distributive shares in personal property. Act, July 6, 1797, c. 11, 1 Stat. 527; *Knowlton v. Moore*, 178 U. S. 41, 50, 44 L. Ed. 969.

36. The act of 1864 contained no statement or intimation that the duty imposed by such act created any lien upon the land, or that any obligation arose, or that any right accrued at a period earlier than that fixed for the payment of the duty. See §§ 133, 137. By the statute of 1866 the duty became a lien on the succession "from the time when such tax shall become due and payable." 14 Stat., p. 140. *Clapp v. Mason*, 94 U. S. 589, 592, 24 L. Ed. 212. See *Scholey v. Rew*, 23 Wall. 331, 347, 23 L. Ed. 99.

The provision in § 125 of the act of 1864, that the tax or duty thereby imposed shall be a lien or charge upon the property bequeathed for twenty years, or until the same is paid within that period, determines nothing as to the time when the tax accrues. It becomes a lien only from that time; for the lien presupposes the existence of the tax, for which it is a security, and is a charge upon the property, out of which it is payable and upon which it is imposed. *Mason v. Sargent*, 104 U. S. 689, 692, 26 L. Ed. 894.

37. The penalty for failing to return and give notice of a succession tax is provided for in § 148 of the act of 1864 (as amended by the act of 1866), which declares that if any person required to

give such notice (of a succession) should willfully neglect to do so within the time required by law, he should be liable to pay to the United States a sum equal to ten per cent upon the amount of tax payable by him. This is the specific penalty provided for the special case, and necessarily excludes any other. *Wright v. Blakeslee*, 101 U. S. 174, 178, 25 L. Ed. 1048.

The penalty prescribed by the fourteenth section of the act of 1864 (as amended by the act of July 13, 1866), which was a penalty of fifty per cent of the tax for refusal or neglect to make a list or return, related to the annual and monthly lists and returns to be made by parties taxable under the law. *Wright v. Blakeslee*, 101 U. S. 174, 178, 25 L. Ed. 1048.

A., who died in October, 1846, devised his real estate to his daughter for life, with remainder in fee to her son B., should he survive her. She died in September, 1865. B. was duly notified to make the return required by § 14 of the internal revenue act of June 30, 1864 (13 Stat. 226), and on his refusal to do so was summoned in June, 1867, to appear before the assessor of the proper district. The assessor assessed a tax of one per cent upon the full value of the property, and added thereto a penalty of fifty per cent and costs, all of which B., July 20, 1867, paid under protest to the collector. It was held that the penalty was erroneously imposed. *Wright v. Blakeslee*, 101 U. S. 174, 25 L. Ed. 1048.

38. Tax on exempt legacies.—By the act of congress of 1898 legacies not exceeding ten thousand dollars are not taxed and when taxes are imposed on such, the amount of such taxes may be recovered back. *Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009, citing *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969.

1. It is possible for the words *sucesion legitama* in a will to mean either issue or lawful heirs. In this case it was held they meant issue. *Rodriguez v. Vironi*, 201 U. S. 371, 376, 50 L. Ed. 792. See, generally, the title *WILLS*.

SUCH.—See note 1.

SUED.—See note 2.

SUFFER.—As to an insolvent suffering a judgment to be rendered against him, constituting a preference, see the title *BANKRUPTCY*, vol. 2, pp. 810, 941.

SUFFICIENT.—See note 3.

SUFFRAGE.—See the title *ELECTIONS*, vol. 5, p. 721.

SUGAR.—See the title *REVENUE LAWS*, vol. 10, p. 887.

SUGAR BOUNTIES.—See the titles *BOUNTIES*, vol. 3, p. 511.

SUGGESTION OF DEATH.—See the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 45.

SUICIDE.—See the titles *ACCIDENT INSURANCE*, vol. 1, p. 59; *INSURANCE*, vol. 7, p. 140.

SUIT.—See the title *ACTIONS*, vol. 1, pp. 99, 100, and references there given. See, also, *PROCEEDINGS IN REM AND IN PERSONAM*, vol. 9, p. 786.

SULPHATE OF POTASH.—See the title *REVENUE LAWS*, vol. 10, p. 897.

SUM.—One of the lexical definitions of the word "sum," and the sense in which it is most commonly used, is "money." Sum. (2) A quantity of money or currency; any amount indefinitely, as a sum of money, a small sum, or a large sum." Webster's Dic. "For a less sum than one dollar" means exactly the same thing as for a less sum of money than one dollar. In the former case there is an ellipsis. In the latter, it is supplied. The implication where the omission occurs is as clear and effectual as the expression where the latter is added. The grammatical construction and the obvious meaning are the same.⁴

SUMMARY ABATEMENT OF NUISANCES.—See the title *NUISANCES*, vol. 8, p. 941.

SUMMARY PROCEEDINGS.—See the titles *APPEAL AND ERROR*, vol. 2, p. 210; *CONTEMPT*, vol. 4, p. 539; *JURY*, vol. 7, p. 764; *MOTIONS AND SUMMARY PROCEEDINGS*, vol. 8, p. 528. As to summary proceedings on appeal bonds, see the title *APPEAL AND ERROR*, vol. 2, p. 193.

1. **Such ship or vessel.**—In a provision containing the phrase "such ship or vessel," the word **such** referred only to the ship or vessel previously spoken of. See *United States v. Goodling*, 12 Wheat. 460, 477, 6 L. Ed. 693.

Such court.—As to the words "such court," referring to the court in which the motion against a sheriff in Virginia for not paying over moneys collected on execution has been made, and not to the term to which notice was given, see *Turner v. Fendall*, 1 Cranch 117, 132, 2 L. Ed. 53.

Such bond or bonds.—See *United States v. Bank*, 6 Pet. 29, 37, 8 L. Ed. 308.

2. **Sued.**—Where corporations have in express terms, in consideration of a grant of the privilege of doing business within

the state, agreed that they may be **sued** there; that is to say, that they may be found there for the purposes of the service of process issued "by any court of the commonwealth having jurisdiction of the subject matter," this condition imposed by the state upon the privilege granted is not unreasonable. Ex parte Schollenberger, 96 U. S. 369, 376, 24 L. Ed. 853.

3. **Sufficient.**—In a statute, providing that "the deed should be taken and considered by the court as **sufficient** evidence of the authority under which said sale was made," it was held that the term **sufficient** was evidently used in the statute as a synonym for "prima facie," and not for "conclusive." *Parker v. Overman*, 18 How. 137, 152, 15 L. Ed. 318.

4. **Sum.**—*United States v. Van Auker*, 96 U. S. 366, 368, 24 L. Ed. 852.

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As to necessity for new process on supplemental bill, see the title EQUITY, vol. 5, p. 857. As to appearance as waiver of objections to summons and process, see the title APPEARANCES, vol. 2, pp. 434, 438, 448. As to whether an appearance to file a petition to remove a cause waives objections to insufficiency of summons, see the title REMOVAL OF CAUSES, vol. 10, p. 705. As to issuance and service of writ of error, see the title APPEAL AND ERROR, vol. 2, p. 142. As to right to enjoin a judgment because of false return of process, see the title JUDGMENTS AND DECREES, vol. 7, p. 633. As to notice of taking depositions, see the title DEPOSITIONS, vol. 5, p. 324. As to service by publication in appellate proceedings, see the title APPEAL AND ERROR, vol. 2, p. 164. As to faith and credit accorded to foreign judgments rendered upon improper service of process or without service, see the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 350. As to whether laws relating to process violate the obligation of a contract, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 873. As to service of process under the Confiscation Act, see the title WAR. As to necessity for service on all parties when they are very numerous, see the title PARTIES, vol. 9, p. 47. As to monition in admiralty practice, see the title ADMIRALTY, vol. 1, p. 176. As to what law governs the federal courts with respect to summons and process, see the title COURTS, vol. 4, p. 1137. As to service on states, see the title COURTS, vol. 4, p. 1020. As to contempt of court in violating supersedeas, see the title CONTEMPT, vol. 4, p. 534. As to review of decision of state courts upon constitutionality of state statute allowing service on foreign corporations, see the title APPEAL AND ERROR, vol. 1, p. 623. As to whether the sufficiency of service of process is a jurisdictional question under the court of appeals act, see the title APPEAL AND ERROR, vol. 1, pp. 440, 460. As to notice in tax proceedings, see the title TAXATION. As to fees of marshal for serving process, see the title UNITED STATES MARSHALS. As to constitutional objections to the sufficiency of summons or service of process, see the title DUE PROCESS OF LAW, vol. 5, pp. 647, 648, 649, 650, 651, 652. As to proceedings against absent defendants, see the title QUIETING TITLE, vol. 10, p. 449. As to whether service of process is the commencement of the suit, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1006. As to sufficiency of process to protect officers acting thereunder, see the title PUBLIC OFFICERS, vol. 10, p. 363. As to publication of notice of application to sell lunatic's real estate, see the title INSANITY, vol. 6, p. 1074. As to necessity for service to sustain judgment by default, see the title JUDGMENTS AND DECREES, vol. 7, p. 658. As to privilege from summons and service, see the title PRIVILEGE, vol. 9, p. 735.

I. Kinds of Notice.

Process is divided into original, mesne and final.¹ Notice may be actual or constructive, as prescribed by law. Where actual notice is required, personal

¹ Under the practice in Pennsylvania writs of *capias* and summons are more similar to the originals out of chancery, than the *latitat* and *clausum fregit*, which are both writs of trespass. *Schlosser v. Leshner*, 1 Dall. 411, 1 L. Ed. 200.

service, in a legal manner, of due process, is a compliance with the requirement; and, in cases where constructive notice is allowed, the duty of the moving party is fulfilled if he complies in every respect with the law, usage, or rule of practice, as the case may be, which prescribes that mode of service.² A rule upon a party to show cause is sometimes sufficient process.³

II. Necessity for Service.

A. In General.—Service of process or notice to appear is essential to the jurisdiction of all courts,⁴ as sufficiently appears from the well-known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his defense.⁵ And if jurisdiction is taken where there has been no service of process, or notice, or a statutory substitute for it, the proceeding is not only voidable, but absolutely void,⁶ and may be collaterally at-

2. Actual and constructive notice.—*Earle v. McVeigh*, 91 U. S. 503, 504, 23 L. Ed. 398.

3. Rule to show cause is adequate.—*Kennard v. Morgan*, 92 U. S. 480, 23 L. Ed. 478.

The mere fact that a proceeding to hold one liable upon a judgment was by rule to show cause why he should not be held liable upon such judgment does not conflict with due process under the fourteenth amendment. The service of the rule was adequate notice. *Louisville, etc., R. Co. v. Schmidt*, 177 U. S. 230, 238, 44 L. Ed. 747.

4. Notice to appear is essential to jurisdiction.—*Mills v. Duryee*, 7 Cranch 481, 3 L. Ed. 411; *The Mary*, 9 Cranch 126, 144, 3 L. Ed. 678; *Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. Ed. 922; *Toland v. Sprague*, 12 Pet. 300, 329, 9 L. Ed. 1093; *Flowers v. Foreman*, 23 How. 132, 16 L. Ed. 405; *Nations v. Johnson*, 24 How. 195, 203, 16 L. Ed. 628; *Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. Ed. 931; *Earle v. McVeigh*, 91 U. S. 503, 507, 510, 23 L. Ed. 398; *Windsor v. McVeigh*, 93 U. S. 274, 277, 278, 23 L. Ed. 914; *Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500; *Smith v. Woolfolk*, 115 U. S. 143, 149, 29 L. Ed. 357.

No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. *Webster v. Reid*, 11 How. 437, 459, 13 L. Ed. 761.

A service set aside is never service by which a judgment in the action can be upheld. *Windsor v. McVeigh*, 93 U. S. 274, 282, 23 L. Ed. 914.

Even in proceedings in rem, notice is requisite in order that the sentence may have any validity. Every person, said Marshall, C. J., may make himself a party to such a proceeding, and appeal from the sentence, but notice of the controversy is necessary in order that one may become a party; and it is a principle of natural justice, of universal obligation, that, before the rights of an individual can be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. *The Mary*, 9 Cranch 126, 144, 3 L. Ed. 678; *Earle v.*

McVeigh, 91 U. S. 503, 510, 23 L. Ed. 398.

Proceedings in a state court cannot be sustained as proceedings in rem where no notice, either personal or constructive, is provided for by the state statute. "It is essential to such a proceeding that there should at least be constructive notice, by some form of publication or advertisement, to adverse claimants, to appear and maintain their rights before a judgment in such a proceeding can operate even as prima facie evidence. *Windsor v. McVeigh*, 93 U. S. 274, 278, 279, 23 L. Ed. 914." *Hassall v. Wilcox*, 130 U. S. 493, 504, 32 L. Ed. 1001.

By international law, a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state, if the defendant had not been served with process, or voluntarily made defense, because neither the legislative jurisdiction nor that of the courts of justice had binding force. *D'Arcy v. Ketchum*, 11 How. 165, 174, 13 L. Ed. 648; *Hall v. Lanning*, 91 U. S. 160, 169, 23 L. Ed. 271.

A judgment recovered in the common pleas, at Westminster, England, against a person in the United States, without any service of process on him, or any notice of the suit other than a personal one served on him in this country, has no validity here, even of a prima facie character. *Bischoff v. Wethered*, 9 Wall. 812, 19 L. Ed. 829.

5. D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; *Nations v. Johnson*, 24 How. 195, 203, 16 L. Ed. 628; *Mason v. Eldred*, 6 Wall. 231, 239, 18 L. Ed. 783; *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. Ed. 80; *Lasere v. Rochereau*, 17 Wall. 437, 21 L. Ed. 694; *Earle v. McVeigh*, 91 U. S. 503, 510, 23 L. Ed. 398; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Renaud v. Abbott*, 116 U. S. 277, 288, 29 L. Ed. 629.

6. Proceedings without notice are void.—*Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 393; *Boswell v. Otis*, 9 How. 336, 13 L. Ed. 164; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Harris v. Hardeman*, 14 How. 334, 339, 14 L. Ed. 444; *Windsor v. McVeigh*, 93 U. S. 274, 277, 23 L. Ed. 914.

When the judgment by default was

tacked.⁷ But this is only where original jurisdiction is exercised, and does not apply to a decision of a collateral question, in a case where the parties are before the court.⁸

B. In Equity—1. IN GENERAL.—After a decree disposing of the issues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process, or appearance, to institute further proceedings on new issues and for new objects, although connected with the subject matter of the original litigation, by merely giving the new proceedings the title of the original cause. If his bill begins a new litigation, the parties against whom he seeks relief are entitled to notice thereof, and without it they will not be bound.⁹

2. UPON AMENDED AND SUPPLEMENTAL PLEADINGS.—New process is necessary, unless waived, upon a supplemental bill and a bill of revivor, but not upon an amended bill as to defendants who are already before the court. Being in court they are bound to take notice of the filing of such bills as of any other proceeding in the case.¹⁰

3. UPON CROSS BILL IN SAME SUIT.—In Illinois where an infant is in court by his original bill, process is not required upon a cross bill against him in the same suit.¹¹

C. Service on Several Defendants.¹²—In most of the states legislative acts have been passed, called joint-debtor acts, which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They are generally held to bind the common

given, the court was not in a condition to exercise jurisdiction over the defendant, because there was no regular service of process, actual or constructive. *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444.

Purchaser of mortgaged premises, not served with process, is not bound by foreclosure proceedings. *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909.

Judgment in attachment cannot be sustained where there is no service on the person of the defendant. *Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. Ed. 587.

Before any proceedings to quiet title could rightfully be taken against the defendants, it was essential that either they be brought into court by service of process or that a lawful appearance be made in their behalf. *Hatfield v. King*, 184 U. S. 162, 166, 46 L. Ed. 481.

7. Collateral attack.—*Cox v. United States*, 131 U. S., appx. c, 19 L. Ed. 500, citing *Nations v. Johnson*, 24 How. 195, 203, 16 L. Ed. 628, and holding service upon the secretary of the interior after his resignation did not bind his successor.

8. Decision of collateral questions.—*Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 393.

9. New process in equity proceedings.—*Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. Ed. 986, following *Smith v. Woolfolk*, 115 U. S. 143, 29 L. Ed. 357. See, also, *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

After final decree parties are not bound to take notice of subsequent proceedings,

unless served with process, or voluntarily appearing. *Smith v. Woolfolk*, 115 U. S. 143, 29 L. Ed. 357. This case is approved in *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 336, 40 L. Ed. 986, in which it was held that a bill, subsequent to a decree beginning new litigation, requires service.

10. New process upon amended pleadings.—*French v. Hay*, 22 Wall. 238, 246, 22 L. Ed. 854; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Smith v. Woolfolk*, 115 U. S. 143, 148, 29 L. Ed. 357.

Ejectment.—After judgment, the parties are still in court, for all the purposes of giving effect to it; and in the action of ejectment, the court having power to extend the demise, after judgment, the defendant may be considered in court, on a motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. In no correct sense, is this power of amendment similar to the exercise of an original jurisdiction between parties on whom process has not been served. *Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 393.

11. Necessity for process upon cross bill in same suit.—*Kingsbury v. Buckner*, 134 U. S. 650, 676, 33 L. Ed. 1047.

12. As to validity of statute directing that process served against one of several defendants may support a judgment against such defendant, see the title DUE PROCESS OF LAW, vol. 5, p. 650.

property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and, whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only *prima facie* binding, on the latter.¹³ There can be no doubt of the power of the state legislatures to pass these acts.¹⁴ But a decree against several defendants is binding on those only who are served with process; as to those who are not served the decree is of no effect.¹⁵ The proceedings may be dismissed as to those not served.¹⁶

III. Issuance.

A. Time of Issuance.—Whenever a writ issues fairly, if it is first delivered, it shall take preference.¹⁷

B. Præcipe.¹⁸—A *præcipe* is necessary to secure the issuance of a bench warrant,¹⁹ but not for a *mittimus* after sentence.²⁰

IV. Form, Requisites and Sufficiency of Summons.

The writ or summons must sufficiently state the nature of the cause of action;²¹

13. Joint-debtor acts.—Hall *v.* Lanning, 91 U. S. 160, 168, 23 L. Ed. 271; Renaud *v.* Abbott, 116 U. S. 277, 287, 29 L. Ed. 629.

Practice in Louisiana.—Renaud *v.* Abbott, 116 U. S. 277, 288, 29 L. Ed. 629.

But the rule that exonerates a defendant actually served with process from the obligation of a judgment, because rendered also against another who has not been served, and therefore is not bound, is purely technical, and when by the local law, according to which such a judgment has been rendered, a different rule has been established, which enforces the personal obligation of the defendant who has been served or who has appeared in the action, the act of congress requires that the same effect shall be given to it in every other state in which it may be sued on, whatever may be the rule that there prevails in respect to its domestic judgments. Renaud *v.* Abbott, 116 U. S. 277, 288, 29 L. Ed. 629.

14. Joint-debtor acts are constitutional.—Mason *v.* Eldred, 6 Wall. 231, 18 L. Ed. 783; Eldred *v.* Bank, 17 Wall. 545, 21 L. Ed. 685; Hall *v.* Lanning, 91 U. S. 160, 168, 23 L. Ed. 271; Sawin *v.* Kenny, 93 U. S. 289, 23 L. Ed. 926; Hanley *v.* Donoghue, 116 U. S. 1, 3, 29 L. Ed. 535; Renaud *v.* Abbott, 116 U. S. 277, 287, 29 L. Ed. 629.

15. Binding effect of decree.—Godfrey *v.* Terry, 97 U. S. 171, 24 L. Ed. 944; Shelton *v.* Tiffin, 6 How. 163, 12 L. Ed. 387.

A personal judgment, rendered in one state against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the state where rendered of any personal liability to the plaintiff of the parties proceeded against by publication. Board of Public Works *v.* Columbia College, 17 Wall. 521, 21 L. Ed. 687.

If a judgment is rendered in one state against two partners jointly, after serv-

ing notice upon one of them only, under a statute of the state providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another state, or in a court of the United States, against the partner who was not served with process. D'Arcy *v.* Ketchum, 11 How. 165, 13 L. Ed. 648; Hall *v.* Lanning, 91 U. S. 160, 169, 23 L. Ed. 271; Goldey *v.* Morning News, 156 U. S. 518, 521, 39 L. Ed. 517, reaffirmed in Sharkey *v.* Indiana, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1266.

16. Dismissal.—Where a bill was filed in the district court of the United States for the northern district of Mississippi, against four defendants, who all resided in Alabama, two of whom appeared for the purpose of moving to dismiss the bill, and the other two declined to appear altogether, nor was process served upon them, the court had no alternative but to dismiss the bill. The two absentees were essential parties. Herndon *v.* Ridgway, 17 How. 424, 15 L. Ed. 100.

17. Time of issuance.—Steiner *v.* Fell, 1 Dall. 22, 1 L. Ed. 20.

18. See post, "Amendment of Process," IX. As to fees of clerk for filing *præcipe*, see the title CLERKS OF COURT, vol. 3, p. 860.

19. Necessity for præcipe.—United States *v.* Van Duzee, 140 U. S. 169, 175, 35 L. Ed. 399.

20. United States v. Van Duzee, 140 U. S. 169, 175, 35 L. Ed. 399.

21. By the practice in Pennsylvania, writs of *capias* and summons always specify the nature of the action you are to declare upon. Schlosser *v.* Leshner, 1 Dall. 411, 1 L. Ed. 200.

Under the statutes of Arkansas a summons commanding the marshal to summon defendants to answer in a certain court a complaint filed against them in such court by certain named plaintiffs, sufficiently sets forth the nature of the

must be properly directed,²² and must be sealed.²³

V. Service of Process.

A. By Whom Served.—The rule in the United States courts is that process must be served by the marshal or his deputy.²⁴

B. Manner of Service—1. **IN GENERAL.**—The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations.²⁵

2. **SUBSTITUTED SERVICE**—a. *Service on Party by Delivery of Copy of Process.*—The statutes in many of the states provide that where a personal service cannot be made on a defendant, a copy of the process is to be delivered to some person of his family above a certain age, at his dwelling house or usual place of abode, or by leaving a copy thereof at the dwelling house or other known place of residence.²⁶

complaint. *Eddy v. Lafayette*, 163 U. S. 456, 41 L. Ed. 225.

22. **In suits against counties in Kansas** the writ is properly directed to the county in its corporate name. *Commissioners v. Sellew*, 99 U. S. 624, 25 L. Ed. 333.

23. **Process without seal is void.**—*Insurance Co. v. Hallock*, 6 Wall. 556, 558, 18 L. Ed. 948. As to sealing warrants of United States Commissioners, see the title **WARRANTS**.

When sealing excused.—The failure to impress the writ with such a seal as the law requires does not avoid it, where no such seal has been provided the clerk, or where the engraved seal has been destroyed or stolen. In such case the clerk may affix an ordinary private seal or scroll to the writ, with a statement that no seal has yet been procured and only a reasonable time elapses to procure such a seal. *Wehrman v. Conklin*, 155 U. S. 314, 39 L. Ed. 167.

24. **Process served by marshal or deputy.**—*United States v. Montgomery*, 2 Dall. 335, 1 L. Ed. 404; *Martin v. Gray*, 142 U. S. 236, 35 L. Ed. 997.

Process may be served by a general deputy, designated by the marshal for the special service. *Martin v. Gray*, 142 U. S. 236, 35 L. Ed. 997.

Service by a de facto officer may be valid. *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314.

Service of capias.—*Quære*, whether a deputy marshal can plead in abatement, that the capias was not served on him by a disinterested person? *Knox v. Summers*, 3 Cranch 496, 2 L. Ed. 510.

25. **Method of service.**—*Kibbe v. Benson*, 17 Wall. 624, 21 L. Ed. 741; *Alexandria v. Fairfax*, 95 U. S. 774, 24 L. Ed. 583; *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110; *Amy v. Watertown*, No. 1, 130 U. S. 301, 316, 32 L. Ed. 946.

"Where actual notice is required, personal service, in a legal manner, of due process, is a compliance with the requirement; and in cases where constructive notice is allowed, the duty of the moving

party is fulfilled if he complies in every respect with the law, usage or rule of practice, as the case may be, which prescribes that mode of service." *Earle v. McVeigh*, 91 U. S. 503, 504, 23 L. Ed. 393.

When the proceedings are against the person, notice is served personally, or by publication; but where they are in rem, notice is served upon the thing itself. *Nations v. Johnson*, 24 How. 195, 205, 16 L. Ed. 628.

26. **Service by delivery of copy of process.**—*Settlemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110.

It was held, under the Mississippi statute, that where a marshal made the following return to a writ of capias: "Executed on the defendant Hardeman, by leaving a true copy at his residence," this service was neither in conformity with the statute nor the rule, and a judgment rendered thereon would be set aside. *Harris v. Hardeman*, 14 How. 334, 14 L. Ed. 444.

Leaving a copy in a distant corner of the yard, one hundred and twenty-five yards from the house, is not delivering a copy "at" the dwelling house of defendant. *Kibbe v. Benson*, 17 Wall. 624, 21 L. Ed. 741.

What return of sheriff must show.—In ejectment for lands in Oregon, the defendant claimed title under a sheriff's deed, pursuant to a sale of them under execution sued out upon a judgment by default rendered in 1861 against A in the state court. A certified transcript of the judgment record, consisting, as required by the statute, of a copy of the complaint and notice, with proof of service, and a copy of the judgment, was put in evidence. The statute also required that in actions in personam service should be made by the sheriff's delivering to the defendant personally, or, if he could not be found, to some white person of his family above the age of fourteen years, at his dwelling house or usual place of abode, a copy of the complaint and notice to answer. The suit against A was for the re-

b. Service by Posting Copy.—The service of process by posting a copy on the door of a dwelling house is not a good service, if it appears by competent evidence that the house was not the usual place where the defendant or his family resided at the time the notice was posted.²⁷

C. Time of Service.—The statutes generally provide that process to commence a suit must be executed within a certain time before the return day.²⁸

D. Place of Service.—1. **SERVICE OUT OF STATE.**—The process of the state courts does not and cannot run beyond the territorial limits of that state. The service of such process within another state would be void, and the judgment obtained thereon of no effect.²⁹

2. **SERVICE OUT OF DISTRICT.**—The district and circuit courts of the United States cannot, either in actions at law or suits in equity, send their process into

covery of money, and the sheriff's return showed that service was made "by delivering to the wife of A, a white woman over fourteen years of age, at the usual place of abode," a copy of the complaint and notice; but it contained no statement that A could not be found. At the ensuing term, judgment was rendered against him, with a recital that the "defendant, although duly served with process, came not, but made default." Held: 1. That the court, by such service, acquired no jurisdiction over the person of A, and its judgment was void. 2. That such substituted service, if ever sufficient for the purposes of jurisdiction, can only be made where the condition upon which it is permissible is shown to exist. 3. That the inability of the sheriff to find A was not to be inferred, but to be affirmatively stated in his return. 4. That the said recital is not evidence of due service, but must be read in connection with that part of the record which sets forth, as prescribed by statute, the proof of service. 5. That such proof must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former. *Settlemyer v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110.

27. Posting copy at "usual place of abode."—*Boswell v. Otis*, 9 How. 336, 350, 13 L. Ed. 164; *Harris v. Hardeman*, 14 How. 334, 340, 14 L. Ed. 444; *Earle v. McVeigh*, 91 U. S. 503, 509, 23 L. Ed. 398.

What is meant by "usual place of abode."—When the law provides that notice may be posted on the "front door of the party's usual place of abode," in the absence of the family, the intention evidently is that the person against whom the notice is directed should then be living or have his home in the said house. He may be temporarily absent at the time the notice is posted; but the house must be his usual place of abode, so that, when he returns home, the copy of the process posted on the front door will operate as notice; which is all that the law requires. By the expression, "the usual place of abode," the law does not mean the last place of abode; for a party may change his place of abode every month in the year. Instead of that, it is only on the

door of his then present residence where the notice may be posted, and constitute a compliance with the legal requirement. *Earle v. McVeigh*, 91 U. S. 503, 508, 23 L. Ed. 398.

Residence within Confederate lines.—Where the statute of a state provided that, during the absence of a party and all the members of his family, notice of a suit might be posted upon the front door of his "usual place of abode," held, that a notice posted upon a house seven months after it had been vacated by the defendant and his family, and while they were residing within the Confederate lines, was not posted upon his "usual place of abode," and that a judgment founded on such defective notice was absolutely void. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398.

28. Time of service of summons.—*Dobyns v. United States*, 3 Cranch 241, 2 L. Ed. 427. (In suit on internal revenue collector's bond, writ to be executed fourteen days before the return day.)

A subpoena issuing in a suit in equity should be served sixty days before the return; otherwise an alias subpoena will be awarded. *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *New York v. Connecticut*, 4 Dall. 1, 1 L. Ed. 715; *New Jersey v. New York*, 5 Pet. 284, 289, 8 L. Ed. 127.

Summons in equity suits against a state had to be served sixty days before the return day. *Grayson v. Virginia*, 3 Dall. 320, 1 L. Ed. 619; *New York v. Connecticut*, 4 Dall. 1, 6, 1 L. Ed. 715; *New Jersey v. New York*, 3 Pet. 461, 7 L. Ed. 741; *New Jersey v. New York*, 5 Pet. 284, 8 L. Ed. 127.

The marshal of the District of Columbia is bound to serve a subpoena in chancery, as soon as he reasonably can. *Kennedy v. Brent*, 6 Cranch 187, 3 L. Ed. 194.

29. Process cannot run out of state.—*Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169; *Tioga Railroad v. Blossburg, etc., Railroad*, 20 Wall. 137, 147, 22 L. Ed. 331.

Under the Virginia compact the state of Indiana has the right to serve process on the Ohio river opposite its shores below low-water mark. *Wedding v. Meyler*, 192 U. S. 573, 48 L. Ed. 570.

another district, except where especially authorized to do so by act of congress.³⁰

30. Process of federal courts cannot run out of district.—*Logan v. Patrick*, 5 Cranch 288, 3 L. Ed. 103; *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 18 How. 421, 453, 15 L. Ed. 435; *Chaffee v. Hayward*, 20 How. 208, 216, 15 L. Ed. 804; *United States v. Union Pac. R. Co.*, 98 U. S. 569, 601, 25 L. Ed. 143.

By the 11th section of the judiciary act of 1789, no civil suit shall be brought before the courts of the United States, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The construction given to these provisions, by this court, is, that no judgment can be rendered by a circuit court against any defendant, who has not been served with process issued against his person, in the manner pointed out; unless the defendant waive the necessity of such process, by entering his appearance to the suit. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093, cited. *Levy v. Fitzpatrick*, 15 Pet. 167, 10 L. Ed. 699.

Congress might have authorized civil process from any circuit court to have run into any state of the Union; it has not done so; it has not, in terms, authorized any civil process to run into any other district, with the single exception of subpoenas to witnesses, within a limited distance. In regard to final process, there are two cases, and only two, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons in another district of the same state; and the other, in favor of the United States, in any part of the United States. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

The provisions authorizing process to be served without the limits of the district where the suit might be brought, and parties and subjects of controversy to be united which, in an ordinary chancery suit, would render a bill multifarious, are regulations of practice and procedure which are subject to legislative control. *United States v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143.

Rule same in proceedings in rem and in personam.—And the jurisdiction of the circuit courts, both as to persons and property, is confined to the district. *Pennsylvania v. Wheeling, etc.*, *Bridge Co.*, 18 How. 421, 453, 15 L. Ed. 435.

Therefore no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a state attachment law. The doctrine announced to this effect, in the case of *Toland v. Sprague*, in 1838 (12 Pet. 300, 327, 9 L.

Ed. 1093) has been uniformly followed since, both by the federal supreme court and at the circuits. (*Levy v. Fitzpatrick*, 15 Pet. 167, 171, 10 L. Ed. 699; *Herndon v. Ridgway*, 17 How. 424, 15 L. Ed. 100); *Chaffee v. Hayward*, 20 How. 208, 215, 15 L. Ed. 804.

If resident of district he is bound though a nonresident of state.—In a suit brought by a citizen of Louisiana, in the circuit court of the United States for the eastern district of Arkansas, to enforce a lien on lands situate within that district, one of the defendants, a citizen of Tennessee, was served with process in Arkansas. Held, that, under the act of Feb. 28, 1839 (5 Stat. 321), such service brought him within the jurisdiction of the court. *Ober v. Gallagher*, 93 U. S. 199, 23 L. Ed. 829.

Patent cases.—This provision of law is not changed by any subsequent process act, or by the law giving jurisdiction to circuit courts in patent cases, without regard to citizenship. Therefore, where a suit was commenced for an infringement of a patent right, and process was served by attaching the property of an absent defendant, this was not sufficient to give the court jurisdiction. *Chaffee v. Hayward*, 20 How. 208, 15 L. Ed. 804.

Service in Indian reservation.—Process from a district court of Idaho cannot be served upon a defendant on an Indian reservation in that territory. If the defendant is found in Idaho outside the limits of the Indian reservation, he may during that period be served with process. *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237. But this case is qualified and explained in *Langford v. Monteith*, 102 U. S. 145, 26 L. Ed. 53; *Utah, etc.*, *Railway v. Fisher*, 116 U. S. 28, 30, 29 L. Ed. 542.

Rule as to persons domiciled abroad.—The true construction of the 11th section of the judiciary act of 1789, is that it did not mean to distinguish between those who are inhabitants, or found within the district, by process issued out of the circuit court, and persons domiciled abroad: so as to protect the first, and leave the others not within the protection; but even with regard to those who are within the United States, they should not be liable to the process of the circuit courts of the United States, unless in one or other of the predicaments stated in the clause. And as to all those who were not within the United States, it was not in the contemplation of congress, that they would be at all subject, as defendants, to the process of the circuit courts; which, by reason of their being in a foreign jurisdiction, could not be served upon them; and therefore, there was no provision whatsoever in relation to them. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093.

3. SERVICE ON PARTIES DECEYED INTO THE STATE.—It has been frequently held that if a defendant in a civil case be brought within the process of the court by a trick or device, the service will be set aside and he will be discharged from custody.³¹ But to avoid the service it must clearly appear that his presence within the jurisdiction was fraudulently procured.³²

E. Service on Natural Persons—1. SERVICE UPON HUSBAND AND WIFE.—Service upon the wife of the defendant is not service upon him. No theoretical unity of husband and wife can make service upon one equivalent to service upon the other.³³

2. SERVICE UPON ATTORNEYS.—In order that service on an attorney shall constitute sufficient service on the parties defendant, it must appear that he was in fact their attorney and not the attorney of some other person.³⁴

F. Service on Corporations—1. FOREIGN CORPORATIONS—*a. In General.*—The statutes in most jurisdictions provide especially as to how process may be served on foreign corporations,³⁵ though in the absence of such provision, it seems that service in the manner prescribed for domestic corporations will give jurisdiction.³⁶

b. Presumption of Assent to Conditions.—It is established as part of the common law of this country, that where a state makes conditions upon which foreign corporations may do business, and provides a method whereby the courts of the state may acquire jurisdiction over them by service of process upon designated agents within the state, a foreign corporation subsequently doing business in the state is deemed to consent to the conditions and to be bound by the service of process in the manner specified by the statute.³⁷

31. Service on parties decoyed into state will be set aside.—In *re Johnson*, 167 U. S. 120, 126, 42 L. Ed. 103.

If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside. *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 105, 34 L. Ed. 608.

Where the president of a foreign corporation was, for the purpose of obtaining service, inveigled into the state, but was not there on the business of the corporation, it was held that service upon him would not bind the corporation. *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608.

Rule in criminal cases.—The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest. In *re Johnson*, 167 U. S. 120, 126, 42 L. Ed. 103.

32. Where a party is induced to enter a state by notice to take a deposition, this alone does not furnish sufficient fraud on which to base a motion to set aside service. *Jaster v. Currie*, 198 U. S. 144, 49 L. Ed. 988.

33. Service upon husband and wife.—*Settemier v. Sullivan*, 97 U. S. 444, 447, 24 L. Ed. 1110.

34. Sufficiency of service on party's attorney.—*Smith v. Woolfolk*, 115 U. S. 143, 29 L. Ed. 357.

35. Service on foreign corporations.—Any hardships that may result from the inadequacy of legislation providing for service on foreign corporations cannot be redressed by the courts; this can only be done by legislation. *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540.

36. A statute providing as to the service of process in suits against "any incorporated company" is broad enough to include foreign as well as domestic corporations. "It matters not under what law the company is organized, or where its domicile is, service of process may be made upon the local agent representing it within the county in which the suit is brought." *Societe Fonciere v. Milliken*, 135 U. S. 304, 307, 34 L. Ed. 208.

37. Presumption of assent to conditions.—*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Railroad Co. v. Harris*, 12 Wall. 65, 81, 20 L. Ed. 354; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Pembina, etc., Min. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650; *Merchants Heat, etc., Co. v. Clow & Sons*, 204 U. S. 286, 289, 51 L. Ed. 488.

It was held in *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345, that while a foreign corporation by going into a state without complying with its statute, may be held to have assented to the provisions of its statute as to service upon it in a suit brought against it there in respect of business

c. *Must Be "Doing Business in the State"*—(1) *In General*.—It is essential to the validity of service on a foreign corporation that the corporation shall be doing business within the state,³⁸ and that the service be upon an agent represent-

transacted by it, in that commonwealth, such assent cannot properly be implied where it affirmatively appears that the business was not transacted in Pennsylvania.

The circuit court of the United States is a "court of the commonwealth" within meaning of Pennsylvania statute providing that insurance companies shall not do business in that state until it has consented to the conditions of such statute with respect to the service of process. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853.

38. Corporation must be doing business in state.—*St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Goldey v. Morning News*, 156 U. S. 518, 521, 522, 39 L. Ed. 517; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 410, 47 L. Ed. 1113; *Pennsylvania Lumbermen's, etc., Ins. Co. v. Meyer*, 197 U. S. 407, 413, 49 L. Ed. 810; *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 482, 49 L. Ed. 1133; *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 390, 394, 51 L. Ed. 841; *Merchants' Heat, etc., Co. v. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488; *Mutual, etc., Ins. Co. v. Birch*, 200 U. S. 612, 50 L. Ed. 620.

The three conditions necessary to give a court jurisdiction in personam over a foreign corporation: First, it must appear that the corporation was carrying on its business in the state where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such state; third, the existence of some local law making such corporation amendable to suit there as a condition, express or implied, of doing business in the state. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 618, 43 L. Ed. 569.

In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state. *Goldey v. Morning News*, 156 U. S. 518, 519, 39 L. Ed. 517; *Merchants' Manufacturing Co. v. Grand Trunk Railway Co.*, 13 Fed. Rep. 358; and if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 610, 43 L. Ed. 569.

Service of process upon the treasurer of a foreign corporation is not a valid service upon the corporation, where the

corporation, at the time of such service, was doing no business within the state, and had never done any business there since it was incorporated. *Kendall v. American Automatic Loom Co.*, 198 U. S. 477, 49 L. Ed. 1133.

A fire insurance company which issues its policies upon real estate and personal property situated in another state, is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies, as it is when engaged in making contracts to take such risks. *Pennsylvania Lumbermen's, etc., Ins. Co. v. Meyer*, 197 U. S. 407, 415, 49 L. Ed. 810.

When, under the terms of the contract, the company sends its agent into the state where the property was insured and where the loss occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the state. *Pennsylvania Lumbermen's, etc., Ins. Co. v. Meyer*, 197 U. S. 407, 414, 49 L. Ed. 810.

Effect of insurance ceasing to seek new risks.—It cannot be said with truth that an insurance company does no business within a state unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 611, 43 L. Ed. 569.

Although the license of a foreign insurance company has been cancelled by the insurance commissioner, yet if it is stipulated that the outstanding policies existing between the company and the citizens of the state are to be continued in force after the action of the insurance commissioner, and if on such policies the association had collected and was collecting dues, premiums and assessments, such company is doing business within the state so that service of summons on the insurance commissioner is sufficient to bring the association into the state court as party defendant. *Mutual, etc., Life Ass'n v. Phelps*, 190 U. S. 147, 47 L. Ed.

ing the corporation with respect to such business.³⁹ And this is the rule applied

987, citing *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

Foreign corporation represented by domestic corporation.—A foreign corporation not doing business itself within the state, but which has a traffic agreement with a domestic corporation cannot be reached because of such agency or representative character of the domestic corporation, although both companies have common agents and employees to a certain extent, and although the conduct and control of its business is entrusted to such domestic corporation, where such foreign corporation has its own officers, a large amount of its own property, and is responsible for its contracts and to persons with whom it deals. *Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 51 L. Ed. 841.

Soliciting freight and passenger business in district.—Where the only business that a foreign corporation does within a district is the solicitation of freight and passenger traffic for which purpose an office was hired therein, this is not enough to bring the defendant within the district so that process can be served upon it, because such transactions do not constitute doing business in the sense that liability to service is incurred. *Green v. Chicago, etc., R. Co.*, 205 U. S. 530, 51 L. Ed. 916.

Correspondents in state taking orders for stock.—Where a foreign corporation dealing in stock transactions has correspondents within the state who take orders from customers, and transmit them directly to the defendant, it was held that in receiving, transmitting, and reporting orders to the customers, receiving their margins, and settling with them for the profits or losses incident to each transaction, their correspondent is really doing business as the agent of the defendant, and may be properly treated as its agent for the service of process. And the fact that the relations between the defendant and its correspondents are, as between themselves, expressly disclaimed to be those of principal and agent, is immaterial. *Board of Trade v. Hammond Elevator Co.*, 198 U. S. 424, 49 L. Ed. 1111, citing *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

The provisions of the Illinois statute as to service of process on a foreign corporation do not apply unless such corporation is doing business in the state. *Merchants Heat, etc., Co. v. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488.

39. Agent served must represent corporation in state.—This representation implies that the corporation does business, or has business, in the state for the transaction of which it sends or appoints an agent there. If the agent occupies no representative character with respect to

the business of the corporation in the state, a judgment rendered upon service on him would hardly be considered in other tribunals as possessing any probative force. *St. Clair v. Cox*, 106 U. S. 350, 359, 27 L. Ed. 222.

Proof of representative character of agent.—When service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or in the finding of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service of process by the proper officer on a person who is its agent there, would be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, distinguished in *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 615, 43 L. Ed. 569.

The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. *St. Clair v. Cox*, 106 U. S. 350, 360, 27 L. Ed. 222.

Agent present in state to investigate claims.—Where a foreign corporation is doing business in a state, an agent present within the state, representing it by its authority in regard to the very claim in dispute, and with authority to compromise it within certain limits, may be served with process, especially where his agency for the company is a continuous one and is not limited to a particular transaction. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569, distinguishing *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

Where an agent of a foreign insurance company enters a foreign state wherein the company formerly did business, with authority to investigate the claims under a policy and to compromise them within certain stated terms, such agent sufficiently represents the company within the principle which calls for the service of process upon a person who is in reality sufficient of a representative to give the court jurisdiction over the company he

in the federal courts.⁴⁰

(2) *Service on Officer Temporarily in Jurisdiction*.—A judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually or temporarily within the state, and not charged with any business of the corporation there.⁴¹

d. *On Whom Served*—(1) *In General*.—Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it, the

represents. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

The mere fact of residence is not material (other things being sufficient), provided he was in the state representing the company and clothed with power as an agent of the company to so represent it. His agency might be sufficient in such event, although he was not a resident of the state. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 614, 43 L. Ed. 569.

The residence of an officer of a corporation does not necessarily give the corporation a domicile in the state. He must be there officially—there representing the corporation in its business. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222. In other words, a corporation must be doing business there. *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 411, 47 L. Ed. 1113, citing *Goldrey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517.

40. Rule in federal courts.—*St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 608. *Goldrey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 111, 42 L. Ed. 964; *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 49 L. Ed. 959.

It has been recently held in the supreme court that as to a circuit court of the United States, where a corporation is doing business in a state other than the one of its incorporation, service may sometimes be made upon its regularly appointed agents there, even in the absence of a state statute conferring such authority. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 42 L. Ed. 964; *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 618, 43 L. Ed. 569.

41. Service on officer casually within jurisdiction insufficient.—*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 357, 359, 27 L. Ed. 222; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 608; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699; *In re Hohorst*,

150 U. S. 653, 663, 37 L. Ed. 1211; *Goldrey v. Morning News*, 156 U. S. 518, 519, 521, 39 L. Ed. 517; *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122; *Remington v. Central Pac. R. Co.*, 198 U. S. 95, 100, 49 L. Ed. 959.

And the words in a statute authorizing service upon the agent of a foreign corporation "within this state," did not sanction service upon an officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222, distinguished in *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 615, 43 L. Ed. 569; *New England, etc., Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. Ed. 379; *Fitzgerald, etc., Const. Co. v. Fitzgerald*, 137 U. S. 98, 106, 34 L. Ed. 608.

Officer passing through on railroad train.—Service of summons upon the president of a foreign corporation, while he is passing through the state or territory on a railroad train, is insufficient as a personal service on the company of which he is president, where defendant was not an inhabitant of the district in which it was being sued; it had no principal or other office in the territory, nor did it have an officer who could, in a legal sense, be found there; nor did it, in any just sense, carry on business in the territory. And the mere fact that the company owned lands there is not sufficient by itself to bring the case within the provisions of the territorial statute. *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 49 L. Ed. 540.

corporation is identified with such agent or officer.⁴²

(2) *Designation of Agent to Receive Service.*—It is well known that foreign corporations, desirous of doing business in a state other than that in which they have their domicil, are generally required to have an agent therein to receive service of process for them. This is exacted as a condition of their doing business in such state.⁴³ And such condition and stipulation may be implied as well as expressed.⁴⁴ Wherever such a statute exists service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of congress, in the courts of the United States held within the state; but it has never

42. On what corporate agents process served.—*Lafayette Ins. Co. v. French*, 18 How. 404, 408, 15 L. Ed. 451.

43. Designation or appointment of agent.—*Pennoyer v. Neff*, 95 U. S. 714, 735, 24 L. Ed. 565; *Provident, etc., Society v. Ford*, 114 U. S. 635, 639, 29 L. Ed. 261.

It may be admitted that any state may by its laws require, as a condition precedent to the right of a corporation to be organized, or to transact business, within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicil at which, service may be made within the state, and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the state. In such cases, the service is held binding because the corporation, or the stockholders, or both, as the case may be, must be taken to have consented that such service within the state shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Pennoyer v. Neff*, 95 U. S. 714, 735, 24 L. Ed. 565; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Wilson v. Seligman*, 144 U. S. 41, 45, 36 L. Ed. 338.

Validity of conditions.—In *Lafayette Ins. Co. v. French*, 18 How. 404, 407, 15 L. Ed. 451, the supreme court, speaking by Mr. Justice Curtis, after saying that a corporation created by one state could transact business in another state, only with the consent, express or implied, of the latter state, and that this consent might be accompanied by such conditions as the latter state might think fit to impose, defined the limits of its power in this respect by adding, "and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemna-

tion without opportunity for defense." Cited in *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 110, 42 L. Ed. 964.

It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. *St. Clair v. Cox*, 106 U. S. 350, 356, 27 L. Ed. 222.

Where a foreign steamship company had within the district no director or other officer of the company, or any agent expressly authorized to accept service upon it, it was held that service of the subpoena upon the head of a firm which was acting as their financial agent in this country for the transaction of its monetary and financial business here, was sufficient service upon the corporation. In *re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211, citing *St. Clair v. Cox*, 106 U. S. 350, 359, 27 L. Ed. 222; *Societe Fonciere v. Milliken*, 135 U. S. 304, 34 L. Ed. 208; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699, and approved in *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 112, 42 L. Ed. 964.

Under the statutes in Arkansas foreign insurance companies are not governed by the act concerning foreign corporations generally, which requires a certificate to be filed with the secretary of the state designating an agent upon whom service may be made, and stating the principal place of business of the corporation within the state. *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154.

Service of monition in admiralty.—The rule that process may be served upon an agent appointed in a state by the principal to receive such service, and such service will be held good in an action at law in any court, state or federal, also applies in admiralty as to the service of the monition. In *re Louisville Underwriters*, 134 U. S. 488, 33 L. Ed. 991, citing *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *New England, etc., Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. Ed. 379.

44. Condition may be implied.—*Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 356, 27 L. Ed. 222.

held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States.⁴⁵

(3) *Particular Persons on Whom Process May Be Served*—aa. *Principal Officer or Managing Agent*.—The statutes usually provide that process shall be served on its principal officer.⁴⁶ In New York, if the cause of action arose within the state, service might be made on a cashier, director, or a managing agent of the corporation within the state.⁴⁷

bb. *Stockholders*.—It is not unlikely that a statute of a state which authorizes service on a member of a foreign corporation, that is, on a mere stockholder, would be held to be a departure from that principle of natural justice which forbids condemnation without citation.⁴⁸

cc. *Local Agents*.—The statutes in some of the states provide for service on a "local agent" of foreign corporations.⁴⁹

dd. *Receivers*.—In an action against a railroad receiver appointed by a fed-

45. *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *New England, etc., Ins. Co. v. Woodworth*, 111 U. S. 138, 146, 28 L. Ed. 379; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 452, 36 L. Ed. 768; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 108, 42 L. Ed. 964.

Construction of Arizona statute.—The service of a summons upon the general manager of a foreign corporation is, under the laws of Arizona, a sufficient service upon the company itself, although the corporation has not complied with the territorial laws requiring it to file an appointment of an agent upon whom summons may be served. In other words the sections providing specially for service upon foreign corporations were not intended to be exclusive of other modes of service. Otherwise if the corporation did not choose to file such appointment, it would be impossible to obtain a valid personal judgment against it. *Henrietta Min., etc., Co. v. Johnson*, 173 U. S. 221, 43 L. Ed. 675, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

46. **Service on principal officer.**—The decision, *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354, in principle and in effect, recognizes that a corporation of one state, lawfully doing business in another state, and summoned in an action in the latter state by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought. *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 109, 42 L. Ed. 964.

47. **Construction of New York statute.**—Where a foreign corporation is doing business within the state and the cause of action arose therein, in such case service upon a director residing in the state is sufficient. *Pennsylvania Lumbermen's, etc., Ins. Co. v. Meyer*, 197 U. S. 407, 418, 49 L. Ed. 810, reconciling *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. Ed. 1113; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122.

When "cause of action" regarded as "arising" in state.—Within the meaning of § 432 of the code of civil procedure of

New York, which provides that service of summons may be made on the cashier, a director, or managing agent of the corporation, within the state "if the cause of action arose therein," it was held that where the policy provided for payment or for rebuilding or repairing, the place of payment in contemplation of the parties is at the domicile of the creditor in the state where the property insured was situated. In other words payment was to be made at the same place where the rebuilding was to be done, in case, the defendant company availed itself of its right to rebuild, that is within the state where the loss occurred. *Pennsylvania Lumbermen's, etc., Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. Ed. 810.

48. **Service on stockholders.**—*St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222.

49. **Service on local agent.**—Under *Rev. Stat. Tex. 1879, art. 1223*, providing for service on the local agent of a corporation in the county in which the suit is brought, service on its general agent for the state of Texas is sufficient. *Societe Fonciere v. Milliken*, 135 U. S. 304, 34 L. Ed. 208.

Under *Sayles' Rev. Civ. Stat. Tex., art. 1223a*, allowing process against a foreign corporation to be served on "any local agent within this state," it was held that the person in charge of a joint warehouse maintained by several corporations, one of which was the defendant, was not a local agent of the defendant, his only relation thereto being the fact that the defendant paid part of the expenses of the warehouse. *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. Ed. 699.

City passenger agent.—Under *Revised Statutes of Missouri, 1879, § 3481*, it was held sufficient to serve process in a suit against a foreign railroad corporation on a city passenger agent of the defendant at his business office in St. Louis, such agent having charge of the office at the time and no chief officer of the defendant being found in the city. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 37 L. Ed. 292.

eral court, process may be served on an agent of the receiver.⁵⁰

(4) *Authority to Receive Service of Process.*—An express authority to receive process is not always necessary.⁵¹ Consent to receive service as provided by the statute of the state is implied by the company entering the state and doing business therein subject to the provisions of the act.⁵² In such case it is not material that the officers of the corporation deny that the agent was expressly given such power, or assert that it was withheld from him. The question turns upon the character of the agent, whether he is such that the law will imply the power and impute the authority to him, and if he be that kind of an agent, the implication will be made notwithstanding a denial of authority on the part of the other officers of the corporation.⁵³

e. *Burden of Proof.*—And the burden is upon the plaintiffs to show by what authority a state court enters a personal judgment against a foreign corporation, not alleged to have appeared in person or by an attorney of its own selection, or to have been personally served with process.⁵⁴

f. *Right of Legislature to Make Changes.*—It is not impairing the obligation of any contract between the corporation and the state to change the manner

50. Action against federal receivers.—*Eddy v. Lafayette*, 163 U. S. 456, 41 L. Ed. 225.

The third section of the judiciary act of March 3, 1887, c. 373, § 2, 24 Stat. 552, 554, authorizing suits to be brought against receivers of railroads, without special leave of the court by which they were appointed, was intended to place receivers upon the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service. *Eddy v. Lafayette*, 163 U. S. 456, 464, 41 L. Ed. 225.

Affidavit denying agency.—In an action against a receiver of a railroad corporation, summons being served on an alleged agent of the receivers, it was held that the allegation in an affidavit by the agent to the effect that he was never the agent of the defendant corporation but that he had been station agent for the receivers of the company, shows that the allegation denying that he was not the agent of the receivers is untrue, and that he was their agent at the time and place named in the return. *Eddy v. Lafayette*, 163 U. S. 456, 41 L. Ed. 225.

51. Express authority to receive service not necessary.—*Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 610, 43 L. Ed. 569.

The service is not confined to an agent who has been expressly authorized to receive service of process upon him in behalf of the foreign corporation. In the absence of any express authority, the question depends upon a review of the surrounding facts and upon the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law

will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 616, 43 L. Ed. 569.

52. Consent to receive service implied.—*Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

Where the law is changed after a foreign corporation enters a state, as to the officers who are to receive process over it in suits commenced against the corporation, if it continues to do business therein, the company impliedly assents to the terms of that statute, at least to the extent of consenting to the service of process upon an agent so far representative in character that the law would imply authority on his part to receive such service within the state. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

Insurance agents.—While as a general rule the fact that an agent has power to make contracts of insurance in behalf of the corporation in the state, will raise the inference of an implied power to receive service of process in behalf of the corporation, *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451, it cannot be said that none but an agent who has authority to make contracts of insurance in behalf of the company can be held to represent it for the purpose of service of process upon it. It is a question simply whether a power to receive service of process can reasonably and fairly be implied from the kind and character of agent employed. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. Ed. 569.

53. Connecticut, etc., Ins. Co. v. Spratley. 172 U. S. 602, 615, 43 L. Ed. 569.

54. Burden of proof.—*Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. Ed. 345.

of serving process after the company is permitted to do business within the state.⁵⁵

2. MUNICIPAL CORPORATIONS.—Upon Whom Served.—Where a statute points out the officers of a municipal corporation on whom process or notice may be served, a service on any other officers than those enumerated is ineffectual, and the judgment rendered thereon of no validity.⁵⁶ While the statutes in some jurisdictions direct that process is to be served on the head of the corporation,⁵⁷ the statutory method most commonly found requires process to be served first on the mayor.⁵⁸

Effect of Resignation or Removal of Officer.—Service of process upon a municipal officer after he has filed his resignation will be of no effect,⁵⁹ unless

55. Changing mode of service does not impair contract obligations.—When the legislature of Tennessee, therefore, permitted the company to do business within its state on appointing an agent therein upon whom process might be served, and when in pursuance of such provisions the company entered the state and appointed the agent, no contract was thereby created which would prevent the state from thereafter passing another statute in regard to service of process, and making such statute applicable to a company already doing business in the state. In other words, no contract was created by the fact that the company availed itself of the permission to do business within the state under the provisions of the act of 1875. *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 622, 43 L. Ed. 569. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 873.

56. On what municipal officers process to be served.—*Alexandria v. Fairfax*, 95 U. S. 774, 24 L. Ed. 583.

Service on auditor.—By the Code of Virginia, service of process or notice, in case of a town or a city, may be made on the mayor, or, in his absence, on the president of the council or board of trustees, or, if both be absent, on an alderman or trustee, held, service on the auditor of Alexandria, without an appearance by the city or the creditor, did not give the court jurisdiction of the debt which the city owed the creditor; and its decree condemning the debt to confiscation and sale is void. *Alexandria v. Fairfax*, 95 U. S. 774, 24 L. Ed. 583.

Where the proceeding to confiscate a debt of the corporation to an individual is, by reason of his absence beyond the jurisdiction, necessarily in rem, the service of the process or notice on the corporation, which is requisite to a valid seizure of the debt, should be made upon some one of the officers of the corporation on whom a similar service would bind it in an ordinary suit against it. *Alexandria v. Fairfax*, 95 U. S. 774, 24 L. Ed. 583, cited in *Phoenix Bank v. Risley*, 111 U. S. 125, 131, 28 L. Ed. 374.

Service on citizen not sufficient.—An incorporated city is not an individual, and service of notice or process on one of its citizens is not service on it. It has its

officers, who speak and act for it by authority of law; and some one of these officers, either by an express statutory provision, or by the nature of their functions, is the proper person on whom all notices and processes necessary to bind it by judicial proceedings must be served. *Alexandria v. Fairfax*, 95 U. S. 774, 779, 24 L. Ed. 583.

57. Under the process act of California, enacting that in a suit against a corporation the summons may be served on "the president or other head of the corporation," service is properly made on the president of a board of trustees, by whom it is declared in the city charter that the city shall be "governed," and which president of the board of trustees, the charter further declares, shall be "general executive officer of the city government, head of the police, and general executive head of the city." *Sacramento v. Fowle*, 21 Wall. 119, 22 L. Ed. 592.

In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. *Amy v. Watertown*, No. 1, 130 U. S. 301, 316, 32 L. Ed. 946.

58. Service to be on mayor.—*New Orleans v. Houston*, 119 U. S. 265, 268, 30 L. Ed. 411; *Coler v. Cleburne*, 131 U. S. 162, 175, 33 L. Ed. 146.

59. The rule under the Wisconsin statutes and the charter of the city of Watertown, Wisconsin, is where the mayor has resigned, and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk, and on a conspicuous member of the board, is insufficient and void. *Amy v. Watertown*, No. 1, 130 U. S. 301, 316, 32 L. Ed. 946.

Service on last mayor insufficient.—*Amy v. Watertown*, No. 1, 130 U. S. 301, 315, 32 L. Ed. 946.

Cases distinguished and explained.—*Badger v. Bolles*, 93 U. S. 599, 23 L. Ed. 991; *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314; *Salamanca Tp. v. Wilson*, 109 U. S. 627, 27 L. Ed. 1055, holding that resignation of an officer does not affect the validity of process served upon him until the resignation is accepted or until another is appointed, were dis-

such resignation was for the purpose of hindering and delaying creditors of the municipality.⁶⁰

After Removal.—Service of summons upon a township treasurer, after his removal out of the township and across the line into an adjoining township, is nevertheless a good and sufficient service of summons.⁶¹

G. Service on Counties.—The statutes of the various states usually provide that process shall be served on the clerk of the county board,⁶² or clerk of the county court.⁶³

H. Service on Partnerships.—Service is not had by serving one partner.⁶⁴ In the absence of a local statute, no valid judgment can be rendered against the members of a partnership without service upon them.⁶⁵

I. Service on Nonresidents—1. **PERSONAL SERVICE**—a. *Personal Judgment without Personal Service*—(1) *Personal Judgment on Substituted Service*.—As a judgment rendered in personam against a defendant without jurisdiction

tinguished and explained in *Amy v. Watertown*, No. 1, 130 U. S. 301, 315, 32 L. Ed. 946.

In *Badger v. Bolles*, 93 U. S. 599, 23 L. Ed. 991, the law of Illinois was in question, and it appeared that by the constitution of that state, the officers elected were to hold their offices until their successors were elected and qualified. In *Edwards v. United States*, 103 U. S. 471, 26 L. Ed. 314, the case arose in Michigan and it was held that the common-law rule prevailed there, by which the resignation of a public officer is not complete until the proper authority accepts it or does something tantamount thereto, such as appointing a successor. In *Salamanca Tp. v. Wilson*, 109 U. S. 627, 27 L. Ed. 1055, a case arising in Kansas, the treasurer of a township moved across the township line into another township. By the constitution of Kansas, township officers were to hold their offices one year from their election and until their successors were qualified, and nothing was said either in the constitution or laws about residence or nonresidence. The federal supreme court held that the removal did not necessarily vacate the office and that service of summons on the treasurer was good. *Amy v. Watertown*, No. 1, 130 U. S. 301, 315, 32 L. Ed. 946.

60. Where a town is trying to escape the enforcement of its liability to creditors through the resignation of an officer on whom process is to be served, and the failure to supply his place, the resigning officer is rightly held, quoad creditors, to continue in office, subject to the service of process, till his successor qualifies. *Oregon v. Jennings*, 119 U. S. 74, 90, 30 L. Ed. 323.

61. **Service after removal of officer from city.**—*Salamanca Tp. v. Wilson*, 109 U. S. 627, 27 L. Ed. 1055, distinguished in *Amy v. Watertown*, No. 1, 130 U. S. 301, 32 L. Ed. 946.

62. **Service of process on clerk of county board.**—*Commissioners v. Sellw*, 99 U. S. 624, 25 L. Ed. 333.

In suits against counties in Kansas, process must be served upon the clerk of the

board; accordingly, service of a copy of the writ upon the clerk is service upon the corporation. *Commissioners v. Sellw*, 99 U. S. 624, 25 L. Ed. 333.

Service on clerk of board equivalent to service on members of board for purposes of contempt proceedings.—*Commissioners v. Sellw*, 99 U. S. 624, 627, 25 L. Ed. 333.

63. **Clerk of county court.**—*Knox County v. Harshman*, 133 U. S. 152, 155, 33 L. Ed. 586.

Under the statutes of Missouri the clerk is made the agent of the county for the purpose of receiving service of process against it, and service upon him is legal and sufficient service upon the county. *Knox County v. Harshman*, 133 U. S. 152, 33 L. Ed. 586, citing *Commissioners v. Sellw*, 99 U. S. 624, 25 L. Ed. 333; *Thompson v. United States*, 103 U. S. 480, 26 L. Ed. 521.

Any neglect of the clerk in communicating the fact to the county court was neglect of an agent of the county, and did not affect the validity of the service or of the judgment. *Knox County v. Harshman*, 133 U. S. 152, 156, 33 L. Ed. 586.

Where the officer's return stating that he served a copy of the summons upon the clerk of the county court in an action against the county is false, yet if no fraud is charged or proved, redress can be sought at law only, and not by bill in equity to enjoin the enforcement of the judgment. *Knox County v. Harshman*, 133 U. S. 152, 33 L. Ed. 586, citing *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552.

64. **Service on partnerships.**—*Peterson v. Chicago, etc., R. Co.*, 205 U. S. 364, 390, 51 L. Ed. 841.

65. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *In re Grossmayer*, 177 U. S. 48, 50, 44 L. Ed. 665.

Partnership is not an association within the meaning of the Revised Statutes of Texas of 1895, providing that in any suit against an association process may be served on certain named officers or agents within the state. *In re Grossmayer*, 177 U. S. 48, 44 L. Ed. 665.

of his person is not only erroneous but void,⁶⁶ a personal judgment obtained

66. Personal judgment against nonresident.—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Wetmore v. Karrick*, 205 U. S. 141, 149, 51 L. Ed. 745.

It is an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; *Boswell v. Otis*, 9 How. 336, 13 L. Ed. 164; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Harris v. Hardeeman*, 14 How. 334, 14 L. Ed. 444; *Thompson v. Whitman*, 18 Wall. 457, 463, 469, 21 L. Ed. 897; *Knowles v. Gaslight, etc., Co.*, 19 Wall. 58, 61, 22 L. Ed. 70; *Hall v. Lanning*, 91 U. S. 160, 165, 23 L. Ed. 271; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Pennoyer v. Neff*, 95 U. S. 714, 732, 24 L. Ed. 565; *Settemier v. Sullivan*, 97 U. S. 444, 447, 24 L. Ed. 1110; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878; *Livingston County v. Darlington*, 101 U. S. 407, 413, 25 L. Ed. 1015; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101; *Cole v. Cunningham*, 133 U. S. 107, 112, 33 L. Ed. 538; *York v. Texas*, 137 U. S. 15, 34 L. Ed. 604; *Grover, etc., Mach. Co. v. Radcliffe*, 137 U. S. 287, 294, 295, 34 L. Ed. 670; *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338; *Noble v. Union River, etc., R. Co.*, 147 U. S. 165, 173, 37 L. Ed. 123; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. Ed. 699; *Scott v. McNeal*, 154 U. S. 34, 38 L. Ed. 896; *Goldey v. Morning News*, 156 U. S. 518, 521, 39 L. Ed. 517; *Owens v. Henry*, 161 U. S. 642, 40 L. Ed. 837; *Dull v. Blackman*, 169 U. S. 242, 243, 42 L. Ed. 733; *Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808; *Thormann v. Frame*, 176 U. S. 350, 356, 44 L. Ed. 500; *Bell v. Bell*, 181 U. S. 175, 178, 45 L. Ed. 804; *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Andrews v. Andrews*, 188 U. S. 14, 34, 47 L. Ed. 366; *National Exchange Bank v. Wiley*, 195 U. S. 257, 269, 49 L. Ed. 184; *Caledonian Coal Co. v. Baker*, 196 U. S. 432, 444, 49 L. Ed. 540; *Clark v. Wells*, 203 U. S. 164, 170, 51 L. Ed. 138; *United States v. American Bell Tel. Co.*, 29 Fed. Rep. 17.

A personal judgment rendered in a state without service of process upon the defendant, or his appearance in the action, has no operation out of the limits of the state where rendered. Out of the state it is a nullity, not binding upon the nonresident defendant, nor establishing any claim against it. *Board of Public*

Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687.

Where the only service made on the defendants is service on a person as their attorney, who is not in fact their attorney, and the mailing to their address by the sheriff of a copy of the order, although good under the state statute, this is but substituted service, and cannot support a personal decree against the defendant. *Smith v. Woolfolk*, 115 U. S. 143, 29 L. Ed. 357, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878.

Action for breach of warranty.—Where a party residing in Maryland sold land in Louisiana with a general warranty, to a resident of Louisiana, who was afterwards evicted from a part of it, and obtained a judgment against his warrantor, whom he had vouched in, this judgment could not be rendered effective against the Maryland vendor, because no notice had been served upon him, and the appointment of a curator ad hoc was not sufficient. *Flowers v. Foreman*, 23 How. 132, 16 L. Ed. 405.

Personal liability of nonresident for special assessments.—The principle which renders void a statute providing for the personal liability of a nonresident to pay a tax assessed upon lots for local improvement is the same which prevents a state from taking jurisdiction through its courts, by virtue of any statute, over a nonresident not served with process within the state, to enforce a mere personal liability, and where no property of the nonresident has been seized or brought under the control of the court. This principle has been frequently decided in the federal supreme court. One of the leading cases is *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, and many other cases therein cited. *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 209, 37 L. Ed. 699; *Dewey v. Des Moines*, 173 U. S. 193, 203, 43 L. Ed. 665.

A judgment in scire facias proceeding has no binding force against a defendant in another state, who has not been served with process or voluntarily appeared. *Owens v. Henry*, 161 U. S. 642, 40 L. Ed. 837, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

A judgment in an action of debt has no binding force as against a nonresident who has not been served with process or voluntarily appeared. *Owens v. Henry*, 161 U. S. 642, 40 L. Ed. 837, citing *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Grover, etc., Mach. Co. v. Radcliffe*, 137 U. S. 287, 34 L. Ed. 670.

A decree for the cancellation of a deed

against a nonresident who was served by a publication of summons only, the defendant neither being served with process, nor appearing in the action, is void and of no effect.⁶⁷ Neither the principles of international comity, nor the full faith and credit clause of the constitution, require that a court of one state shall not inquire as to whether the courts of another state have jurisdiction in which the judgment sought to be enforced was rendered.⁶⁸

Collateral Attack.—And a judgment recovered in a state court against a nonresident who was neither served with process nor appeared in person or by a duly authorized attorney, is subject to collateral attack in the United States circuit court sitting in the same district as the state court.⁶⁹

is in personam merely, and can only be supported against a nonresident of a state by actual service upon him within the jurisdiction of the state, and constructive service by publication is not sufficient. *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, distinguished in *Roller v. Holly*, 176 U. S. 398, 403, 44 L. Ed. 520.

Suit to enforce a lien upon a mining claim.—*Turner v. Sawyer*, 150 U. S. 578, 37 L. Ed. 1189.

Where a suit is brought, not to enforce a claim or lien upon property, but to cancel a purely personal contract, the circuit court cannot acquire jurisdiction of the defendant unless he appear or there be personal service of process upon him within the district. *Insurance Co. v. Bangs*, 103 U. S. 435, 26 L. Ed. 580.

67. Personal judgment against nonresident on substituted service.—*Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. Ed. 922; *Boswell v. Otis*, 9 How. 336, 13 L. Ed. 164; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Harris v. Hardeman*, 14 How. 334, 339, 14 L. Ed. 444; *Bischoff v. Wethered*, 9 Wall. 812, 19 L. Ed. 829; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, is distinguished from *Connecticut, etc., Ins. Co. v. Spratley*, 172 U. S. 602, 617, 43 L. Ed. 569; *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878; *Insurance Co. v. Bangs*, 103 U. S. 435, 26 L. Ed. 580; *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Smith v. Woolfolk*, 115 U. S. 143, 29 L. Ed. 357; *Freeman v. Alderson*, 119 U. S. 185, 30 L. Ed. 372; *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338; *Davis v. Wakelee*, 156 U. S. 680, 39 L. Ed. 578; *Dull v. Blackman*, 169 U. S. 242, 247, 42 L. Ed. 733; *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520.

Substituted service by publication, or in any other authorized form, is sufficient to inform a nonresident of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act; but where the suit is brought to determine his personal rights and obligations, that is, where it is merely in personam, such service upon him is ineffectual for any

purpose. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

No title to property passes by a sale under an execution issued upon such a judgment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, following *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Proceeding declaring municipal aid bonds void.—A decree rendered in a county court in a suit against a railroad company and others, declaring that municipal bonds and coupons issued to the company are null and void, does not effect the holders of them who did not appear, and had only constructive notice of the suit. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Empire v. Darlington*, 101 U. S. 87, 25 L. Ed. 878; *Pana v. Bowler*, 107 U. S. 529, 27 L. Ed. 424.

Personal liability for costs.—Service of citation by publication cannot authorize the creation of any personal demand against the absent or nonresident defendant, even for costs, which could be satisfied out of his property. *Freeman v. Alderson*, 119 U. S. 185, 30 L. Ed. 372.

68. See the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 350.

Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is by operation of the due process clause of the fourteenth amendment void as against the nonresident, even in the state where rendered, and, therefore, such nonresident in virtue of rights granted by the constitution of the United States may successfully resist even in the state where rendered, the enforcement of such a judgment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Haddock v. Haddock*, 201 U. S. 562, 567, 50 L. Ed. 867.

69. Collateral attack.—*Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808, cited in *Howard v. De Cordova*, 177 U. S. 609, 613, 44 L. Ed. 908; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761.

(2) *Personal Judgment against Nonresident Infants.*—A judgment or decree against a nonresident infant, upon a purely personal demand, is void, and may be collaterally attacked, where there has been no previous service of process upon the infant, although a guardian ad litem has been appointed.⁷⁰ But where a nonresident infant owns lands, against which a decree is made for the debts of an ancestor, the infant is bound by the decree, if a guardian ad litem had been appointed, although there was no process served upon the infant.⁷¹

(3) *Application of Rule to Corporations.*—A valid personal judgment cannot be recovered against a foreign corporation by publication alone.⁷²

(4) *Rule in Federal Courts.*—The principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the circuit courts of the United States, although sitting in the state in which the judgment was rendered. In either case the court, the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments.⁷³ In some instances the states have provided for personal judgments against non-

70. Service on nonresident infants.—*Insurance Co. v. Bangs*, 103 U. S. 435, 441, 26 L. Ed. 580, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

"The statute of Michigan requiring the general guardian of an infant to 'appear for and represent his ward in all legal suits and proceedings unless when another person is appointed for the purpose as guardian or next friend,' does not change the necessity of service of process upon the defendants in a case before a court of the United States where a personal contract alone is involved." *Insurance Co. v. Bangs*, 103 U. S. 435, 439, 26 L. Ed. 580.

71. *Manson v. Duncanson*, 166 U. S. 533, 541, 41 L. Ed. 1105.

Case distinguished.—"In the case of *Insurance Co. v. Bangs*, 103 U. S. 435, 26 S. W. 580, the court held that it was not competent for the federal courts to appoint a guardian ad litem for a nonresident or absent infant, so as to subject him to a purely personal claim. But it was distinctly admitted that where the infant had an interest in real estate within the state or district, the rule was otherwise, and that the power to appoint a guardian ad litem in such a case was founded in the general powers of courts of equity." *Manson v. Duncanson*, 166 U. S. 533, 541, 41 L. Ed. 1105.

72. Personal judgment against corporation on substituted service.—*Henrietta Min., etc., Co. v. Johnson*, 173 U. S. 221, 43 L. Ed. 675, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

Service on foreign corporations.—A state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions

prescribed by law. *Pennoyer v. Neff*, 95 U. S. 714, 735, 24 L. Ed. 565.

Under the Missouri statute which authorizes execution upon a judgment against a corporation to be ordered against any of its stockholders, to the extent of the unpaid balance of their stock, "upon motion in open court, after sufficient notice in writing to the persons sought to be charged," there can be no personal liability enforced unless the notice is personally served upon the defendant within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed, unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient. In the case at bar, the defendant never resided in Missouri, and was not served with process within the state. *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338.

73. Rule in federal courts.—*Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Hernon v. Ridgway*, 17 How. 424, 425, 15 L. Ed. 100; *Pennoyer v. Neff*, 95 U. S. 714, 732, 733, 24 L. Ed. 565; *Goldey v. Morning News*, 156 U. S. 518, 522, 39 L. Ed. 517, reaffirmed in *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266; *Insurance Co. v. Bangs*, 103 U. S. 435, 439, 26 L. Ed. 580.

For the same reason, service of mesne process from a court of a state, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the circuit court of the United States after the removal of the case into that court, pursuant to the acts of congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court. *Goldey v. Morning News*, 156 U. S. 518, 522, 39 L. Ed. 517, reaffirmed in *Sharkey v. Indiana, etc., R. Co.*, 186 U. S. 479, 46 L. Ed. 1266.

residents without personal citation, upon a mere constructive service of process by publication; but the federal courts have not hesitated to hold such judgments invalid.⁷⁴ A federal court is not bound to treat such a judgment rendered by a state court as if it were a domestic judgment of a domestic court.⁷⁵

(5) *Conclusiveness of Recitals in Record*.—The recitals in a record that the defendant was a citizen and a resident, or that he appeared by an attorney who had authority to represent him, may be contradicted.⁷⁶

b. *Personal Service on Nonresidents*.—No tribunal established by a state can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, *Confli. Laws*, § 539.⁷⁷ Process sent to a party out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.⁷⁸

2. SERVICE BY PUBLICATION—*a. Practice in District of Columbia*.—Constructive service by publication is authorized by § 787 of the Revised Statutes relating to the District of Columbia.⁷⁹

b. *Practice in Federal Courts*.—The state law cannot determine for the federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against nonresident or absent parties, allowed in some states in purely personal actions, is not permitted in the federal courts. Such service can only be resorted to where some claim or lien upon real or personal property is sought to be enforced, and the decision of the court will then only affect property of the party within the district.⁸⁰

74. Personal judgment on substituted service.—*Hollingsworth v. Barbour*, 4 Pet. 466, 475, 7 L. Ed. 922; *Boswell v. Otis*, 9 How. 336, 13 L. Ed. 164; *Bischoff v. Wethered*, 9 Wall. 812, 19 L. Ed. 829; *Knowles v. Gaslight, etc., Co.*, 19 Wall. 58, 22 L. Ed. 70; *Pennoyer v. Neff*, 95 U. S. 714, 744, 24 L. Ed. 565; *Mohr v. Manierre*, 101 U. S. 417, 422, 25 L. Ed. 1052; *Hart v. Sansom*, 110 U. S. 151, 155, 28 L. Ed. 101.

The courts of the United States only regard judgments of the state courts establishing personal demands as having validity or importing verity when they have been rendered upon personal citation of the party or upon his voluntary appearance. *St. Clair v. Cox*, 106 U. S. 350, 353, 27 L. Ed. 222; *Pana v. Bowler*, 107 U. S. 529, 545, 27 L. Ed. 424.

75. *Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808, citing *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101; *Goldey v. Morning News*, 156 U. S. 518, 39 L. Ed. 517.

76. Contradicting recitals in record.—*Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808.

Action on judgment rendered in another state.—*Knowles v. Gaslight, etc., Co.*, 19 Wall. 58, 22 L. Ed. 70, citing and following *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897.

77. Actual service out of state unavailing.—*Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. Ed. 565.

Rule in territorial courts.—There can be no jurisdiction in a court of a territory to render a personal judgment against any one upon service made outside its limits. *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

78. *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. Ed. 565; *Hart v. Sansom*, 110 U. S. 151, 155, 28 L. Ed. 101; *Dull v. Blackman*, 169 U. S. 242, 243, 42 L. Ed. 733.

Where a suit is purely one in personam, service attempted to be made on nonresidents by delivering a copy of the summons to them in another state is ineffectual to bring them within the jurisdiction of that court. They must either be served with process within the limits of the state, or enter an appearance in the case. *Dull v. Blackman*, 169 U. S. 242, 243, 42 L. Ed. 733, citing *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

A judgment recovered upon notice actually served upon a nonresident is valid as against land within the territorial jurisdiction of the court, though of course not against the defendant in personam. *Wehrman v. Conklin*, 155 U. S. 314, 39 L. Ed. 167.

79. Practice in District of Columbia.—*Lynch v. Murphy*, 161 U. S. 247, 40 L. Ed. 688.

80. Practice in federal courts.—*Rev. Stat.*, § 738; *Insurance Co. v. Bangs*, 103 U. S. 435, 439, 26 L. Ed. 580.

Effect of removal of cause to federal court.—Where a suit has been removed from a state to a federal court before service of summons, service by publication as prescribed by the state statutes

c. *When Publication of Summons Proper*—(1) *In General*.—Constructive notice in certain cases may be sufficient to bind the party.⁸¹ But such notice can only be admitted in cases coming fairly within the provisions of the statutes authorizing the courts to make orders for publication and providing that the publication, when made, shall authorize the courts to decree.⁸²

(2) *In Proceedings in Rem*—aa. *In General*.—Service by publication may answer in all actions which are substantially proceedings in rem.⁸³ Thus notice by publication has been held sufficient in proceedings to condemn land for railway purposes in special assessment proceedings,⁸⁴ in proceedings against non-resident stockholders,⁸⁵ in proceedings for the appointment of trustees,⁸⁶ in proceedings to quiet the title to real estate,⁸⁷ in proceedings against nonresident infants⁸⁸ and in proceedings in an appellate tribunal to review the action of courts

cannot be made in the federal court. *Clark v. Wells*, 203 U. S. 164, 51 L. Ed. 138.

81. When publication of summons proper.—*Nations v. Johnson*, 24 How. 195, 205, 16 L. Ed. 628, citing *Harris v. Harde-man*, 14 How. 334, 339, 14 L. Ed. 444.

There are many other cases in which a judgment may be good within the jurisdiction in which it was rendered so far as to bind the debtor's property there found, without personal service of process, or appearance of the defendant; as in foreign attachments, process of outlawry, and proceedings in rem. *Hall v. Lan-ning*, 91 U. S. 160, 168, 23 L. Ed. 271.

Personal service upon nonresidents is not always within the state's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

82. Hollingsworth v. Barbour, 4 Pet. 466, 475, 7 L. Ed. 922; *Nations v. Johnson*, 24 How. 195, 205, 16 L. Ed. 628, citing *Hollingsworth v. Barbour*, 4 Pet. 466, 475, 7 L. Ed. 922; *Galpin v. Page*, 18 Wall. 350, 369, 21 L. Ed. 959; *Earle v. Mc-Veigh*, 91 U. S. 503, 508, 23 L. Ed. 398; *Regina v. Lightfoot*, 26 Eng. L. & Eq. 177.

83. Substituted service in proceedings in rem.—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, cited and approved in *Arndt v. Griggs*, 134 U. S. 316, 326, 33 L. Ed. 918; *Haddock v. Haddock*, 201 U. S. 562, 569, 50 L. Ed. 867; *Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. Ed. 922.

When the proceedings are in personam the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application, is sufficient to enable the court to render judgment. *Leigh v. Green*, 193 U. S. 79, 91, 48 L. Ed. 623.

Binds nothing but property attached.—In such case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill

in chancery. It must be, substantially, a proceeding in rem. *Boswell v. Otis*, 9 How. 336, 348, 13 L. Ed. 164, approved in *Arndt v. Griggs*, 134 U. S. 316, 324, 33 L. Ed. 918; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Proceeding affecting fund in jurisdiction of court.—*Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

This is as true in the case of an assessment against a nonresident as in the case of a more formal judgment. *Dewey v. Des Moines*, 173 U. S. 193, 203, 43 L. Ed. 665.

84. Condemnation proceedings.—*Huling v. Kaw Val. R., etc., Co.*, 130 U. S. 559, 563, 32 L. Ed. 1045, cited in *Ballard v. Hunter*, 204 U. S. 241, 254, 51 L. Ed. 461. See the titles EMINENT DOMAIN, vol. 5, p. 789; SPECIAL ASSESSMENTS, ante, p. 10.

85. Proceedings against nonresident stockholders.—*Mandeville v. Riggs*, 2 Pet. 482, 7 L. Ed. 493.

86. Proceedings for appointment of trustees.—*Arndt v. Griggs*, 134 U. S. 316, 329, 33 L. Ed. 918.

87. Proceedings to quiet title.—State court may acquire jurisdiction to quiet title to real estate by publication against nonresident defendants, where the state statute so provides. *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918, explaining *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101; *Hamilton v. Brown*, 161 U. S. 256, 40 L. Ed. 691.

As to how *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918, is distinguishable from *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, see *Roller v. Holly*, 176 U. S. 398, 403, 44 L. Ed. 520.

Such a state statute is clearly constitutional.—*Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918; *Hamilton v. Brown*, 161 U. S. 256, 274, 40 L. Ed. 691; *Cooper v. Newell*, 173 U. S. 555, 571, 43 L. Ed. 808.

88. Nonresident minors may be proceeded against by publication whenever the statute permits such process against adults, in the absence of an exception in their favor in the statute. *Bryan v. Kennett*, 113 U. S. 179, 28 L. Ed. 908, citing 1 Daniell Ch. Prac. 164, 659, ch. 15, § 2.

of first instance.⁸⁹ But a bill which is in no wise auxiliary to an original suit, nor in continuation of that proceeding, does not present a case proper for substituted service.⁹⁰ And this same rule obtains in the federal courts.⁹¹ But as this proceeding is a departure from the fundamental principle that no man shall be condemned in his person or property without notice, and an opportunity to make his defense, it should be subjected to a strict legal scrutiny.⁹²

bb. *What Are Proceedings in Rem.*—Actions in rem, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs.⁹³ There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted.⁹⁴ They differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.⁹⁵

(3) *Proceedings to Determine Status of Residents.*—A state may authorize proceedings to determine the status of one of its citizens towards a nonresident, which would be binding within the state, though made without service of process or personal notice to the nonresident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory.⁹⁶

89. Publication in appellate proceedings.—*Hunt v. Wickliffe*, 2 Pet. 201, 214, 7 L. Ed. 397; *Mandeville v. Riggs*, 2 Pet. 482, 489, 7 L. Ed. 493; *Nations v. Johnson*, 24 How. 195, 206, 16 L. Ed. 628, cited in *Pennoyer v. Neff*, 95 U. S. 714, 734, 24 L. Ed. 565.

90. Publication in auxiliary proceedings.—*Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. Ed. 587, citing *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845.

91. Rule in federal courts.—*Mohr v. Manierre*, 101 U. S. 417, 422, 25 L. Ed. 1052.

92. Boswell v. Otis, 9 How. 336, 350, 13 L. Ed. 164.

93. What are proceedings in rem.—*Freeman v. Alderson*, 119 U. S. 185, 187, 30 L. Ed. 372. See PROCEEDINGS IN REM AND IN PERSONAM, vol. 9, p. 786.

If there is personal service of process on the defendant or personal appearance by him, the case is mainly a personal action; but if in the absence of either of these his property is attached and sold, it becomes essentially a proceeding in rem and is governed by principles applicable to that class of cases. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

In a larger and more general sense, the term "proceeding in rem" is applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are proceedings in rem in the broader sense. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

The proceeding in the Texas practice of trespass to try title is not a proceeding in rem. *Cooper v. Newell*, 173 U. S. 555, 43 L. Ed. 808.

Whilst the costs of an action may properly be satisfied out of the property attached, or otherwise brought under the control of the court, no personal liability for them can be created against the absent or nonresident defendant. *Freeman v. Alderson*, 119 U. S. 185, 189, 30 L. Ed. 372.

Suits against "the owners of the half-breed lands lying in Lee County," under Iowa statute.—*Webster v. Reid*, 11 How. 437, 459, 13 L. Ed. 761.

A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is, substantially, of that character. *Boswell v. Otis*, 9 How. 336, 348, 13 L. Ed. 164, approved in *Arndt v. Griggs*, 134 U. S. 316, 324, 33 L. Ed. 918.

Money decree ordering sale of other lands than those mentioned in decree for specific execution.—*Boswell v. Otis*, 9 How. 336, 13 L. Ed. 164, approved in *Arndt v. Griggs*, 134 U. S. 316, 324, 33 L. Ed. 918.

94. Actions quasi in rem.—*Freeman v. Alderson*, 119 U. S. 185, 187, 30 L. Ed. 372.

95. Freeman v. Alderson, 119 U. S. 185, 188, 30 L. Ed. 372.

96. Proceedings to determine status of citizens.—*Pennoyer v. Neff*, 95 U. S. 714, 734, 24 L. Ed. 565; *Atherton v. Atherton*, 181 U. S. 155, 163, 45 L. Ed. 794.

Divorce proceedings against nonresident without personal service.—*Pennoyer*

(4) *Proceedings Affecting Personal Property*.—Within the meaning of the act of congress of March 3, 1875, allowing absent defendants to be served by an order of publication in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, it was held that the stock of a Michigan corporation was "personal property within the district."⁹⁷

(5) *Proceedings Affecting Title to Real Estate*—aa. *In General*.—A state has the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication.⁹⁸

bb. *Foreclosure of Liens and Removal of Clouds*.—If the plaintiff be in possession, or have a lien upon land within a certain state, he may institute proceedings against nonresidents to foreclose such lien or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law.⁹⁹

d. *Proceedings to Obtain*—(1) *Necessity for Strict Compliance with Statute*.—A strict and literal compliance with statutes allowing constructive service of

v. Neff, 95 U. S. 714, 735, 24 L. Ed. 565; *Haddock v. Haddock*, 201 U. S. 562, 569, 50 L. Ed. 867.

97. *Proceedings affecting personal property*.—*Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647.

98. *Proceedings affecting real estate*.—*Freeman v. Alderson*, 119 U. S. 185, 188, 30 L. Ed. 372; *Huling v. Kaw Val. R., etc., Co.*, 130 U. S. 559, 32 L. Ed. 1045; *Arndt v. Griggs*, 134 U. S. 316, 319, 327, 33 L. Ed. 918; *Hamilton v. Brown*, 161 U. S. 256, 274, 40 L. Ed. 691; *Roller v. Holly*, 176 U. S. 398, 403, 44 L. Ed. 520; *Leigh v. Green*, 193 U. S. 79, 92, 48 L. Ed. 623.

That rights in land may be affected by constructive notice, so that the decree rendered thereon is entitled to recognition in a federal court, see *Lynch v. Murphy*, 161 U. S. 247, 40 L. Ed. 688, pointing out that *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, was explained in *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918.

Generally, if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. *Hart v. Sansom*, 110 U. S. 151, 154, 28 L. Ed. 101.

Under the laws of Missouri, nonresident defendants in equity suits concerning real estate, whether they be adults or minors, may be proceeded against by publication. *Bryan v. Kennett*, 113 U. S. 179, 28 L. Ed. 908.

99. *Proceedings to foreclose liens or remove clouds*.—*Roller v. Holly*, 176 U. S. 398, 405, 44 L. Ed. 520, citing *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101; *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918.

Where a bill is filed to enforce a claim or lien upon a specific fund within reach

of the court, and such of the defendants as are neither inhabitants of nor found within the district do not voluntarily appear, the circuit court has jurisdiction to adjudicate upon their right to, or interest in, the fund, if they be notified of the pendency of the suit by service or publication, in the mode prescribed by § 738 of the Revised Statutes. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

According to the better opinion suits to quiet title and remove clouds are proceedings in rem, so that a nonresident defendant may be summoned by publication only. *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918, explaining away *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101, which seemed to regard such suit as in personam.

The Code of Iowa, §§ 2831 and 2835, permit personal service or service by publication upon defendants out of the jurisdiction "in an action for the sale of real property under a mortgage lien or other incumbrance or charge;" and such statutes have been upheld by the federal supreme court. *Arndt v. Griggs*, 134 U. S. 316, 33 L. Ed. 918; *Wehrman v. Conklin*, 155 U. S. 314, 331, 39 L. Ed. 167.

Equitable lien for purchase money.—Although there is no Texas statute specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, yet such proceeding may be had under a general provision in the code of Texas providing for the institution of suits against absent and nonresident defendants, which lays down a method of procedure applicable to all such cases. Of course it must be restricted to actions in rem, having no application to suits in personam. Nor is any preliminary seizure of the property necessary to give the court jurisdiction. *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520.

process by publication in place of personal citation is required.¹ And more especially is this true after the lapse of a great number of years.² The reason for this is that substituted service in actions purely in personam is a departure from the rule of the common law.³ While all the steps pointed out by the statute to effect constructive service on nonresidents are necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless indeed the statute expressly or by implication requires it.⁴

(2) *Sufficiency of Substituted Service.*—If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard.⁵ But mere irregularities in the publication of notice, such as make it voidable merely and not absolutely void, cannot be raised in a collateral proceeding.⁶

1. **Strict compliance with statutes is required.**—*Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116, citing *Hunt v. Wickliffe*, 2 Pet. 201, 7 L. Ed. 397; *Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 957; *Cheely v. Clayton*, 110 U. S. 701, 28 L. Ed. 298.

A publication in strict accordance with the statute is a jurisdictional fact. *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116; *Noble v. Union River, etc., R. Co.*, 147 U. S. 165, 173, 37 L. Ed. 123.

A defective publication of notice in a foreclosure proceeding, renders a judgment of foreclosure in the subsequent proceeding void. *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116, explaining *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

2. *Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 29 L. Ed. 892.

3. **Substituted service in derogation of common law.**—*Settlemier v. Sullivan*, 97 U. S. 444, 447, 24 L. Ed. 1110.

4. **What must appear of record.**—*Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 270, 29 L. Ed. 892, distinguishing *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, cited in *Ballard v. Hunter*, 204 U. S. 241, 265, 51 L. Ed. 461.

Unless the statute expressly or by implication requires it, the record need not show publication and posting of notice to the defendants, as required by the order of the court and by law. *Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 29 L. Ed. 892, distinguishing *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, and citing *Voorhees v. United States Bank*, 10 Pet. 449, 9 L. Ed. 490.

It is to be presumed that the court before making its decree took care to see that its order for constructive service, on which its right to make the decree depended, had been obeyed. *Applegate v. Lexington, etc., Min. Co.*, 117 U. S. 255, 269, 29 L. Ed. 892.

5. *Bellingham Bay, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 319, 43 L. Ed. 460.

A notice directed to defendants in the Confederate lines and published in a newspaper was held to be a mere idle form, as it was unlawful for them to cross those lines and obey the summons. Therefore any proceedings based on such proceedings are wholly void and inoperative. *Dean v. Nelson*, 10 Wall. 158, 172, 19 L. Ed. 926; *Lasere v. Rochereau*, 17 Wall. 437, 438, 21 L. Ed. 694; *University v. Finch*, 18 Wall. 106, 110, 21 L. Ed. 818; *Burbank v. Conrad*, 96 U. S. 291, 305, 24 L. Ed. 731, distinguished from *Ludlow v. Ramsey*, 11 Wall. 581, 589, 20 L. Ed. 216.

6. **Collateral attack.**—*Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. Ed. 922; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

Distinction between irregular and void process.—There is an obvious distinction in reason between a case where there is an irregularity merely in the manner of issuing or awarding the notice by publication, and a case in which notice by publication is wholly unauthorized. In the former case the party has notice in part and may, if he will, appear and object to, or waive the irregularity; but in the latter case, the publication, being unauthorized, is not even constructive notice; and unless the proceedings are considered as void, the injured party may be remediless. *Hollingsworth v. Barbour*, 4 Pet. 466, 476, 7 L. Ed. 922.

For example, where the property of a nonresident is seized under the proper process of the court, such seizure is the basis of the court's jurisdiction, and defects and irregularities in the publication of notice will not render the judgment therein absolutely void, although they might be grounds for reversal in a direct attack. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931.

Proceedings cannot be collaterally attacked on the ground that there was no sufficient proof of the publication of any warning order, or any notice to the plain-

(3) *Affidavit*—aa. *Necessity for*.—An affidavit stating the grounds upon which notice by publication is sought, is a jurisdictional prerequisite.⁷

bb. *By Whom Made*.—The provision of a statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper.⁸

cc. *Sufficiency*—aaa. *In General*.—Where the affidavit shows that the defendant is a nonresident of the district and that personal service cannot be made upon him, and the marshal or other public officer to whom the summons was delivered, returns it with his indorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question.⁹

bbb. *Inability to Make Personal Service*.—It would seem that the facts tending to show due diligence to make service of summons within the state should be disclosed.¹⁰ But it is not to be expected that positive proof that the defendant cannot be found within the state or district will always be attainable.¹¹

dd. *How Defects Taken Advantage of*.—Inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit to the satisfaction of the court or judge, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally.¹²

(4) *The Order*.—An order of notice by publication to all persons interested in the estate is essential to the jurisdiction of the court in its chief proceeding;

tiffs in error, filed or produced in court upon the decree of sale of their lands as rendered. *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

7. *Necessity for affidavit*.—By chapter 95, §§ 13 and 14, Laws of Texas 1847 and 1848, page 129, the affidavit by the plaintiff or his attorney as to the want of knowledge of the names of the parties defendant or their residences, is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character. *Howard v. De Cordova*, 177 U. S. 609, 614, 44 L. Ed. 908.

8. *Affidavit by editor instead of printer sufficient*.—*Pennoyer v. Neff*, 95 U. S. 714, 721, 24 L. Ed. 565.

Construction of Oregon statute.—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

9. *Sufficiency of affidavit*.—*Marx v. Ebner*, 180 U. S. 314, 319, 45 L. Ed. 547.

An affidavit for service by publication cannot be objected to as insufficient, because it does not deny the existence of conditions which clearly could never have existed. *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

10. *Due diligence to make service must be shown*.—*Romig v. Gillett*, 187 U. S. 111, 47 L. Ed. 97.

An affidavit merely alleging inability to obtain personal service by the exercise of due diligence is one of a conclusion of

law and not of fact. *Romig v. Gillett*, 187 U. S. 111, 47 L. Ed. 97.

Mere return of summons "not served."

—Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in cases of this kind by § 3934 a summons can be issued to and served in any county of the territory. *Romig v. Gillett*, 187 U. S. 111, 116, 47 L. Ed. 97.

11. *Positive proof not required*.—*Marx v. Ebner*, 180 U. S. 314, 319, 45 L. Ed. 547.

An inference that due diligence has been exercised is reasonable when proof is made that the defendant is a nonresident of the state, and there is an affidavit that personal service cannot be made upon him within its borders, and there is a certificate of the marshal such as appears in this case. *Marx v. Ebner*, 180 U. S. 314, 319, 45 L. Ed. 547.

Presumptive evidence.—There is, too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of official duty. *Marx v. Ebner*, 180 U. S. 314, 319, 45 L. Ed. 547.

12. *How defects taken advantage of*.—*Pennoyer v. Neff*, 95 U. S. 714, 721, 24 L. Ed. 565.

and if no such notice is shown by the record, judgment for the state will be reversed.¹³

(5) *The Paper*.—Ordinarily the notice must be published in the paper designated by the statute or order of court.¹⁴ But publication in a supplement has been held sufficient.¹⁵

(6) *Time of Publication*.—aa. *In General*.—It is well settled that the publication of the notice for the full period required by law is necessary to the validity of a decree pronounced upon the basis of such publication.¹⁶

bb. *Computation of Time*.—Where a statute requires publication of notice for a certain number of months, this means calendar and not lunar months.¹⁷

cc. *Publication for Prescribed Number of Weeks*.—Where a notice is required to be published for a certain number of weeks, it is unnecessary that this notice be published on any particular day of the week; if published once a week for the specified period, the law is complied with, and its object effectuated.¹⁸

dd. *Length of Notice*.—That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. What shall be deemed a reasonable notice admits of considerable doubt.¹⁹ It may be said in general,

13. The order.—*Hamilton v. Brown*, 161 U. S. 256, 40 L. Ed. 691.

14. Consolidation of designated paper with another.—Although the notice must be published in the paper designated, the order is sufficiently complied with by publication in a paper that has merged the paper so designated by purchase or otherwise, provided the identity of the paper remains. *Sage v. Central R. Co.*, 99 U. S. 334, 25 L. Ed. 394.

15. Newspaper supplement.—*Lent v. Tillson*, 140 U. S. 316, 35 L. Ed. 419.

16. Time of publication of notice.—*Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116, citing *Early v. Doe*, 16 How. 610, 14 L. Ed. 1079.

Suit to foreclose lien.—*Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 148, 35 L. Ed. 116.

17. Month means calendar month.—*Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116. See MONTH, vol. 8, p. 450.

A statutory provision that publication shall be made once a week for four months was not satisfied by a publication for sixteen weeks or four lunar months. The word "month" must be construed to mean calendar and not lunar month. *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 35 L. Ed. 116.

Construction of Kentucky statute.—*Hunt v. Wickliffe*, 2 Pet. 201, 7 L. Ed. 397, approved in *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 147, 35 L. Ed. 116.

18. Publication for prescribed number of weeks.—*Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882. See WEEK.

As to publication of notice of elections,

see the title ELECTIONS, vol. 5, p. 727. As to publication of notice of sale under deed of trust, see the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 490. As to publication of notice of time and place of tax sale, see the title TAXATION. As to publication of notice to co-owner of mining claim to contribute his share of expenditure, see the title MINES AND MINERALS, vol. 8, p. 378.

Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfies the requirement of the act of congress of June 8, 1898 (30 Stat. at L. 434, ch. 394, § 6), requiring such publication in the District of Columbia at least "twice a week for a period of not less than four weeks," although there was but one publication in the last calendar week of such period. *Leach v. Burr*, 188 U. S. 510, 47 L. Ed. 567.

19. Length of notice.—*Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 712, 28 L. Ed. 569; *Roller v. Holly*, 176 U. S. 398, 409, 44 L. Ed. 520.

"The authority of the legislature to prescribe the length of notice is not absolute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time." *Bellingham Bay, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 318, 43 L. Ed. 460.

The insufficiency of a notice on a non-resident in another state to constitute due process of law is not affected by the fact that by the local practice there would be several days' additional time before the case could be called for trial or default taken, or that the court, in its discretion,

with reference to the statutes of most of the states, that in cases of publication notice is required to be given at least once a week for from four to eight weeks, and in case of personal service out of the state, no notice for less than twenty days between the service and return day is contemplated in any of the states except Mississippi, where a personal notice of ten days seems to be sufficient.²⁰

e. *Objections for Want of Due Publication.*—It is error to reject evidence offered by the defendant to show that no notice was given by publication, as the act requires. It is necessary for the plaintiff to prove notice, and negative proof that the notice was not given, under such circumstances, could not be rejected.²¹ But objections for defects in a notice of publication are waived by an appearance.²²

J. *Acceptance or Acknowledgment of Service.*—The authority of an attorney commences with his retainer. He cannot while acting generally as an attorney for an estate or a corporation accept service of process which commences the action without any authority so to do from his principal.²³

VI. Proof of Notice.

The fact of notice may be proved by parol,²⁴ or may be shown by the recitals in the decree.²⁵

VII. Return.

See RETURN, vol. 10, p. 837, and references there given.

A. *Necessity for.*—A legal return of the service is absolutely necessary; because the writ gives the jurisdiction, and before the return the court does not know the cause.²⁶

would probably set aside a default judgment and permit a defense. *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520.

Discrimination between resident and nonresident owners.—A state statute by requiring personal service of summons upon resident owners or occupants of land for at least twenty days before the rendition of the decree of sale, and providing for constructive service by publication upon nonresident owners of only four weeks, does not thereby discriminate between owners of land and nonresident owners. *Ballard v. Hunter*, 204 U. S. 241, 51 L. Ed. 461.

^{20.} *Roller v. Holly*, 176 U. S. 398, 412, 44 L. Ed. 520. Opinion of Mr. Justice Brown, setting out the statutes of many jurisdictions.

Notice for five days held insufficient.—It was held in *Roller v. Holly*, 176 U. S. 398, 44 L. Ed. 520, that five days' notice given a defendant in Virginia to appear in Texas and answer a suit to foreclose a mortgage lien was not, considering the distance between the place of service and place of return, a reasonable notice, or due process of law; and a judgment obtained upon such notice is not binding upon the defendant.

As to the time to be allowed in summary proceedings before a justice of the peace, see 2 Chitty's General Practice 175, quoted in *Roller v. Holly*, 176 U. S. 398, 409, 44 L. Ed. 520.

^{21.} *Evidence admissible to prove lack of notice.*—*Webster v. Reid*, 11 How. 437, 460, 13 L. Ed. 761.

Parol evidence admissible to show lack of notice by publication.—Under a statute passed by the territorial legislature

of Iowa for the partitioning of the Half-Breed Lands of the Sac and Fox reservation, the only service of process required was the publication of eight weeks notice in the Iowa Territorial Gazette. In a proceeding founded upon a judicial sale under this statute, it was held to be error in the trial court to refuse to permit the defendant to show by parol evidence that no service had ever been made upon a person in the suit in which the judgment was rendered, under which the sale of the land was had, and that no notice was given by publication of the institution of said suit, and that the returns of the sheriff were false and fraudulent, and that in fact no sale was ever made. *Webster v. Reid*, 11 How. 437, 459, 13 L. Ed. 761.

^{22.} Appearance by caveators in a proceeding to probate a will. *Leach v. Burr*, 188 U. S. 510, 47 L. Ed. 567.

^{23.} *Acceptance of service by attorney.*—*Stone v. Bank*, 174 U. S. 412, 421, 43 L. Ed. 1028.

^{24.} *Parol evidence to show notice.*—*Walden v. Craig*, 14 Pet. 147, 10 L. Ed. 393.

^{25.} *Recitals in decree to show notice.*—A decree of distribution against a minor shows that proper notice was given to the minor where it recites that due and sufficient notice had been given as required by law, and that the attorney appointed by the court to represent the minor appeared at the hearing and was present at every step of the hearing. *Robinson v. Fair*, 128 U. S. 53, 55, 88, 32 L. Ed. 415.

^{26.} *Return of service is necessary.*—*McCarty v. Nixon*, 1 Dall. 77, 1 L. Ed. 44.

B. Return Non Est Inventus.—The common law provided a remedy in case efforts to procure a service of process were ineffectual, by a return of non est inventus (or what was equivalent thereto), and a reissue of the writ from term to term, until a service could be made or by process of outlawry. The issue of successive writs kept the suit alive so as to prevent the running of the statute of limitations.²⁷

C. When Returnable.—By an early statute in Pennsylvania any writs, original, mesne or judicial process were returnable to the last day, as well as the first day, of the term.²⁸ By practice in Virginia, a writ returnable to the court is returnable the first day of the court.²⁹ An alias capias must be made returnable at the next ensuing term.³⁰

D. Requisites and Sufficiency.—1. **PLACE OF SERVICE.**—A return to a summons by the sheriff that he has served the defendant personally therewith is sufficient, without stating that the service was made in his county. This will be presumed.³¹

2. **SERVICE ON OFFICER OF CORPORATION.**—A return of service on a corporation should generally name the officer or agent upon whom service was made.³²

E. Effect and Conclusiveness.—The return of the officer or the proof of service prima facie imports verity both as to the place of service and the person upon whom served,³³ but it is not conclusive as to these matters.³⁴ And notice

27. **Return non est inventus.**—*Amy v. Watertown*, No. 1, 130 U. S. 301, 32 L. Ed. 946.

28. **Return time under Pennsylvania practice.**—*Ewing v. McNair*, 2 Dall. 269, 1 L. Ed. 377 (execution on judgment returnable to last day of term).

Defective summons by Philadelphia county justice.—On the return of a certiorari to one of the justices of Philadelphia county, it appeared, that the defendant had been summoned to answer tomorrow, that is, on the day succeeding the date of the summons, for a debt under forty shillings; that the matter in dispute was then referred to three men, who reported the sum of £2, 2s., 4d., due to the plaintiff; and that for the amount of this report, the justice had entered judgment with costs. The judgment was reversed: 1st. Because the summons was returnable on the next day, whereas, the act of assembly requires that there should be allowed a time not less than five, nor exceeding eight days. (1 State Laws 204; Act of 1745.) *Pinchin v. Fry*, 1 Dall. 403, 1 L. Ed. 197.

29. **Return time under Virginia practice.**—*Young v. Bank*, 5 Cranch 45, 3 L. Ed. 32.

30. **Return of alias capias.**—*United States v. Parker*, 2 Dall. 373, 1 L. Ed. 421.

31. **Place of service.**—*Knowles v. Gaslight, etc., Co.*, 19 Wall. 58, 22 L. Ed. 70.

A return of process by the marshal, as served upon the defendant within the district, is sufficient. *Gracie v. Palmer*, 8 Wheat. 699, 5 L. Ed. 719.

32. **Service on a corporation.**—An act of congress, in cases of a suit against a railroad company which it incorporated, authorized service of process "on any director of the company." On a suit brought, the marshal made a return of service, July 6th, 1868, on J. S., "reputed to be one of the directors of the com-

pany." The record showed that on the 5th of May, 1866, J. S. was, in fact, one of the directors. Held, sufficient service, in the absence of proof, that J. S. was not one of the directors at the time of service; and the defendant having appeared and moved, for want of sufficient service, the opening of a judgment which had been obtained for default; which motion as asked for, the court refused, but granted on condition that the defendant appeared; which he did, and proceeded to trial. *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675.

Under the Tennessee statute which allows service on the chief agent of the corporation, if neither the president, cashier, treasurer or secretary resides within the state, it has been distinctly laid down that service on the chief agent of a corporation, residing in the county, is sufficient, although the return does not show that the president or other head of the corporation, or the cashier, treasurer, secretary or director thereof, were absent or nonresident, and that "the presumption in all such cases, is, that until the contrary is made to appear, the sheriff has done his duty, and has served the process upon the proper party." At all events, a return that a party is not to be found is regarded in Tennessee as more correct than a return of not found, because indicative of proper exertion to find him. *Kansas City, etc., R. Co. v. Daugherty*, 138 U. S. 298, 305, 34 L. Ed. 963.

33. **Return prima facie correct.**—*Galpin v. Page*, 18 Wall. 350, 366, 21 L. Ed. 959; *Settlemyer v. Sullivan*, 97 U. S. 444, 449, 24 L. Ed. 1110.

34. The record of a judgment showing service of process on the defendant could be contradicted and disproved. *Hall v. Lanning*, 91 U. S. 160, 165, 23 L. Ed. 271, citing *Thompson v. Whitman*, 18 Wall.

and return appearing of record in the proceedings, controls the general recital in the decree that due service has been made upon the defendant.³⁵

F. Compelling Return.—A rule may be issued to the marshal of a district to return the writ in the cause.³⁶

VIII. Exceptions and Objections.

A. Who May Object.—The object of notice or citation in all legal proceedings is to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protection of the applicant or suitor. Accordingly, it does not lie in the mouth of the latter to make objection.³⁷

B. Waiver of Objections.—As a general rule parties do not waive their objections to the service of the summons by pleading to the merits and going to trial, having excepted to the rulings of the trial court sustaining the regularity of the service.³⁸

IX. Amendment of Process.

A. Power to Amend.—The power to amend all process returnable to the circuit court is vested in that court as fully as it is in the supreme court.³⁹

B. Something to Amend by.—The process may be amended by the præcipe.⁴⁰

C. Amendable Defects.—The judgment of the circuit court ought not to be reversed for defects of form in the process returnable on error to that court, which are amendable by the express words of an act of congress.⁴¹

X. Alias and Pluries Writs.

An alias capias must be tested at the return of the original capias.⁴²

XI. Lost Process.

An original writ has fulfilled its functions when the defendant is brought into court. If lost, the court can provide, in its discretion, for the filing of a copy.⁴³

XII. Abuse of Process.

Equitable powers of courts of law over their own process to prevent abuses are inherent.⁴⁴

457, 21 L. Ed. 897; *Knowles v. Gas Light, etc., Co.*, 19 Wall. 58, 22 L. Ed. 70.

The marshal's return stating that service of the subpoena was made by serving it upon a certain person named therein, is not conclusive of that fact. In *re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211.

Service on nonresidents.—As any provisions by statute for the rendition of judgment against a person not a citizen or resident of a state, and not served with process or voluntarily appearing to an action against him therein, would not be according to the course of the common law, it must follow that he would be entitled to show that he was not such citizen or resident, and had not been served or appeared by himself or attorney. *Cooper v. Newell*, 173 U. S. 555, 569, 43 L. Ed. 808.

35. Recitals in decree.—*Cheely v. Clayton*, 110 U. S. 701, 28 L. Ed. 298.

36. Compelling return.—*Oswald v. New York*, 2 Dall. 401, 402, 1 L. Ed. 433.

37. Estoppel to object.—*Mohr v. Manierre*, 101 U. S. 417, 426, 25 L. Ed. 1052.

38. Waiver of objections.—*Eddy v. Lafayette*, 163 U. S. 456, 41 L. Ed. 225

(receivers); *Merchants' Heat, etc., Co. v. Clow & Sons*, 204 U. S. 286, 51 L. Ed. 488 (holding that objections to insufficient service on corporation were waived by setting up a counterclaim).

Even if the marshal's return is false, defendant waives the want of notice by pleading to the action. *Walker v. Robbins*, 14 How. 584, 14 L. Ed. 552.

39. Power to amend.—*Semmes v. United States*, 91 U. S. 21, 24, 23 L. Ed. 193.

40. Amendment by præcipe.—*Black v. Wistar*, 4 Dall. 267, 1 L. Ed. 828. See the title EXECUTIONS, vol. 6, p. 106.

41. Amendable defects.—*Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193.

42. Teste of alias capias.—*United States v. Parker*, 2 Dall. 373, 1 L. Ed. 421.

43. Practice when process is lost.—*York, etc., R. Co. v. Myers*, 18 How. 246, 15 L. Ed. 380.

44. Abuse of process.—*Gumbel v. Pitkin*, 124 U. S. 131, 31 L. Ed. 374, citing *Krippendorf v. Hyde*, 110 U. S. 276, 25 L. Ed. 145; *Put-in-Bay Waterworks, etc., Co. v. Ryan*, 181 U. S. 409, 433, 45 L. Ed. 927.

SUNDAYS AND HOLIDAYS.

CROSS REFERENCES.

As to issuance of writ of attachment on Sunday, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 679. As to validity of laws which prohibit labor, particular business, or occupation on the Sabbath, see the title CONSTITUTIONAL LAW, vol. 4, p. 375. As to the power of courts to inquire into motives of the legislature in fixing upon Sunday as a day of rest, see the title CONSTITUTIONAL LAW, vol. 4, p. 270. As to refusal of a Jew to testify on his Sabbath, see the title CONTEMPT, vol. 4, p. 536. As to federal courts being bound by decisions of state courts in construing Sunday laws, see the title COURTS, vol. 4, p. 1121. As to constitutionality of a statute prohibiting running of freight trains on Sunday, see the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 418; POLICE POWER, vol. 9, p. 528. As to rendition on Sunday as invalidating judgment, see the title JUDGMENTS AND DECREES, vol. 7, p. 576. As to legislative power and discretion to enact Sunday laws, see the title POLICE POWER, vol. 9, p. 528. As to letter carriers' extra pay for overtime work on Sundays, see the title POSTAL LAWS, vol. 9, p. 561.

Sundays—Objects of Sunday Law.—The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society is promoted.¹

Sunday as Dies Non Juridicus.—At common law Sunday was dies non juridicus, and no strictly judicial act could be performed upon that day.² But this does not interrupt the continuity of the term or session of the courts.³

Sunday Contracts—Actions on Sunday Contracts.—Courts will refuse to maintain actions on contracts made in contravention of Sunday statutes.⁴

Contract Signed but Not Delivered.—But the mere signing of a contract on Sunday, which is not delivered on that day, does not avoid the contract.⁵

Notice of Rescission of Contract.—Nor is the notice of the rescission of a contract rendered void by reason of the fact that it was given in Nevada on Sunday.⁶ The principal may recover on a contract entered into by his agent on Sunday without his concurrence or knowledge, where it was asserted to and signed by him on a week day.⁷

Effect of Violation of Sunday Laws in Negligence Cases—Breach of Sunday Law as Defense to Action.—The general rule is that in an action for damages for negligence it is no defense that the plaintiff violated the Sun-

1. Object of Sunday law.—Hennington v. Georgia, 163 U. S. 299, 305, 41 L. Ed. 166.

As to reason why laws setting aside Sunday as a day of rest are upheld, see the title POLICE POWER, vol. 9, p. 530, n. 65.

Nature and origin.—See Richardson v. Goddard, 23 How. 28, 41, 16 L. Ed. 412.

2. Sunday as dies non juridicus.—Danville v. Brown, 128 U. S. 503, 505, 32 L. Ed. 507.

As to rendition of verdict on Sunday, see the title VERDICT.

3. United States v. Shields, 153 U. S. 58, 35 L. Ed. 645.

4. Actions on contracts.—The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day is the elementary princi-

ple that one who has himself participated in violation of law cannot be permitted to assert in a court of justice any rights founded upon or governing the illegal transactions. Gibbs, etc., Mfg. Co. v. Brucker, 111 U. S. 597, 601, 28 L. Ed. 534. See, generally, the title CONTRACTS, vol. 4, p. 552.

5. Contract signed on Sunday but not delivered.—Gibbs, etc., Mfg. Co. v. Brucker, 111 U. S. 597, 603, 28 L. Ed. 534.

6. Notice of rescission of contract.—Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420. See the title RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799.

7. Liability of principal for act of agent.—Gibbs, etc., Mfg. Co. v. Brucker, 111 U. S. 597, 603, 28 L. Ed. 534. See the title PRINCIPAL AND AGENT, vol. 9, p. 692.

day law.⁸ Although it may be a violation of the Sunday law in a particular jurisdiction for a carrier to transfer and deliver goods, still this does not exonerate it from the duty to safely and securely keep such as are in its custody. To take care of them on the Sabbath day is a work of necessity, and therefore not unlawful.⁹

Computation of Time—Where a Prescribed Period Ends on Sunday.—When an act is to be performed within a certain number of days, and the last day falls on Sunday, the person charged with the performance of the act has the following day to comply with his obligation.¹⁰

Penalties and Forfeitures—Sunday Law Defining Duty to State.—The law relating to the observance of Sunday defines a duty of a citizen to the state, and to the state only. For the breach of that duty, he is liable to the fine or penalty imposed by the statute and nothing more.¹¹

But works of necessity and charity are excepted from the operation of Sunday laws in most states.¹²

Holidays.—There are no fixed and established holidays in Massachusetts, in which all business is suspended, except Sunday.¹³

SUNDRIES.—See the title *REVENUE LAWS*, vol. 10, p. 896.

SUNK OR OTHERWISE DESTROYED.—See the titles *BOUNTIES*, vol. 3, p. 510; *PRIZE*, vol. 9, p. 744. See, also, note 1.

8. Breach of Sunday law as defense to action.—Where a vessel was prosecuting her voyage on Sunday, and was injured by piles negligently left in the river, the statute making traveling on Sunday an offense and punishing it by a penalty, constituted no defense to an action for damages by the vessel. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 218, 16 L. Ed. 433, cited in *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 581, 31 L. Ed. 795.

Sailing, lading, and unlading of vessels.—In all Christian countries, the sailing of vessels engaged in commerce, and even their lading and unlading, are classified among the works of necessity which are excepted from the operation of Sunday laws. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 219, 16 L. Ed. 433.

9. Duty of carriers to keep goods safely.—*Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247, 253, 16 L. Ed. 682.

10. Computation of time.—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 56, 37 L. Ed. 72; *Danville v. Brown*, 128 U. S. 503, 32 L. Ed. 507; *Endick on Statutes*, § 393. See the titles *SUPERSEDEAS AND STAY OF PROCEEDINGS; TIME*.

11. Sunday law defining duty to state.—*Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 16 L. Ed. 433, cited in *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 569, 31 L. Ed. 795.

Example.—Courts of justice have no power to add to this penalty the loss of a ship by the tortious conduct of another, against whom the owner has committed no offense. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 16 L. Ed. 433, cited in *Bucher v.*

Cheshire R. Co., 125 U. S. 555, 569, 31 L. Ed. 795.

12. Works of necessity and charity.—*Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 16 L. Ed. 433 (Maryland statute); *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247, 16 L. Ed. 682 (Virginia statute).

By the canon law, the observance of Sundays and holidays did not extend to those who sold provisions, to posts or public conveyances, to travellers, to carriers by land or water, to the lading and unlading of ships engaged in maritime commerce. *Richardson v. Goddard*, 23 How. 28, 41, 16 L. Ed. 412.

Connecting carrier caring for goods preparatory to shipment.—Where a connecting carrier delivered goods to a railroad company on Sunday to be forwarded to its destination, caring for the goods on Sunday and safely and securely keeping them, after the goods were received, was a work of necessity within the meaning of a law prohibiting labor on Sunday. *Powhatan Steamboat Co. v. Appomattox R. Co.*, 24 How. 247, 256, 16 L. Ed. 682.

As to liability of carrier for delivery of goods on Sunday, see the title *CARRIERS*, vol. 3, p. 609.

Under Massachusetts statute.—In order to constitute an act of charity, such as is exempted from the Lord's day act of Massachusetts, the act which is done must be itself a charitable act. *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 579, 31 L. Ed. 795.

13. Holidays in Massachusetts.—*Richardson v. Goddard*, 23 How. 28, 41, 16 L. Ed. 412.

1. Sunk or otherwise destroyed—Prize and bounty acts.—The words *sunk or otherwise destroyed* are equivalent to "de-

SUPERINTENDENT.—See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 8, p. 982; PUBLIC OFFICERS, vol. 10, p. 363.

SUPERIOR FORCE.—See FORTUITOUS EVENT, vol. 6, p. 391. See, also, the title LANDLORD AND TENANT, vol. 7, p. 841. As to liability of banks for conversion by a “superior force” of collateral held by it, see the title BANKS AND BANKING, vol. 3, p. 66.

SUPERIOR SERVANTS.—See the title FELLOW SERVANTS, vol. 6, p. 255.

SUPERNUMERIES.—See the title ARMY AND NAVY, vol. 2, p. 514.

stroyed by sinking or otherwise.” The Manilla Prize Cases, 188 U. S. 254, 261, 47 L. Ed. 463.

Vessels of enemy lying on the bottom in shallow water, unable to be floated by means ordinarily possessed by naval force, but raised and repaired and appropriated

by government by other means, are not **sunk or otherwise destroyed** within meaning of bounty acts. The Manilla Prize Cases, 188 U. S. 254, 263, 266, 47 L. Ed. 463. See, also, The Infanta Maria Teresa, 188 U. S. 283, 288, 47 L. Ed. 477.

SUPERSEDEAS AND STAY OF PROCEEDINGS.

BY FRANK MOORE.

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See the title *INJUNCTIONS*, vol. 6, p. 1022.

As to point that motion to stay proceedings is discretionary and irreviewable, see the title *APPEAL AND ERROR*, vol. 1, p. 997. As to effect of writ of error as supersedeas upon appeals from state courts, see the title *APPEAL AND ERROR*, vol. 1, p. 791. As to right to exact new supersedeas bond, see the title *APPEAL AND ERROR*, vol. 2, p. 184. As to stay of proceedings on removal of cause until payment of costs, see the title *REMOVAL OF CAUSES*, vol. 10, p. 714. As to whether appeals under court of appeals act operate as supersedeas, see the title *APPEAL AND ERROR*, vol. 1, p. 488. As to effect of appeal in habeas corpus, see the title *APPEAL AND ERROR*, vol. 1, p. 424. As to allowance of supersedeas as suspending proceedings under judgment, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 649. As to suspension of appeals in admiralty, see the title *ADMIRALTY*, vol. 1, p. 186. As to operation of certiorari as supersedeas, see the title *CERTIORARI*, vol. 3, p. 652. As to right to supersedeas where case is docketed and dismissed, see the title *APPEAL AND ERROR*, vol. 2, p. 242.

I. Supersedeas.

A. Definition, Nature and Form—1. *DEFINITION*.—A supersedeas, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeals against the execution of the writ.¹

2. *NATURE*.—A supersedeas is solely a statutory remedy in federal practice now.² In the courts of other states, a supersedeas is merely an auxiliary process designed to supersede the enforcement of the judgment of the court below brought up by writ of error for review. But in Virginia the supersedeas

1. *Definition*.—Hovey v. McDonald, 109 U. S. 150, 159, 27 L. Ed. 888.

2. *A statutory remedy*.—Sage v. Cen-

tral R. Co., 93 U. S. 412, 417, 23 L. Ed. 933; Railroad Co. v. Harris, 7 Wall. 574, 19 L. Ed. 100.

is a substitute for the writ of error in all cases in which it is designed that the judgment of the court below shall be superseded.³

3. **FORM.**—The form of the supersedeas at common law was "that if the judgment be not executed before the receipt of the supersedeas, the sheriff is to stay from executing any process of execution until the writ of error is determined."⁴

B. Manner of Superseding Proceedings Below—1. **AT COMMON LAW.**—Writs of error at common law, whether sued out by plaintiff or defendant, operated in all cases as a supersedeas by implication.⁵

2. **UNDER THE STATUTES**—a. *In General.*—To avoid the effect of the foregoing rule the Revised Statutes now provide that a writ of error will operate as a supersedeas and stay of process on the judgment only where a copy of the writ of error is lodged for the adverse party in the clerk's office where the record remains, and the security is given, within sixty days after the rendering of the judgment complained of. And in such cases where a writ of error may be a supersedeas, no execution shall issue for ten days.⁶ Under these statutes it has been held repeatedly that a supersedeas can only be obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard.⁷

b. *Perfecting Appeal*—(1) *In General.*—Where the appeal has not been properly perfected within the time directed by the statute, as, for example, by reason of a failure to seal the writ of error in time,⁸ or where there has been an omission to serve the citation before the return day,⁹ or because no proper allowance of the appeal is shown,¹⁰ or because the wrong remedy has been employed for removing the cause,¹¹ or because the record is incomplete in any respect,¹² in

3. **Nature of supersedeas.**—*Williams v. Bruffy*, 102 U. S. 248, 249, 26 L. Ed. 135.

4. **Form of supersedeas.**—*United States v. Dashiell*, 3 Wall. 688, 700, 18 L. Ed. 268.

For form of writ of supersedeas, see *In re McKenzie*, 180 U. S. 536, 45 L. Ed. 657.

5. **Writ of error as stay of proceedings.**—*Bac. Abr.* title *Supersedeas*, D, 4; *United States v. Dashiell*, 3 Wall. 688, 701, 18 L. Ed. 268; *Hunnicut v. Peyton*, 102 U. S. 333, 356, 26 L. Ed. 113.

Statement of common-law rule.—*Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 381, 27 L. Ed. 609.

6. **Revised Statutes**, § 1007; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810, reviewing federal legislation from earliest enactments.

7. **Strict compliance with statutes required.**—*Hogan v. Ross*, 11 How. 294, 13 L. Ed. 702; *Railroad Co. v. Harris*, 7 Wall. 574, 19 L. Ed. 100; *French v. Shoemaker*, 12 Wall. 86, 100, 20 L. Ed. 270; *Kitchen v. Randolph*, 93 U. S. 86, 89, 23 L. Ed. 810; *Sage v. Central R. Co.*, 93 U. S. 412, 417, 23 L. Ed. 933.

A judgment of ouster being rendered in the circuit court, and the defendant having filed the necessary bond, and sued out a writ of error to the federal supreme court, this amounts to a supersedeas upon the judgment. *United States v. Addison*, 22 How. 174, 16 L. Ed. 304; *S. C.*, 6 Wall. 291, 296, 18 L. Ed. 919.

8. **Appeal must be perfected in time.**—*Washington v. Dennison*, 6 Wall. 495, 18 L. Ed. 863. But sealing is no longer necessary. See the title **APPEAL AND**

ERROR, vol. 2, p. 142.

9. **Failure to serve citation in time.**—*Washington v. Dennison*, 6 Wall. 495, 18 L. Ed. 863, citing *Hodge v. Williams*, 22 How. 87, 16 L. Ed. 237.

10. **Where the only allowance of an appeal or writ of error** in a cause is that disclosed in a recital in the supersedeas bond, a motion to revoke the supersedeas created by the bond, because it is not valid in law to prevent the issuance of execution on the judgment, should be granted. *Tuskaloosa Northern R. Co. v. Gude*, 141 U. S. 244, 35 L. Ed. 742.

11. **Failure to use proper remedy to remove.**—*United States v. Addison*, 22 How. 174, 16 L. Ed. 304.

Where an appeal was taken in a common-law case instead of a writ of error, and after the lapse of ten days the plaintiff issued an execution upon his judgment, and the defendant then sued out a writ of error to bring the case up to the supreme court, it was error in the court below to quash the execution and supersede the judgment. The appeal did not remove the case, and the writ of error was sued out too late to stay execution. It is immaterial whether it was a mistake of the party or the court. *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034.

12. **Where the value of the matter in dispute does not appear on the record**, but must be shown by affidavit, in such case the writ of error is not a supersedeas. *Williamson v. Kincaid*, 4 Dall. 20, 1 L. Ed. 723.

By the practice in the District of Columbia an appeal from the supreme court

all such cases the court will refuse to quash the execution and supersede the judgment.¹³

(2) *Service of Writ and Filing Bond.*—aa. *In General.*¹⁴—Whenever a defendant sues out a writ of error, and he desires that it may operate as a supersedeas, he is required to do two things, and if either is omitted, he fails to accomplish his object: he must serve the writ of error or perfect the appeal, within sixty days, "Sundays exclusive," after the rendition of the judgment, or the passing of the decree complained of.¹⁵ And he must give bond within sixty days after

to the court of appeals of the district must be dismissed solely because the transcript is not filed in the court of appeals within the forty days by the rule of the court of appeals, without reference to whether the appeal operates as a supersedeas or not. *United States v. Alvey*, 182 U. S. 456, 45 L. Ed. 1180.

13. The court will not quash an execution, issued by the court below, to enforce its decree, pending the writ of error, if the writ of error be not a supersedeas to the decree by reason of its being too late. *Wallen v. Williams*, 7 Cranch 278, 3 L. Ed. 342; *Adams v. Law*, 16 How. 144, 147, 14 L. Ed. 880.

14. *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810, reviews the Federal legislation on this subject.

15. **Writ of error must be sued out and served within sixty days.**—*Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 910; *Wurts v. Hoagland*, 105 U. S. 701, 26 L. Ed. 1109; *Western Air Line Constr. Co. v. McGillis*, 127 U. S. 776, 32 L. Ed. 324.

Under early statutes writ of error had to be sued out in ten days after rendition of judgment.—1 Stat. at Large 85; *Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158; *Stockton v. Bishop*, 2 How. 74, 11 L. Ed. 184; *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Hogan v. Ross*, 11 How. 294, 296, 297, 13 L. Ed. 702; *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034; *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511; *United States v. Addison*, 22 How. 174, 16 L. Ed. 304; *United States v. Dashiell*, 3 Wall. 688, 701, 18 L. Ed. 268, 270; *Rubber Co. v. Goodyear*, 6 Wall. 153, 155, 18 L. Ed. 762; *Railroad Co. v. Harris*, 7 Wall. 574, 19 L. Ed. 100; *Slaughter-House Cases*, 10 Wall. 273, 289, 19 L. Ed. 915; *Bigler v. Waller*, 12 Wall. 142, 148, 20 L. Ed. 260; *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857; *Kitchen v. Randolph*, 93 U. S. 86, 88, 23 L. Ed. 810.

The requirement stated in the text is an indispensable prerequisite to a supersedeas, and it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done. *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034; *Kitchen v. Randolph*, 93 U. S. 86, 92, 23 L. Ed. 810; *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

The rule that the mode of taking security, and the time of perfecting it, "are matters of discretion, to be regulated by the court," cannot apply to a case where the appeal operates as a supersedeas. It must be brought strictly within the provisions of the law. *Adams v. Law*, 16 How. 144, 147, 14 L. Ed. 880.

Such a service is not required in an appeal, but the requirement is that the appeal must be taken and allowed, in cases where it is required to be allowed, within the same period of time, and in both cases, that is whether the cause is removed by writ of error or by appeal, the plaintiff in error or the appellant must give the required security within the ten days, Sundays exclusive, in order that the writ of error or appeal may operate as a supersedeas. *Bigler v. Waller*, 12 Wall. 142, 148, 20 L. Ed. 260.

Where the matter in controversy was the right to the mayoralty in Georgetown, and there was a judgment of ouster in the circuit court, if the defendant filed the necessary bond and sued out a writ of error to the federal supreme court, this amounts to a supersedeas upon the judgment. *United States v. Addison*, 22 How. 174, 16 L. Ed. 304; *S. C.*, 6 Wall. 291, 296, 18 L. Ed. 919.

Rule in Eyser's case.—The fair inference from the opinion in *Telegraph Co. v. Eyser*, 19 Wall. 419, 22 L. Ed. 43, construing the act of 1872, is that as that law "was silent as to the writ," and "it was not said when it must be served," a supersedeas could be obtained by the execution, approval, and filing of the necessary security, even though the writ of error should not be served or the appeal taken until after the expiration of sixty days. In this way the old rule requiring promptness of action to obtain a stay of proceedings was substantially abandoned. A justice or judge could, in his discretion, grant the stay at any time, if the writ should be issued and served within the two years allowed for that purpose. The revised section is not "silent as to the writ," and it is "said when it must be served." If a supersedeas is asked for when the writ is obtained, the writ must be sued out and served within the sixty days, and the requisite bond executed when the citation is signed. The policy of the old law is thus restored, the only modification being in the extension of time allowed for action. Sixty days are

the rendition of the judgment with sureties to the satisfaction of the court, for the benefit of the plaintiff, in a sum sufficient to secure the whole judgment in case it be affirmed.¹⁶ But it is not enough that the writ be issued and served, but a copy of the writ must be lodged, for the adverse party, within ten days, Sundays exclusive, after judgment or decree;¹⁷ because a writ of error operates as a supersedeas only from the time of the lodging of the writ in the office of the clerk where the record to be re-examined remains.¹⁸ Time is an essential

given instead of ten. Discussed in *Kitchen v. Randolph*, 93 U. S. 86, 89, 90, 23 L. Ed. 810.

The effect wrought by statute on the decision in *Telegraph Co. v. Eyser* is stated in *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

The rule in *Telegraph Co. v. Eyser*, 19 Wall. 419, 22 L. Ed. 43, that a supersedeas could be obtained by a compliance with the other requisites, even though the writ of error be not served or the appeal taken until after the expiration of sixty days, was changed by § 1007 of the Revised Statutes providing in terms that the writ must be sued out and served within the sixty days. This is law at the present time. *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

But though this changed the law from what it was held to be in *Board of Comm'rs v. Gorman*, 19 Wall. 661, 22 L. Ed. 226, yet as soon as the effect of what has been done was found out, an amendment was adopted limiting the time to ten days as it originally stood. *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

16. Formerly bond had to be given in ten days from date of judgment.—*Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158; *Black v. Zacharie*, 3 How. 483, 495, 11 L. Ed. 690; *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876; *Adams v. Law*, 16 How. 144, 14 L. Ed. 880, distinguishing *Dos Hermanos*, 10 Wheat. 306, 311, 6 L. Ed. 328; *Hardeman v. Anderson*, 4 How. 640, 642, 11 L. Ed. 1138; *Hudgins v. Kemp*, 18 How. 530, 535, 15 L. Ed. 511; *United States v. Dashiell*, 3 Wall. 688, 701, 18 L. Ed. 268; *Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762; *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915, following *Rubber Co. v. Goodyear*, 6 Wall. 153, 155, 18 L. Ed. 762; *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260; *O'Dowd v. Russell*, 14 Wall. 402, 20 L. Ed. 857; *Waters v. Barrill*, 131 U. S. appx. lxxxiv, 18 L. Ed. 878; *Patterson v. Hoa*, 131 U. S., appx. lxxxviii, 18 L. Ed. 884; *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

But the existing statute allows sixty days for the filing of the bond by which the appeal is made to operate as a supersedeas. *Rodd v. Heartt*, 17 Wall. 354, 357, 21 L. Ed. 627.

But yet, if the party does not give the bond within the prescribed time, he may, nevertheless, sue out his writ of error or take his appeal, as the case may be, at any time within two years from the date

of the decree or judgment, upon giving security sufficient to cover the costs that may be awarded against him in the appellate court. And his omission to give the security in ten days is no ground for dismissing the appeal. *Hudgins v. Kemp*, 18 How. 530, 535, 15 L. Ed. 511.

Administrator de bonis non must file bond in time to prevent enforcement of decree against executor. *Taylor v. Savage*, 1 How. 282, 11 L. Ed. 132.

A writ of error brought by direction of a department of the government, operates as a supersedeas, under §§ 1000 and 1001 of the Revised Statutes, without any bond to answer in damages being given. *Schell v. Cochran*, 107 U. S. 625, 628, 27 L. Ed. 543.

Rule in case of appeals.—Since appeals are subject to the same rules and regulations as are prescribed in case of writs of error, an appeal in chancery must be perfected, by giving an appeal bond within sixty days, to act as a supersedeas. *Adams v. Law*, 16 How. 144, 14 L. Ed. 880, distinguishing *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260.

Vacation of supersedeas.—A supersedeas allowed at a former day of the term will be vacated on motion where it appears that the appeal bond was filed too late to make the writ of error a supersedeas. *Waters v. Barrill*, 131 U. S., appx. lxxxiv, 18 L. Ed. 878; *Patterson v. Hoa*, 131 U. S., appx. lxxxviii, 18 L. Ed. 884.

Excuses for failure to file bond.—A mere understanding on the part of counsel for the disappointed appellant that security for the money decreed to be paid would not be required, which arrangement, however, was not assented to by the appellee, does not afford sufficient excuse for a failure to file the appeal bond in time. *Adams v. Law*, 16 How. 144, 14 L. Ed. 880.

17. Railroad Co. v. Harris, 7 Wall. 574, 19 L. Ed. 100.

18. Foster v. Kansas, 112 U. S. 201, 204, 28 L. Ed. 629, citing *Board of Commissioners v. Gorman*, 19 Wall. 661, 22 L. Ed. 226; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

Vacancy in office by judgment of ouster may be filled pending appeal, but before the writ of error is lodged in the clerk's office, without being guilty of contempt. *Foster v. Kansas*, 112 U. S. 201, 28 L. Ed. 629.

element in the proceeding, and one which neither the court nor the judges can disregard.¹⁹ The stay of proceedings follows as a matter of right from the issue and service of the writ of error, in the manner and within the time prescribed by the act.²⁰ But unless an appeal is perfected, or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of, it is not within the power of a justice of the supreme court to allow a supersedeas.²¹ And, upon the expiration of that time, the plaintiff has a right to proceed on his decree and carry it into execution, notwithstanding the pendency of the appeal in the federal supreme court.²²

bb. Computation of Time—(aa) From Rendition and Entry of Judgment.—In calculating the lapse of time under the statute, the date of the entry of the judgment controls, and not the date when the judgment was read to and signed by the judges.²³

(bb) From Decision on Motion to Open Decree.—Under an act providing that to operate as a supersedeas the bond must be executed within a prescribed time from the judgment or decree, it is held that where the court entertains a petition to open the decree the final decree is suspended by such action, and the time does

19. Time an essential element.—*Sage v. Central R. Co.*, 93 U. S. 412, 417, 23 L. Ed. 933.

Doctrine of relation—Nunc pro tunc orders.—Nor can the court give effect to a supersedeas by ordering that the appeal shall relate back to a time within the sixty days. To make a nunc pro tunc order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and injustice will not be done. *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

But in another case it was held that the court may set aside a judgment entered at a former term and enter it anew as of a subsequent date for the purpose of giving it effect for a supersedeas, where it is claimed that more than sixty days from the date of the final determination of the cause had elapsed before the filing of the writ and bond. *Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244, citing *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

Where original judgment is modified or altered and re-entered.—*Memphis v. Brown*, 94 U. S. 715, 24 L. Ed. 244, citing *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

20. Kitchen v. Randolph, 93 U. S. 86, 88, 23 L. Ed. 810.

Where the writs of error are seasonably sued out and served, and the parties in whose favor they are granted comply in each case with all the conditions prescribed in the act of congress as necessary to give the writ effect as a supersedeas and stay execution, such proceedings operate as a stay of execution, and it is well settled that if the subordinate court, under such circumstances, proceeds to issue final process, it is competent for the federal supreme court to issue a supersedeas, as an exercise of appellate power, to correct the error. *Stockton v. Bishop*, 2 How. 74, 75, 11 L. Ed. 184; *Slaughter-House Cases*, 10 Wall. 273, 292, 19 L. Ed. 915.

21. Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810, followed in *Sage v. Central R. Co.*, 93 U. S. 412, 416, 23 L. Ed. 933.

22. Hudgins v. Kemp, 18 How. 530, 535, 15 L. Ed. 511.

23. Time reckoned from date of entry of judgment.—Board of Comm'rs v. Gorman, 19 Wall. 661, 22 L. Ed. 226, distinguishing *Silsby v. Foote*, 20 How. 290, 15 L. Ed. 822; *Wurts v. Hoagland*, 105 U. S. 701, 26 L. Ed. 1109; *Western Air Line Constr. Co. v. McGillis*, 127 U. S. 776, 32 L. Ed. 324.

Appeal from decree within prescribed time from the rendition of the decree, or after the decree is settled and signed, is in time to operate as supersedeas. *Silsby v. Foote*, 20 How. 290, 15 L. Ed. 822.

Ordering distribution of funds in court.—Where the circuit court "decrees" that a fund in court belongs to certain persons named, and that their claims be paid, and (the fund not being large enough to pay all the persons in full) orders a distribution by a commissioner, in accordance with the principles laid down by the court, and on a table of distribution being reported by the commissioner, recites that the commissioner had submitted a distribution based upon the decree theretofore made by the court, and then "orders and decrees" that the fund be distributed according to it, the "decree" may be considered as of either date as respects the matter of a supersedeas. *Rodd v. Heartt*, 17 Wall. 354, 21 L. Ed. 627.

Under the practice in New Jersey, where an appeal is taken from the supreme court of that state to the court of errors and appeals and affirmed by the latter court, and the record remitted to the supreme court, the time is to be computed from the judgment of affirmance by the court of errors and appeals, because the judgment of that court is the final judgment in the cause. *Wurts v. Hoagland*, 105 U. S. 701, 26 L. Ed. 1109.

not begin to run until the action of the court upon the motion.²⁴

(cc) *From Decision on Motion for Rehearing*.—A writ of error sued out and served within sixty days after a motion for rehearing is decided, is in time to secure the supersedeas.²⁵

(dd) *Sundays*.—Sundays are to be excluded in computing the sixty days in which the bond must be filed as required by § 1007 of the Revised Statutes.²⁶

cc. *When Bond Unnecessary*.—The rule that security must be given in order to supersede the execution does not apply where the decree is in favor of the appellant. "That rule applies in cases where the decree or judgment is against the party appealing, and who desires to suspend the issuing of execution by the adverse party until the appeal is heard and determined."²⁷ And it is immaterial that the adverse party has entered a cross appeal and given bond.²⁸

c. *Rule as to Appeals*.—By § 1012, Rev. Stat., that part of the act of 1803 (2 Stat. 244) which placed appeals on the same footing as writs of error was re-enacted.²⁹ It has accordingly been held that an appeal to operate as a supersedeas must be perfected and the security given within the same time after the rendition of the decree, as is required in the case of writs of error to judgments at law.³⁰

3. WHAT LAW GOVERNS.—**In Error to Inferior Federal Courts**.—On appeals from decisions of federal inferior courts, in proceedings construing state statutes, the state practice is often adopted as the rule of decision in the federal courts.³¹

In Case of Error to a State Court.—The writs of error to the highest state courts under § 709 of the Revised Statutes, operate as a supersedeas and stay of execution under the same circumstances as if the judgments or decrees were rendered in a federal court.³²

C. Who May Apply for Stay of Proceedings.—An administrator de bonis non may stay proceedings.³³

24. Time reckoned from decision on motion to open decree.—*Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Railroad Co. v. Bradleys*, 7 Wall. 575, 577, 19 L. Ed. 274.

But a motion to set aside a decree, made by persons not parties to the suit, but who are permitted to intervene only for the purpose of an appeal from the decree as originally rendered, will not operate to suspend such decree so as to give them sixty days after the motion is denied to perfect an appeal and obtain a supersedeas. *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933, distinguishing *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251.

Effect of pendency of appeals from motions to open or rescind decree on time of filing bond.—*Railroad Co. v. Bradleys*, 7 Wall. 575, 19 L. Ed. 274.

25. Reckoning time from decision on motion for rehearing.—*Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915; *Texas, etc., R. Co. v. Murphy*, 111 U. S. 488, 28 L. Ed. 492.

26. Sundays are excluded.—*Danville v. Brown*, 128 U. S. 503, 32 L. Ed. 507. See the title SUNDAYS AND HOLIDAYS, ante, p. 330.

27. When bond unnecessary.—*Bronson v. La Crosse, etc., R. Co.*, 1 Wall. 405, 410, 17 L. Ed. 616.

28. Bronson v. La Crosse, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616.

29. Rule as to appeals.—*Kitchen v. Randolph*, 93 U. S. 86, 90, 23 L. Ed. 810.

30. Appeal must be perfected in same way as writ of error.—2 Stat. at Large, 244; *The San Pedro*, 2 Wheat. 132, 42 L. Ed. 202; *Adams v. Law*, 16 How. 144, 147, 148, 14 L. Ed. 880, 882; *Hudgins v. Kemp*, 18 How. 530, 535, 15 L. Ed. 511; *Silsby v. Foote*, 20 How. 290, 15 L. Ed. 822; *Slaughter-House Cases*, 10 Wall. 273, 296, 19 L. Ed. 915; *French v. Shoemaker*, 12 Wall. 86, 100, 20 L. Ed. 270; *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260; *Telegraph Co. v. Eyser*, 19 Wall. 419, 426, 22 L. Ed. 43; *Kitchen v. Randolph*, 93 U. S. 86, 88, 23 L. Ed. 810.

31. Where according to the practice in the state no appeal in eminent domain proceedings shall, during the pendency of it, prevent the petitioner from occupying the land involved therein, and proceeding to work thereon, a supersedeas on a writ of error from the supreme court to a federal inferior court will be limited in the same way. *East Tennessee, etc., R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 28 L. Ed. 746.

32. What law governs on error to state court.—*Green v. Van Buskerk*, 3 Wall. 448, 18 L. Ed. 245; *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915. See the title APPEAL AND ERROR, vol. 1, p. 791.

33. Administrator de bonis non may stay proceedings.—Where a decree is passed by the court below against an ex-

D. Supersedeas Bond³⁴—1. **CONDITION OF BOND.**—Where the writ is a supersedeas and stays execution, the bond is conditioned that if the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fails to make his plea good, he shall answer all damages and costs, or all costs only where it is not a supersedeas.³⁵

2. **APPROVAL OF BOND.**³⁶—**Approval by Whom.**—The supersedeas bond must be approved by the judge allowing the writ,³⁷ unless he refuses, in which case it may be approved by a justice of the supreme court.³⁸

Mandamus.—But approval cannot be enforced by mandamus from the supreme court.³⁹

Vacation of Approval.—A supersedeas will be vacated when the acceptance or approval of the bond therefor was procured by fraud and perjury.⁴⁰

3. **AMOUNT OF BOND.**—As was stated above it is necessary that sufficient bonds be given in each case, in order that the appeal or writ of error may operate as a supersedeas and stay of execution on judgments removed into the supreme court for re-examination.

a. *Determination of Sufficiency.*—The amount of a supersedeas bond as well as the sufficiency of the security are matters to be determined by the judge below,⁴¹

executor, being the defendant in a chancery suit, and before an appeal is prayed the executor is removed by a court of competent jurisdiction, and an administrator de bonis non with the will annexed is appointed, after he is made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree, if the bond be not filed in time. *Taylor v. Savage*, 1 How. 282, 11 L. Ed. 132, re-affirmed in *Taylor v. Savage*, 2 How. 395, 11 L. Ed. 313.

34. For a history of common law, and statutory requirements that bond must be given in order to supersede judgment below, see *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 381, et seq., 27 L. Ed. 609, opinion of Bradley, J.

As to form and contents of supersedeas bond, see *Railroad Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605; *Tuskaloosa Northern R. Co. v. Gude*, 141 U. S. 244, 35 L. Ed. 742.

As to measure of recovery on bond, see the title **APPEAL AND ERROR**, vol. 2, pp. 180, 186, 191.

As to necessity for bond, see ante, "Perfecting Appeal," I, B, 2, b.

35. **Condition of supersedeas bond.**—*Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690; *United States v. Addison*, 22 How. 174, 184, 16 L. Ed. 304; *S. C.*, 6 Wall. 291, 296, 18 L. Ed. 919; *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 27 L. Ed. 609.

36. See the title **APPEAL AND ERROR**, vol. 2, p. 181.

37. **Bond must be approved by judge.**—*Board of Commissioners v. Gorman*, 19 Wall. 661, 22 L. Ed. 226.

Where the transcript of the record shows that the supersedeas bond was approved by the court, it is sufficient. *Richards v. Mackall*, 113 U. S. 539, 28 L. Ed. 1132.

38. **Justice of supreme court may approve bond.**—The refusal of the circuit court to accept a supersedeas bond, when

offered during the term at which the decree was rendered, does not take from a judge of that court, or a justice of the federal supreme court, the power to approve one thereafter. *Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641.

After the term at which such final decree was rendered, any justice of the federal supreme court may, within the time prescribed by law, allow an appeal, and approve the bond which is to operate as a supersedeas. *Sage v. Railroad Co.*, 96 U. S. 712, 24 L. Ed. 641.

39. **Mandamus to compel approval.**—That the judge below refused to approve a bond for a supersedeas, because all the sureties were nonresidents of the district, is no ground for mandamus, but the supreme court ordered that on filing a bond to be approved by the clerk of that court, a supersedeas should issue from the federal supreme court. *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676, citing *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138.

40. **Approval obtained by fraud.**—*Railroad Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605; *Draper v. Davis*, 102 U. S. 370, 371, 26 L. Ed. 121.

41. **Determination of sufficiency.**—*Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Black v. Zacharie*, 3 How. 483, 495, 11 L. Ed. 690.

What is necessary is that the bond to prosecute the writ be sufficient, and when it is desired to make the appeal a supersedeas, that it be filed within ten days from the rendering of the decree, and the question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal that question as well as every other in the cause becomes cognizable here. It is, therefore, matter of discretion with the court to increase or diminish the amount of the bond and to require additional sureties or other-

and will not be reconsidered by the appellate court.⁴²

b. *As Dependent on Operation of Writ as Supersedeas.*—Where an appeal or writ of error is intended to operate as a supersedeas, the bond given in the case must be in a sum sufficient to constitute indemnity for the whole amount of the judgment or decree.⁴³ In such case it is conditioned that the plaintiff in error or

wise as justice may require. *Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762; *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915; 1 Stat. at Large 404. *French v. Shoemaker*, 12 Wall. 86, 99, 20 L. Ed. 270.

42. *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529, citing *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515, explaining *Black v. Zacharie*, 3 How. 483, 495, 11 L. Ed. 690, and doubting whether this discretion is unlimited.

Where the court below awarded a supersedeas to stay execution, but afterwards revoked that order on account of the insufficiency of the security, the supreme court will not interfere by granting a supersedeas. *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690, commented on and criticised in *Jerome v. McCarter*, 21 Wall. 17, 30, 22 L. Ed. 515.

Inquiry not precluded in case of fraud.—*Railroad Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605, distinguishing *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121.

43. **Bond to be for whole amount of judgment or decree.**—*Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876; *United States v. Addison*, 22 How. 174, 16 L. Ed. 304; *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268; *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270; *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

When a bond is given for appeal in a bill for the foreclosure of a mortgage, the condition of the bond being simply that the appellant shall pay costs and damages, it does not operate to stay a sale of mortgaged premises already decreed. *Orchard v. Hughes*, 1 Wall. 73, 17 L. Ed. 560.

Presumptions on appeal.—But where nothing appears in the record to show that the bond is not in a sum sufficient to constitute indemnity for the whole amount of the decree, it must be presumed that the amount is sufficient. *French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

Appeals on same footing as writs of error.—*Stafford v. Union Bank*, 16 How. 135, 139, 14 L. Ed. 876; *Stafford v. Union Bank*, 17 How. 275, 15 L. Ed. 101, affirmed in *Stafford v. New Orleans, etc., Co.*, 17 How. 283, 15 L. Ed. 102, cited in *Jerome v. McCarter*, 21 Wall. 17, 29, 22 L. Ed. 515.

The rules of practice are satisfied if the supersedeas bond is commensurate with the damages that may follow from the stay which is effected, because the only object of the rule is to secure eventual

payment or performance of the judgment or decree, the execution of which is stayed by the supersedeas, in case the appeal or writ of error is not prosecuted to effect. *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529.

Property in hands of receiver.—The two facts, namely: first, that the receiver appointed by the court below had given bond to a large amount, and second, that the persons to whom the property had been hired had given security, for its safe-keeping and delivery, do not affect the above result. The security must notwithstanding be equal to the amount of the decree. *Stafford v. Union Bank*, 16 How. 135, 14 L. Ed. 876.

Bond required where separate judgment rendered against joint defendants, part of whom only desire a stay of execution.—Where a judgment or decree for the recovery of money is severable as between the defendants, and has actually been severed by the court below for the purposes of the stay of execution, the bonds for stay of execution are sufficient in amount if they are in excess in each instance in the amount recovered against the several defendants who seek the stay. *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529.

Nature of claim as effecting amount of bond.—An act requiring sufficient security that the plaintiff in error "prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good," was held not to refer to the nature of the claim upon which the original judgment was founded, but to be descriptive of the indemnity to which the defendant was entitled if the judgment was affirmed. It was also held that whatever loss the defendant in error might sustain by the judgment not being satisfied after the affirmance was the damage for which the bond ought to give good and sufficient security, without reference to the nature of the case. *Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158, approved in *Jerome v. McCarter*, 21 Wall. 17, 29, 22 L. Ed. 515. See in accord, *Stafford v. Bank*, 16 How. 135, 14 L. Ed. 876.

Amount in suit for foreclosure of mortgage.—Indemnity in such case is only required in an amount sufficient to secure sum recovered for use and detention of the property, and the costs of the suit, and just damages for the delay and costs and interest on appeal. But this does not mean accumulation of interest upon the mortgage indebtedness pending appeal. *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

appellant shall prosecute his writ or appeal to effect; and if he fail to make his plea good, that he shall answer all damages and costs where the writ is a supersedeas.⁴⁴ There is no discretion to be exercised by the judge taking the bond, where the appeal or writ of error is to operate as a supersedeas.⁴⁵ But if a party appealing does not desire that the appeal shall operate as a supersedeas, in that event all that can be required of him is that he shall give good and sufficient security for costs, including "just damages for delay."⁴⁶

c. *Practice Where Insufficiency of Security Appears.*—Where the security is insufficient, the supreme court will, upon motion of the appellee, lay a rule upon the judge below, to show cause why a mandamus should not issue, commanding him to carry into execution the decree of the court below.⁴⁷

4. **FILING BOND.**—Where upon an appeal by several defendants no supersedeas bond is filed by one, but the appeal is properly perfected as to the others, the one not filing a proper bond will be granted leave to do so nunc pro tunc as of the day of hearing.⁴⁸

5. **AMENDMENT OF BOND.**—Where the judgment of the court below is defectively described in a supersedeas bond, an amendment of the bond will be allowed under penalty of vacating the supersedeas.⁴⁹

6. **NEW OR ADDITIONAL SECURITY.**⁵⁰—While the supreme court in a proper case, after an appeal or writ of error are taken there, may interfere and require additional security upon a supersedeas, it will not attempt to direct or control the discretion of the judge or justice in respect to a case as it existed when he was called upon to act, except by the establishment of rules of practice.⁵¹ A motion for a rule upon the plaintiff in error to file a new supersedeas bond will be denied, where the showing does not satisfy the court that the alleged insufficiency of the security taken when the writ of error was sued out, arises from any change in the circumstances of the sureties since the acceptance and approval of the bond,⁵² or where fraud and perjury in the procurement of the original bond is shown.⁵³ If, however, after the security has been accepted, the circum-

44. Rev. Stat., § 1000; *Babbitt v. Finn*, 101 U. S. 7, 11, 25 L. Ed. 820.

Under the act of 1789 no special directions as to the security were necessary, because it was always conditioned to answer all damages and costs if he failed to make good his plea. *Kitchen v. Randolph*, 93 U. S. 86, 88, 23 L. Ed. 810.

But under existing statutes the form of the security became material, and the supersedeas was made to depend upon the condition of the bond executed at the time of the signing of the citation, as well as upon the prompt issue and service of the writ. *Rubber Co. v. Goodyear*, 6 Wall. 153, 156, 18 L. Ed. 762; *Slaughter-House Cases*, 10 Wall. 273, 291, 19 L. Ed. 915; *Kitchen v. Randolph*, 93 U. S. 86, 88, 23 L. Ed. 810.

45. **Discretion of court.**—*Stafford v. Union Bank*, 16 How. 135, 140, 14 L. Ed. 876, approved in *Jerome v. McCarter*, 21 Wall. 17, 29, 22 L. Ed. 515. Compare *Black v. Zacharie*, 3 How. 483, 11 L. Ed. 690.

46. **Amount of bond when there is no supersedeas.**—Rule 32; 1 Stat. at Large, 404; *Bigler v. Waller*, 12 Wall. 142, 149, 20 L. Ed. 260; *Jerome v. McCarter*, 21 Wall. 17, 28, 22 L. Ed. 515; *Kitchen v. Randolph*, 93 U. S. 86, 88, 23 L. Ed. 810 (giving history of federal legislation on this point).

47. **Practice where insufficiency of security appears.**—*Stafford v. Union Bank*, 17 How. 275, 15 L. Ed. 101, affirmed in *Stafford v. New Orleans, etc., Co.*, 17 How. 283, 15 L. Ed. 102.

Motion to dismiss not proper remedy.—But as the security given was sufficient to bring the case before the federal supreme court by appeal, a motion to dismiss the appeal must be overruled. *Stafford v. Union Bank*, 17 How. 275, 15 L. Ed. 101, affirmed in *Stafford v. New Orleans, etc., Co.*, 17 How. 283, 15 L. Ed. 102.

48. **Filing bond.**—*Shepherd v. Pepper*, 133 U. S. 626, 33 L. Ed. 706.

49. **Amendment of bond.**—*Knox County v. United States*, 131 U. S., appx. clxvi, 25 L. Ed. 191, citing *O'Reilly v. Edrington*, 96 U. S. 724, 726, 24 L. Ed. 659.

50. **Motion for additional security.**—See the title **APPEAL AND ERROR**, vol. 2, p. 184.

51. **Additional security.**—*Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

52. **When motion for additional security denied.**—*Martin v. Hazard Powder Co.*, 93 U. S. 302, 23 L. Ed. 885, following *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515.

53. *Railroad Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605.

stances of the case, or of the parties, or of the sureties upon the bond have changed, so that security which at the time it was taken was "good and sufficient" does not continue to be so, the appellate court, on proper application, may so adjudge and order as justice may require.⁵⁴

E. Security for Costs.—By § 1000 of the Revised Statutes, provision was made for security for costs only in cases where no supersedeas was desired, thus reproducing the old law on that subject.⁵⁵

F. Issuance of Writ from Appellate Court—1. **NECESSITY FOR APPELLATE PROCESS TO PERFECT SUPERSEDEAS.**—Appeals and writs of error do not become a supersedeas and stay execution in the court where the judgment or decree remains, by virtue of any process issued by the supreme court merely as such, but they are constituted such by a compliance with the conditions prescribed by the acts of congress. Where those conditions are complied with the act of congress operates to suspend the jurisdiction of the court to which the writ of error is addressed, and stays execution in the case pending the writ of error and until the case is determined or remanded.⁵⁶

2. **POWER OF APPELLATE COURT TO ISSUE.**—Although the issue of the writ is not ordinarily required as just stated, there are instances in which it has been done, under special circumstances, and in furtherance of justice.⁵⁷ And that the supreme court, as a court, has power to issue a writ of supersedeas under § 716 of the Revised Statutes is quite clear; for that section gives it power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law.⁵⁸ It will issue this writ rather than attain the same end by issuing a man-

54. When motion for additional security allowed.—*Draper v. Davis*, 102 U. S. 370, 371, 26 L. Ed. 121.

Where the surety on an appeal bond becomes insolvent.—*American Brewing Co. v. Talbot*, 135 Mo. 170, 172, citing *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Williams v. Clafin*, 103 U. S. 753, 26 L. Ed. 606; *Knox County v. United States*, 131 U. S., appx. clxvi, 25 L. Ed. 191.

55. Security for costs.—1 Stat. at Large, 404; *Hudgins v. Kemp*, 18 How. 530, 15 L. Ed. 511; *United States v. Addison*, 22 How. 174, 184, 16 L. Ed. 304; *United States v. Dashiell*, 3 Wall. 688, 701, 18 L. Ed. 268; *Kitchen v. Randolph*, 93 U. S. 86, 90, 23 L. Ed. 810. See the title COSTS, vol. 4, p. 802.

By the act of December 12th, 1794, when a stay of execution is not desired, security shall be given only to answer costs. *Stafford v. Union Bank*, 16 How. 135, 139, 14 L. Ed. 876.

Plaintiff also may bring error, but he, like the defendant, is required to give bond to answer for costs. *United States v. Dashiell*, 3 Wall. 688, 701, 18 L. Ed. 268.

56. Necessity for appellate process to perfect supersedeas.—*Hogan v. Ross*, 11 How. 294, 296, 13 L. Ed. 702; *Adams v. Law*, 16 How. 144, 148, 14 L. Ed. 880; *Hudgins v. Kemp*, 18 How. 530, 535, 15 L. Ed. 511; *United States v. Addison*, 22 How. 174, 183, 16 L. Ed. 304; *Slaughterhouse Cases*, 10 Wall. 273, 291, 19 L. Ed. 915.

"A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from

a compliance by the appellant with the provisions of the act of congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, we may, under § 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.' The precise form of the writ to be issued, or relief to be granted, must necessarily depend upon the particular circumstances of any case that may arise." *Goddard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237.

If, before the appeal is perfected, an execution has been lawfully issued, a writ of supersedeas directed to the officer holding it will be necessary. *Hovey v. McDonald*, 109 U. S. 150, 159, 27 L. Ed. 888.

57. Issuance of writ by appellate court.—*Stockton v. Bishop*, 2 How. 74, 11 L. Ed. 184; *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676; *In re McKenzie*, 180 U. S. 536, 549, 45 L. Ed. 657.

Execution of writ of assistance.—Pending an appeal a writ of supersedeas may be granted on motion to stay the execution of a writ of assistance to put a party in possession of land under the judgment or decree of the court. *Hunt v. Oliver*, 109 U. S. 177, 27 L. Ed. 897.

58. Supreme court has power to issue the writ.—*Hardeman v. Anderson*, 4 How.

damus to the court below, in a case where the issuing of a mandamus would control judicial action in a matter apparently one of discretion; as ex gr. the approval or rejection of a bond offered for the court's approval.⁵⁹ This is equally true of the circuit court of appeals under § 12 of the act of March 3, 1891.⁶⁰ But to give a justice or judge of the appellate court authority to grant a supersedeas after the expiration of the sixty days, a writ of error must have been issued and served, or an appeal allowed within that time,⁶¹ except where the aggrieved party is obliged to sue out a second writ of error in consequence of the neglect of the clerk below to send up the record in season, or where the granting of such a writ is necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district.⁶²

640, 11 L. Ed. 1138; *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676; *In re Claasen*, 140 U. S. 200, 207, 35 L. Ed. 409; *Hudson v. Parker*, 156 U. S. 277, 39 L. Ed. 424; *In re McKenzie*, 180 U. S. 536, 550, 45 L. Ed. 657.

The federal supreme court may issue a supersedeas whenever it becomes necessary to the exercise of its appellate jurisdiction. 1 Stat. at Large 81; *Stockton v. Bishop*, 2 How. 74, 75, 11 L. Ed. 184; *French v. Shoemaker*, 12 Wall. 86, 100, 20 L. Ed. 270.

As, for example, where the subordinate court, after the party in whose favor a writ of error is granted has complied with all the conditions prescribed in the act of congress as necessary to give the writ effect as a supersedeas and stay of proceeding, nevertheless proceeds to issue final process. *Slaughter-House Cases*, 10 Wall. 273, 292, 19 L. Ed. 915, citing *Stockton v. Bishop*, 2 How. 74, 75, 11 L. Ed. 184.

Rule of court.—And after the decision in *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409, a rule was adopted expressly allowing any justice of the supreme court or any circuit or district judge within his circuit or district to grant a supersedeas and stay of execution, or of proceedings, pending the writ of error or appeal. *In re McKenzie*, 180 U. S. 536, 45 L. Ed. 657.

Criminal cases.—A justice of the United States supreme court has authority to grant a supersedeas and stay of execution in criminal cases, although there is no express provision in the act of March 3, 1891, authorizing it. *In re Claasen*, 140 U. S. 200, 35 L. Ed. 409.

Section 507 of the Alaska Code, which provides that "the proceedings in other respects in the district court in the cause in which such interlocutory order was entered, shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court," and similar language as used in section seven of the judiciary act of March 3, 1891," does not operate as a limitation upon the inherent power of the appellate court to stay or supersede proceedings on appeal from an order appointing a receiver. *In re McKenzie*, 180 U. S. 536, 550, 45 L. Ed. 657.

Practice in Virginia on applications for supersedeas.—*Williams v. Bruffy*, 102 U. S. 248, 249, 26 L. Ed. 135.

59. *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676.

60. **Circuit court of appeals may issue writ.**—*In re McKenzie*, 180 U. S. 536, 549, 45 L. Ed. 657.

Judge of court of appeals may issue writ.—A writ of supersedeas is not void because not directed to be issued by the court of appeals as a court. But the judge of the circuit court of appeals has the power to grant a supersedeas, if in his judgment a writ of supersedeas is required. *In re McKenzie*, 180 U. S. 536, 45 L. Ed. 657.

61. **Cannot issue supersedeas unless appeal perfected in time.**—*Stockton v. Bishop*, 2 How. 74, 75, 11 L. Ed. 184; *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915; *Kitchen v. Randolph*, 93 U. S. 86, 92, 23 L. Ed. 810; *Sage v. Central R. Co.*, 93 U. S. 412, 416, 23 L. Ed. 933; *Peugh v. Davis*, 110 U. S. 227, 228, 28 L. Ed. 127.

But if a court in session and acting judicially allows an appeal which is entered of record without taking a bond within sixty days after rendering a decree, a justice or judge of the appellate court may, in his discretion, grant a supersedeas after the expiration of that time, under the provisions of § 1007 of the Revised Statutes. *Peugh v. Davis*, 110 U. S. 227, 229, 28 L. Ed. 127.

62. **On second writ of error.**—*Wallen v. Williams*, 7 Cranch 278, 279, 3 L. Ed. 342; *Stockton v. Bishop*, 2 How. 74, 11 L. Ed. 184; *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Hogan v. Ross*, 11 How. 294, 296, 13 L. Ed. 702; *Saltmarsh v. Tuthill*, 12 How. 387, 389, 13 L. Ed. 1034; *Ex parte Milwaukee R. Co.*, 5 Wall. 188, 18 L. Ed. 676; *Slaughter-House Cases*, 10 Wall. 273, 291, 19 L. Ed. 915; *French v. Shoemaker*, 12 Wall. 86, 100, 20 L. Ed. 270.

But where a case was dismissed by the supreme court for want of a citation, and the plaintiff in error sued out another writ, and applied to the supreme court for a supersedeas to stay execution in the court below, the application cannot be granted. *Hogan v. Ross*, 11 How. 294,

3. **NECESSITY FOR ISSUANCE OF WRIT.**—Where there is no occasion for a supersedeas none will issue. Writs of supersedeas do not issue, unless it may become necessary from some peculiar circumstances.⁶³

4. **TIME OF ISSUANCE.**—And the power of the appellate court to grant a supersedeas may be exercised even before the return day of the writ of error, where it appears that the court to which it was addressed has made return to the same, and that the plaintiff has filed in the clerk's office a copy of the record duly certified as required by law. It is true that except in the case of urgent necessity the court, in the exercise of a proper discretion, might well decline to exercise the power before the return day of the writ, but the better opinion is that the jurisdiction for such a purpose attaches from the time the party in whose favor the writ of error is granted has complied with all the conditions prescribed in the act of congress to make the writ of error operate as a supersedeas and stay of execution.⁶⁴ In fact, an appellate court may issue the writ of supersedeas even before the citation, the assignment of errors, the order allowing the appeal, and the other appeal papers are filed in the court below.⁶⁵

5. **MOTION**—a. *Sufficiency of Showing on Motion.*—A motion for a supersedeas must show the necessity therefor.⁶⁶

13 L. Ed. 702, explaining *Stockton v. Bishop*, 2 How. 74, 11 L. Ed. 184; *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138.

63. Necessity for issuance of writ must be shown.—*Western Air Line Constr. Co. v. McGillis*, 127 U. S. 776, 32 L. Ed. 324.

"We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, we may, under § 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.'" *Goddard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237.

A motion to vacate a supersedeas will be denied where the papers show that the writ was neither sued out or served within sixty days after the rendition of the judgment which is the subject of the writ of error. It follows as a matter of course that the writ cannot operate as a supersedeas, and we know of no motion that is necessary or proper in the federal supreme court on that subject. *Western Air Line Constr. Co. v. McGillis*, 127 U. S. 776, 32 L. Ed. 324.

Further stay of execution.—Although an appeal operates only as a partial stay of execution, still a motion to the supreme court for a full supersedeas will be denied, for, if the appeal was taken within sixty days after the rendition of the decree, a justice of the supreme court, assigned to that circuit, has power, under § 1007 of the Revised Statutes, to grant, in his discretion, a further stay of execution, if application to him for that purpose is made. *Covington Stock-Yards Co. v. Keith*, 121 U. S. 248, 30 L. Ed. 914.

Order restraining receiver from paying over funds.—Where a rule has been al-

ready entered and served upon the court below and its receiver, restraining them from paying over any portion of the fund to the defendant until the further order of the federal supreme court, and that rule is now in force, no further writ of supersedeas will be necessary to give it effect. *Goddard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237.

Bankruptcy of the judgment debtor is of itself no ground why the supreme court should interfere to stay proceedings on the execution, or to award a supersedeas. It is a matter, if at all cognizable, properly cognizable in the circuit court, upon an application and petition, by the assignee, to that court, upon a case showing an equitable title to relief; or for an application to the proper district court, sitting in bankruptcy for that purpose. *Black v. Zacharie*, 3 How. 483, 495, 11 L. Ed. 690.

64. Court may issue supersedeas before return day of writ of error.—*Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915, citing *Railroad Co. v. Bradleys*, 7 Wall. 575, 19 L. Ed. 274.

65. May issue before allowance of appeal, etc.—*In re McKenzie*, 180 U. S. 536, 45 L. Ed. 657.

66. A motion for the allowance of supersedeas will be denied, where the movant claims that before the judgment had been enforced by execution, it had been stayed by supersedeas. If this claim is supported by the facts, no new supersedeas is necessary, because that already obtained will operate to stay any further proceedings which may be had under the judgment. *Boise County Comm'rs v. Gorman*, 131 U. S., appx. cxxv, 22 L. Ed. 148.

A motion to restrain proceedings on an execution will be denied, where the motion does not show any necessity for the order which is asked. In the absence of anything to the contrary, it is to be presumed that the parties to a suit submit

b. *Notice of Motion*.—Where the real object of a motion for a supersedeas is to avoid the effect of the alleged improper execution of a judgment, such motion cannot be entertained, except after reasonable notice to the opposite party.⁶⁷ But if such motion is overruled because no notice was given to the opposite party, it will generally be without prejudice to its renewal after a reasonable notice is given to the defendant in error.⁶⁸

Service of Notice.—Service of this notice is to be made by delivering a copy of the motion and of the brief which has been filed in support of it on the counsel in the court below of the party against whom the stay is asked, at least one week before the day fixed for the hearing.⁶⁹

G. Scope and Extent of Stay—1. **PROCEEDINGS COLLATERAL TO THE MAIN PROCEEDINGS.**—The supersedeas only stays proceedings on the very judgment brought under review, and not a judgment in any collateral proceeding, even though in aid of execution of the main judgment.⁷⁰

2. **SUPPLEMENTAL DECREES.**—Where an appeal by the defendant in equity is dismissed for want of prosecution, and the court on petition allows another, and at the same term passes a decree to execute the original decree, from which the defendant also appeals, the second appeal from the original decree does not operate as a supersedeas.⁷¹

3. **AFTER EXPIRATION OF APPEAL.**—As the supersedeas is but an appurtenance of the appeal, it is at an end when the appeal becomes inoperative. Accordingly a failure to aver that an appeal is in force is a failure to aver that the stay as

to a supersedeas obtained upon an appeal to the supreme court. *Lanier v. Nash*, 122 U. S., appx., 630.

Affidavits in support of motion.—Where the affidavits filed in support of a motion for the issuance of a supersedeas, failed to show that the subordinate court has done anything inconsistent with the prohibition contained in the act of congress which gives the writ of error the effect of a supersedeas, the motion cannot be granted. *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915.

67. **Notice of motion.**—*Boise County Comm'rs v. Gorman*, 131 U. S., appx. cxxv, 22 L. Ed. 148.

A motion for stay of execution must be upon notice to the other side to appear and show cause to the contrary. *Lanier v. Nash*, 122 U. S., appx., 630.

68. *Boise County Comm'rs v. Gorman*, 131 U. S., appx. cxxv, 22 L. Ed. 148.

69. **Service of notice.**—*Lanier v. Nash*, 122 U. S., appx., 630.

70. **Collateral proceedings not affected.**—*Grant v. Phoenix Life Ins. Co.*, 121 U. S. 118, 30 L. Ed. 909; *Spraul v. Louisiana*, 123 U. S. 516, 31 L. Ed. 233; *Knox County v. Harshman*, 132 U. S. 14, 33 L. Ed. 249.

Right to bring new suits involving same questions.—It operates on the judgment or decree, not on the questions involved considered apart from the particular suit in which they were decided. Accordingly it is no contempt of the supersedeas to bring new suits involving the same questions considered in the first cause, where no attempt is made to carry the judgment into execution which is in the appellate court for review. *Spraul v. Louisiana*, 123 U. S. 516, 31 L. Ed. 233.

Judgments for different purposes.—

Where a judgment is recovered against a county in one proceeding, and in another proceeding a writ of mandamus is awarded the judgment creditor to levy taxes to pay the same, it was held that an appeal from a decree dismissing the county's bill in equity to restrain the collection of the judgment as commanded, does not operate to supersede the judgment in collection of which the peremptory writ of mandamus was awarded. "The supersedeure of process on the decree dismissing the bill could not supersede process on the judgment at law, and this is so, notwithstanding a bill to impeach a judgment is regarded as an auxiliary or dependent and not as an original bill." *Knox County v. Harshman*, 132 U. S. 14, 33 L. Ed. 249, citing *Spraul v. Louisiana*, 123 U. S. 516, 31 L. Ed. 233.

An appeal from the main decree in a cause, does not deprive the court below of its power to proceed further in the cause, by executing such an order as that authorizing a receiver to make such necessary repairs to the property in litigation as he considers essential to the preservation of the property. *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 118, 30 L. Ed. 909.

71. **Supplemental decrees.**—*Carr v. Hoxie*, 13 Pet. 460, 10 L. Ed. 247.

Appeal from decree of circuit court, ordering the execution of the original decree, is not a supersedeas to further proceedings in the circuit court to execute the original decree. *Carr v. Hoxie*, 13 Pet. 460, 10 L. Ed. 247.

granted continued to have that effect.⁷²

4. SEVERABLE STAY IN CASE OF JOINT DEFENDANTS.—Although a writ of error is sued out by all the defendants to an entire judgment, to obtain its reversal, they may separate when they ask for a stay if a part only desire to have the execution against them stayed.⁷³

H. Operation and Effect—1. TIME OF OPERATION.—A supersedeas operates from the time of the completion of those acts which are requisite to call it into existence.⁷⁴

2. ON POWER OF COURT BELOW.—The power of the justice of the court below over the appeal and the security, in the absence of fraud, is exhausted after he approves the bond and signs the citation. From that time the control of the supersedeas as well as the appeal is transferred to the supreme court of the United States. Accordingly the court below is without power to proceed in the execution of the decree which has been appealed from.⁷⁵ But the general rule that an appeal suspends the power of the court below to proceed further in the cause, by executing the decree, does not prevent such court from making orders for the preservation of the property in litigation.⁷⁶

3. ON EXECUTION—*a. At Common Law*.—Nothing is better settled at the common law, than the doctrine that a supersedeas, in order to stay proceedings on an execution, must come before there is a levy made under the execution; for if it comes afterwards, the sheriff is at liberty to proceed upon a writ of venditioni exponas to sell the goods.⁷⁷ If the writ of execution has been not only lawfully issued, but actually executed, there is no remedy until the appellate proceedings are ended, when, if the judgment or decree be reversed, a writ of restitution will be awarded.⁷⁸

b. Under the Statutes.—To remedy the inconveniences that arose from an immediate issue of execution before the appellate proceedings could be perfected, the original judiciary act of 1789 provided, and the present Revised Statutes now provide, that no execution shall issue upon judgments in the courts of the United States, where a writ of error may be a supersedeas, until the expiration of ten days after the judgment. This regulation applies to proceedings in equity as well as to cases at law.⁷⁹ Under the act of 1872, execution might issue

72. Supersedeas expires with appeal.—*Gillette v. Bullard*, 20 Wall. 571, 22 L. Ed. 387.

73. Joint judgment in ejectment may be stayed as to some and execution ordered as to others, though all join in writ of error. *Ex parte French*, 100 U. S. 1, 25 L. Ed. 529.

74. Time of operation.—*Hovey v. McDonald*, 109 U. S. 150, 159, 27 L. Ed. 888.

75. Effect of supersedeas on power of court below.—*Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121. See the title APPEAL AND ERROR, vol. 2, p. 276.

And it is a fortiori that after a supersedeas bond is accepted and the case is actually entered in the supreme court, the jurisdiction of the court below is gone. *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025, following *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121, and distinguishing *Goddard v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040.

76. Grant v. Phoenix Life Ins. Co., 121 U. S. 118, 30 L. Ed. 909 (order by special term of supreme court of District of Columbia, after appeal to general term, authorizing receiver to make necessary repairs to property in his hands).

77. Supersedeas after levy of execu-

tion.—*Boyle v. Zacharie*, 6 Pet. 648, 659, 8 L. Ed. 532; *United States v. Dashiell*, 3 Wall. 688, 700, 18 L. Ed. 268.

The levy of an execution takes effect from the time when it is made by seizing the property, and is not defeated by a subsequent writ of supersedeas. *Freeman v. Dawson*, 110 U. S. 264, 270, 28 L. Ed. 141.

Directions are that the sheriff should proceed to the sale of the goods he had already levied, and that he should return the money into court to abide the event of the writ of error. *United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268.

Even if an injunction could be said to operate as a supersedeas at law, under any circumstances, in the courts of the United States, it cannot so operate where levy is made before the injunction is granted. *Boyle v. Zacharie*, 6 Pet. 648, 8 L. Ed. 532.

78. Hovey v. McDonald, 109 U. S. 150, 159, 27 L. Ed. 888. See the title APPEAL AND ERROR, vol. 2, p. 388.

79. Issuance of execution under the statutes.—*Hovey v. McDonald*, 109 U. S. 150, 159, 27 L. Ed. 888.

Quashal of execution.—An execution, issued in the court below, after a writ of

unless the writ of error and bond were filed within ten days. However, by performing these acts within sixty days from the entry of the judgment, a supersedeas might be obtained, though it stayed proceedings only from the filing of the bond.⁸⁰ But the rule laid down in *Board of Commissioners v. Gorman*, that under the act of 1872 execution might issue after the expiration of ten days, was changed by § 1007 of the Revised Statutes, which provided that, where a writ of error may be a supersedeas, execution shall not issue until the expiration of sixty days.⁸¹ At the next session of congress, an amendment to this section was passed, limiting the time for withholding execution to ten days.⁸²

c. *Who May Issue Execution.*—It is not clear that a complainant who has appealed from a decree in his favor, in the hope of obtaining a larger sum, can, pending the appeal, issue execution upon the decree of the court below.⁸³

d. *Practice in District of Columbia.*—By the rules regulating appeals from the special to the general term of the supreme court of the District of Columbia, it is declared that, after judgment is entered in the circuit court, or at a special term, execution may be issued, unless the party condemned moves to vacate or set it aside, or resorts to a review of it before the general term; but no appeal shall operate as a stay of execution where the judgment is for a specific sum of money, unless the appellant, with surety, within twenty days after the judgment or decree, execute and file an undertaking in the form prescribed.⁸⁴

4. ON JUDGMENTS IN CRIMINAL CASES.—The judgment of the court below in a capital case prescribing that the punishment shall be death, is not vacated by the writ of error; only its execution is stayed pending proceedings in the appellate court.⁸⁵

5. ON DECISION IN HABEAS CORPUS PROCEEDINGS.—The bare pendency of an appeal from the decision of a circuit court of the United States, denying a writ of habeas corpus to a person alleging restraint of his liberty by state authority in violation of the constitution or laws of the United States, has the effect of staying further proceedings against him under state authority, pending the appeal. If the appeal to the supreme court is dismissed, the supersedeas falls with the disposition of the case.⁸⁶ But if, upon an appeal from an order of the circuit court of the United States denying an application for a writ of habeas corpus,

error has been sued out, a bond given, and a citation issued, all in due time, may be quashed either in the court below or in the appellate court—these things operating as a stay of execution, and supersedeas will issue to supersede and quash the same. *Stockton v. Bishop*, 2 How. 74, 11 L. Ed. 184.

80. *Construction of act of 1872.*—*Board of Comm'rs v. Gorman*, 19 Wall. 661, 663, 22 L. Ed. 226, cited and discussed in *Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

81. *Limit upon time for withholding execution.*—*Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

82. *Kitchen v. Randolph*, 93 U. S. 86, 90, 23 L. Ed. 810.

Effect of enactment on state courts.—This statute has reference only to the judgments of the courts of the United States. It was not the intention of congress to interfere at all with the practice of the state courts as to executions upon their judgments. *Doyle v. Wisconsin*, 94 U. S. 50, 52, 24 L. Ed. 64; *Foster v. Kansas*, 112 U. S. 201, 204, 28 L. Ed. 629.

83. *Estoppel to issue execution.*—*Taylor v. Savage*, 1 How. 282, 11 L. Ed. 132.

84. *Practice in District of Columbia.*—*Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888.

It would not seem that this rule makes it unlawful to issue an execution within the twenty days. The proper construction of it would seem to be that the supersedeas does not take effect until the condition is complied with, and will not take effect at all unless complied with during the time limited. *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888.

85. *Effect of appeal in criminal cases.*—*Schwab v. Berggren*, 143 U. S. 442, 36 L. Ed. 218, cited with approval in *Cross v. United States*, 145 U. S. 571, 578, 36 L. Ed. 821.

Solitary confinement of defendant is not effected by stay. *Trezza v. Brush*, 142 U. S. 160, 35 L. Ed. 974.

86. *Stay of proceedings in state court pending appeal in habeas corpus proceedings.*—Rev. Stats., §§ 765, 766; *Lambert v. Barrett*, 159 U. S. 660, 40 L. Ed. 296; *In re Jugiro*, 140 U. S. 291, 35 L. Ed. 510; *Cramer v. Washington*, 168 U. S. 124, 42 L. Ed. 407.

No order staying proceedings under state authority is made a condition to

the state court after judgment by the supreme court proceeds before the mandate issues, its action, though not to be commended, is not void.⁸⁷

6. **RETROACTIVE OPERATION.**—Neither at common law,⁸⁸ nor under the statute⁸⁹ does a supersedeas have any retroactive effect.

7. **RULE IN EQUITY SUITS**—a. *In General.*—Independent of statutory regulations, the term supersedeas has little or no application in equity suits, as the rule is well settled in the English courts that an appeal in chancery does not stop the proceedings under the decree from which the appeal was taken without the special order of the subordinate court.⁹⁰

such stay, and the bare pendency of the appeal effects a stay. *Lambert v. Barrett* (1895), 159 U. S. 660, 40 L. Ed. 296.

The object of § 766 of the Revised Statutes, as was said in *In re Jugiro*, 140 U. S. 291, 35 L. Ed. 510, was, in cases where the applicant for the writ was held in custody under the authority of a state court, or by the authority of a state, to stay the hands of such court or state, while the question whether his detention was in violation of the constitution, laws, or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. *McKane v. Durston*, 153 U. S. 684, 686, 38 L. Ed. 867, reaffirmed in *Herold v. Frank*, 191 U. S. 558, 559, 48 L. Ed. 302.

But § 766 of the Revised Statutes does not prevent the accused from being committed to prison in execution of the sentence pronounced against him by the state court. *McKane v. Durston*, 153 U. S. 684, 38 L. Ed. 867.

Stay has not effect of certificate of reasonable doubt.—A suspension of proceedings in the state court, when it occurs under the circumstances stated in this section, has not the same effect as a certificate of reasonable doubt given by a state judge, under a state statute, after the execution of the judgment of conviction has been commenced. The only purpose of the statute is to prevent the state court, or the state, pending proceedings on appeal to the supreme court, from changing, to the prejudice of the accused, the situation as it was at the time the appeal was taken from the judgment of the circuit court disallowing an application for a writ of habeas corpus based on grounds of which, under the statutes of the United States, the federal courts could take cognizance. *McKane v. Durston* (1894), 153 U. S. 684, 38 L. Ed. 867.

87. **Stay terminates with final judgment.**—*In re Boardman*, 169 U. S. 39, 42 L. Ed. 653, following *In re Jugiro*, 140 U. S. 291, 35 L. Ed. 510.

When the supreme court affirms, with costs, the judgment of the circuit court denying an application for a writ of habeas corpus, it is a final judgment in the premises, and nothing remains that is "in process of being heard and determined;" and the state court has power to proceed, though it would be more ap-

propriate and orderly for the state court to defer final action until the mandate is issued and filed in the circuit court. *In re Jugiro* (1891), 140 U. S. 291, 35 L. Ed. 510. See, also, *In re Boardman* (1898), 169 U. S. 39, 42 L. Ed. 653; *McKane v. Durston* (1894), 153 U. S. 684, 38 L. Ed. 867.

88. **Retroactive operation of supersedeas.**—*United States v. Dashiell*, 3 Wall. 688, 18 L. Ed. 268.

89. **The supersedeas under the act of 1872**, by filing the bond within sixty days, stays further proceedings, but does not interfere with what has already been done. *Board of Comm'rs v. Gorman*, 19 Wall. 661, 22 L. Ed. 226; *Doyle v. Wisconsin*, 94 U. S. 50, 52, 24 L. Ed. 64.

Thus, where one has been ousted from office by virtue of a writ on a judgment rendered on the 20th of January, and the writ was executed by ousting him on the 3d of February, and on the latter day a supersedeas bond was filed, but subsequently to the execution of the writ, held, that no relief could be had under the act of 1872. *Board of Comm'rs v. Gorman*, 19 Wall. 661, 22 L. Ed. 226.

90. **Supersedeas in equity practice.**—*Slaughter-House Cases*, 10 Wall. 273, 296, 19 L. Ed. 915.

In this country the effect of an appeal from a decree or order in chancery is usually regulated by statute or rules of court, and generally speaking an appeal, upon giving the security required by law (when security is required), suspends further proceedings, and operates as a supersedeas of execution. This, as we have seen, is the case in the circuit courts of the United States. But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order, either of the court which makes the decree, or of the appellate tribunal. *Hovey v. McDonald*, 109 U. S. 150, 160, 27 L. Ed. 888.

Practice in England stated.—*Hovey v. McDonald*, 109 U. S. 150, 160, 27 L. Ed. 888.

But in one case Mr. Chief Justice Waite said: "A supersedeas upon the appeal of a suit in equity operates to stay the execution of the decree appealed from." *Goddard v. Ordway*, 94 U. S. 672, 24 L. Ed. 237.

Decree dismissing cross bill.—The de-

b. *Decrees in Injunction Proceedings*.—(1) *In General*.⁹¹—Strictly speaking, at the common law, an injunction in equity does not operate as a supersedeas, although it may furnish a proper ground for the court of law, in which the judgment is rendered, to interfere by summary order to quash or stay the proceedings on the execution.⁹² But though an appeal from a decree granting or dissolving an injunction does not supersede or vacate the injunction, a justice or judge taking part in the decision may suspend or modify the injunction pending the appeal.⁹³ But if the power is not exercised by the court, nor by the judge who allowed the appeal, the decree retains its intrinsic force and effect.⁹⁴

(2) *Under Court of Appeals Act*.—Where an appeal is taken to a circuit court of appeals from the decree of the district or circuit court granting or continuing an injunction by an interlocutory order or decree, as authorized by § 7 of the act of March 3, 1891, commonly known as the circuit court of appeals act, the petitioner has not an absolute right to a supersedeas of the injunction pending the appeal, on the filing of a bond satisfactory to the circuit court, but the circuit court has a discretion to grant or refuse a supersedeas,⁹⁵ and its discretion cannot be controlled by a writ of mandamus.⁹⁶

c. *Orders to Receivers*.—An order directing a receiver to pay over funds in his hands, is not suspended or superseded by an appeal therefrom, although notice of the taking of the appeal is given to the receiver at once, and before he parts with the funds in his hands. Accordingly he is not affected by a subsequent reversal of such order.⁹⁷

8. **POWER OF COURT BELOW TO PUNISH FOR CONTEMPT.**—Though an appeal has been properly perfected, a supersedeas will not issue to restrain the court

of general term of supreme court of District of Columbia ordering the dismissal of a cross bill to set aside a deed of trust with costs, held to be superseded. *Hitz v. Jenks*, 185 U. S. 155, 46 L. Ed. 851.

91. As to effect of appeal from decree granting, refusing or dissolving injunctions, see the title APPEAL AND ERROR, vol. 2, p. 277.

92. **Injunction as supersedeas.**—*Boyle v. Zacharie*, 6 Pet. 648, 658, 5 L. Ed. 532.

93. **Power of court to suspend decree.**—*Leonard v. Ozark Land Co.*, 115 U. S. 465, 29 L. Ed. 445, citing *Slaughter-House Cases*, 10 Wall. 273, 19 L. Ed. 915; *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888.

94. *Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888.

95. **Construction of court of appeals act.**—*In re Haberman Mfg. Co.*, 147 U. S. 525, 37 L. Ed. 266.

The power of the appellate court over the cause, of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of § 7 of the act of 1891 and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed, pending the appeal. *Hovey v. McDonald*, 109 U. S. 150, 160, 161, 27 L. Ed. 888; *In re Haberman Mfg. Co.*, 147 U. S. 525, 37 L. Ed. 266; *Smith v. Vulcan Iron Works*, 165 U. S. 518, 525, 41 L. Ed. 810.

96. **Mandamus.**—*In re Haberman Mfg. Co.*, 147 U. S. 525, 37 L. Ed. 266.

In re Haberman Mfg. Co., 147 U. S. 525, 530, 37 L. Ed. 266, it was held that in view of the terms of the act the lower court had a discretion to grant or refuse a supersedeas, and that thereupon the federal supreme court would not issue a mandamus to command the judge of that court to approve a supersedeas bond, to supersede an injunction, and to enter an order vacating the injunction. *In re McKenzie*, 180 U. S. 536, 550, 45 L. Ed. 657.

97. **Order directing receiver to pay over funds.**—*Hovey v. McDonald*, 109 U. S. 150, 27 L. Ed. 888. In this case Mr. Justice Bradley said that it was in the power of the special term of the supreme court of the District of Columbia to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so; and suggested that the latter course would have been eminently proper, and would have protected all parties and produced injury to none. "But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order. It was his duty to obey the decree as made."

Effect of superseding order of appointment of receiver.—The authorities are many that where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and that this may be directed to be done. It is at all events evident that an order that he should do so is not void in itself. *In re McKenzie*, 180 U. S. 536, 551, 45 L. Ed. 657.

below from punishing for contempt of its orders.⁹⁸

9. **EFFECT UPON INSTRUMENTS INVOLVED.**—An appeal from a decree declaring a lease to be void does not give the lease any force and vitality upon such an appeal. Whatever effect the appeal and supersedeas may have upon the decree, they cannot give validity to a void instrument.⁹⁹

10. **APPEAL FROM ACTION OF COURT BELOW ON MANDATE.**—An appeal to the supreme court, from the decision of the court below as to the form of proceeding which that court should adopt to enforce the execution of its own mandate in the court below, does not stay proceedings. It would be the duty of the circuit court, notwithstanding the appeal, to proceed to execute the judgment of the supreme court, unless he entertains doubts of its construction and meaning, and deems it just and equitable to suspend its execution until the decision of the appellate court could be had in the premises.¹

11. **APPEALS IN ADMIRALTY.**—An appeal in admiralty stays proceedings under the judgment and keeps the vessel in the possession of the court;² and protects the stipulators as well as the principals.³

12. **RULE IN LOUISIANA.**—A devolutive appeal in Louisiana practice never operates as a supersedeas.⁴

13. **QUESTIONS OF LAW AND FACT.**—It is a matter of law whether a writ of error operates as a supersedeas.⁵

I. Vacation of Supersedeas.—1. **IN GENERAL.**—Motion to vacate is the proper remedy where a supersedeas has been improperly granted;⁶ which motion, if made before the record is printed, must be accompanied by a statement of the facts on which it rests, agreed to by the parties, or supported by printed copies of so much of the record as will enable the appellate court to act understandingly, without reference to the transcript on file.⁷

2. **GROUND FOR VACATING.**—A motion will be granted to vacate a supersedeas which was awarded after the expiration of the time required to perfect the appeal,⁸ or when the approval of the bond therefor was obtained by fraud and perjury,⁹ or when the supersedeas bond is defective.¹⁰ But where no writ of error was ever issued in a cause, a motion to vacate a supersedeas must be denied, because a supersedeas cannot be allowed except as an incident to an appeal actually taken or a writ of error actually sued out.¹¹

98. Lower court may enjoin party from violating its decree for injunction, though appeal from decree has been properly perfected.—*French v. Shoemaker*, 12 Wall. 86, 20 L. Ed. 270.

99. Effect upon validity of instruments involved.—*Lehnen v. Dickson*, 148 U. S. 71, 79, 37 L. Ed. 373.

1. *Perkins v. Fourniquet*, 14 How. 328, 329, 14 L. Ed. 441. See the title **MANDATE AND PROCEEDINGS THEREON**, vol. 8, p. 97.

2. Judgment dismissing libel stayed by allowance of appeal.—*The Rio Grande*, 23 Wall. 458, 23 L. Ed. 158. See the title **ADMIRALTY**, vol. 1, p. 196.

3. Execution against stipulators as well as principal is stayed.—*The Belgenland*, 108 U. S. 153, 27 L. Ed. 685.

4. Louisiana practice.—*Montgomery v. Samory*, 99 U. S. 482, 491, 25 L. Ed. 375.

5. Question of law.—*Western Air Line Constr. Co. v. McGillis*, 127 U. S. 776, 32 L. Ed. 324.

6. Motion to vacate.—*Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810.

The propriety or impropriety of an order granting a supersedeas cannot be considered on a motion to dismiss the appeal.

—*Hudgins v. Kemp*, 18 How. 530, 535, 15 L. Ed. 511.

7. Scope and contents of motion.—*Power v. Baker*, 112 U. S. 710, 28 L. Ed. 825.

8. Grounds for vacating supersedeas.—*Kitchen v. Randolph*, 93 U. S. 86, 23 L. Ed. 810. Compare *Western Air Line Constr. Co. v. McGillis*, 127 U. S. 776, 32 L. Ed. 324.

But in such case the burden rests on the movant.—Thus, upon a motion to vacate a supersedeas, it rests upon the appellees to show that the bond was not accepted in time; if this is not done the motion to vacate will be denied. *Power v. Baker*, 112 U. S. 710, 28 L. Ed. 825.

9. Approval of supersedeas bond procured by fraud.—*Railroad Co. v. Schutte*, 100 U. S. 644, 25 L. Ed. 605.

10. That bond contains no true description of judgment.—*Knox County v. United States*, 131 U. S., appx. clxxi, 27 L. Ed. 191, citing *O'Reilly v. Edrington*, 96 U. S. 724, 726, 24 L. Ed. 659.

11. Where no writ of error has issued.—*Ex parte Ralston*, 119 U. S. 613, 30 L. Ed. 506.

J. Remedy in Case Stay Is Violated.—Prohibition is the proper remedy to prevent a lower court from carrying its decree into execution when an appeal operated as a supersedeas,¹² not because it suspends the effect of the decree, for that is already done by the appeal; but because it enables the court of appellate jurisdiction, in case of disobedience, to punish the inferior court as being in contempt.¹³

II. Stay of Proceedings.

A. Right to Stay Proceedings.—Proceedings on a judgment recovered in a United States circuit court may be stayed, until the parties have time to seek further relief from a state court.¹⁴

B. Review of Order Granting Stay.—A writ of error does not lie to an order of the court below, granting an indefinite stay of proceedings upon suggestion of the attorney for the United States, in a case to which the United States are not parties, but the court will award a mandamus nisi, in the nature of a procedendo.¹⁵

SUPERVISORS.—As to supervisory inspectors, see the title COLLISION, vol. 3, p. 885. As to supervisor of elections, see the title ELECTIONS, vol. 5, p. 725. As to right to issue county bonds, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 675.

SUPPLEMENTAL BILL AND PLEADINGS.—As to supplemental bills, see the title EQUITY, vol. 5, p. 856, and cross references there found. As to supplemental answers, see the titles EJECTMENT, vol. 5, p. 709; EQUITY, vol. 5, p. 863.

SUPPLEMENTARY PROCEEDINGS.—As to proceedings in aid of execution, see the title COURTS, vol. 4, p. 1146. As to nature and effect of supplementary proceedings, see the title EXECUTIONS, vol. 6, p. 116.

SUPPLIES.—See the title MARITIME LIENS, vol. 8, p. 225.

SUPPORT AND MAINTENANCE.—As to right of wife to support from her husband, see the title HUSBAND AND WIFE, vol. 6, p. 730. As to duty of father to support child, see the title PARENT AND CHILD, vol. 9, p. 9. As to lateral or subjacent support, see the title ADJOINING LANDOWNERS, vol. 1, p. 117.

SUPREME COURTS.—See the titles APPEAL AND ERROR, vol. 1, p. 406; COURTS, vol. 4, p. 1006.

SURETIES AND SURETYSHIP.—See the title PRINCIPAL AND SURETY, vol. 9, p. 713.

SURETY TO KEEP THE PEACE.—See the title BAIL AND RECOGNIZANCE, vol. 2, p. 773.

SURETY, TRUST AND SAFE DEPOSIT COMPANIES.—See the title LOAN, TRUST AND SAFE DEPOSIT COMPANIES, vol. 7, p. 1057.

SURFACE WATERS.—See the title WATERS AND WATERCOURSES.

SURGEON.—See the title PHYSICIANS AND SURGEONS, vol. 9, p. 308.

SURGICAL INSTRUMENTS.—See the title CARRIERS, vol. 3, p. 583.

SURPLUS.—See note 1.

SURPLUSAGE.—See the title PLEADING, vol. 9, p. 426.

SURPLUS MONEY.—See the titles MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 520; SHERIFFS', CONSTABLES' AND MARSHALS' SALES, vol. 10, p. 1134.

12. Prohibition.—Bronson v. La Crosse, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616.

13. Penhallow v. Doane, 3 Dall. 54, 87, 1 L. Ed. 507.

14. Right to stay of proceedings.—Dunn v. Clarke, 8 Pet. 1, 8 L. Ed. 845.

15. Review of order granting stay.—Livingston v. Dorgenois, 7 Cranch 577, 2 L. Ed. 444.

1. Surplus.—Where a testator, in Penn-

sylvania, gave to his wife a life estate in the homestead and two lots, and charged upon his goods and lands an annuity to her, but did not mention his lands in any other part of the will, and then, after sundry legacies, bequeathed the surplus to be applied to the purposes of the Presbyterian church, this surplus does not relate to his lands, which his heirs will take. Allen v. Allen, 18 How. 385, 15 L. Ed. 396.

SURPRISE.—As ground for new trial, see the title *NEW TRIAL*, vol. 8, p. 919. As ground for relief against judgment, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 631. As to reviewability of questions of, see the title *APPEAL AND ERROR*, vol. 1, p. 1004.

SURREJOINDER.—See the title *PLEADING*, vol. 9, p. 453.

SURRENDER.—The word "surrender," however, does not exclude compelled action, but to the contrary generally implies such action. That this is the primary and commonly accepted meaning of the word is shown by the dictionaries. Thus, the *Standard Dictionary* defines its meaning as follows: 1. To yield possession of to another upon compulsion or demand, or under pressure of a superior force; give up, especially to an enemy in warfare; as to surrender an army or a fort. And in *Webster's International Dictionary* the word is primarily defined in the same way. The word, of course, also sometimes denotes voluntary action. In the statute, however, it is unqualified, and generic, and hence embraces both meanings.¹

SURROGATE COURTS.—Orphans' courts, prerogative courts, probate courts and surrogate courts are tribunals for the establishment of wills and the administration of the estates of men dying either with or without wills. To these functions have occasionally been added the guardianship of infants, and control of their property, the allotment of dower, and perhaps other powers related more or less to the same subject.² They possess, with respect to personal assets, nearly all the powers formerly exercised by the court of chancery and the ecclesiastical courts in England.³

1. **Surrender.**—*Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 362, 49 L. Ed. 790. See the title *BANKRUPTCY*, vol. 2, p. 882.

Surrender of preferences.—As to meaning of **surrender** in the provision of the bankrupt act that claims of creditors who have preference shall not be allowed unless such preferences are **surrendered**, see the title *BANKRUPTCY*, vol. 2, p. 882.

As to surrender of principal by bail, see the title *BAIL AND RECOGNIZANCE*, vol. 2, p. 770.

As to surrender of property, see the title *DEEDS*, vol. 5, p. 253.

As to surrender of patent on reissue, see the title *PATENTS*, vol. 9, p. 240.

As to termination of an estate by surrender, see the title *LANDLORD AND TENANT*, vol. 7, p. 831.

As to surrender of insurance policy, see the title *INSURANCE*, vol. 7, p. 147.

Surrender indicating transfer of title.—Where an indictment charged the director of a national bank with procuring the **surrender** and delivery to himself of funds of the bank, the court said: "The general words of a fraudulent misapplication to the use and benefit of the defendant, and of an intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose. Indeed, the word **surrender** carries with it something more than a bare delivery, and indicates a transfer of title as well as of possession." *Evans v. United States*, 153 U. S. 584, 590, 38 L. Ed. 830.

2. *Robinson v. Fair*, 128 U. S. 53, 32 L. Ed. 415; *Public Works v. Columbia College*, 17 Wall. 521, 531, 21 L. Ed. 87. See the title *EXECUTORS AND ADMIN-*

ISTRATORS, vol. 6, p. 125.

"It was said in *Ferris v. Higley*, 20 Wall. 375, 382, 22 L. Ed. 383, to be the almost uniform rule among the people who make the common law of England the basis of their jurisprudence, to have a district tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills—which tribunals are 'variously called prerogative courts, probate courts, surrogate courts, orphans' courts, etc.,' and that to these functions 'have occasionally been added the guardianship of infants, and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject.'" *Robinson v. Fair*, 128 U. S. 53, 86, 32 L. Ed. 415. See, also, *Public Works v. Columbia College*, 17 Wall. 521, 531, 21 L. Ed. 687.

3. **Powers.**—*Public Works v. Columbia College*, 17 Wall. 521, 531, 21 L. Ed. 687.

"In this country, there are special courts established in all the states, having jurisdiction over estates of deceased persons, called probate courts, orphans' courts, or surrogate courts, possessing, with respect to personal assets, nearly all the powers formerly exercised by the court of chancery and the ecclesiastical courts in England. They are authorized to collect the assets of the deceased, to allow claims, to direct their payment and the distribution of the property to legatees or other parties entitled, and generally to do everything essential to the final settlement of the affairs of the deceased, and the claims of creditors against his estate." *Public Works v. Columbia College*, 17 Wall. 521, 531, 21 L. Ed. 687.

SURVEY.—See the titles **BOUNDARIES**, vol. 3, p. 461; **EJECTMENT**, vol. 5, p. 703; **PUBLIC LANDS**, vol. 10, pp. 33, 78, 150, 161, 284, 330. As to surveys as evidence, see the title **DOCUMENTARY EVIDENCE**, vol. 5, p. 444.

SURVEYORS.—See the title **COUNTIES**, vol. 4, p. 838. As to surveyor general, see the title **LOGS AND LOGGING**, vol. 7, p. 1060. As to surveyors of ports, see the title **REVENUE LAWS**, vol. 10, p. 1008.

SURVIVAL OF ACTIONS.—See the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 12.

SURVIVING.—As to liability of surviving partner, see the title **PARTNERSHIP**, vol. 9, p. 113.

SURVIVORSHIP.—See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 7, p. 534. As to presumption of, see the title **PRESUMPTIONS AND BURDEN OF PROOF**, vol. 9, p. 628.

SUSPEND—SUSPENSION.—See the titles **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900; **SENTENCE AND PUNISHMENT**, vol. 10, p. 1904. As to suspension held to be a discontinuance, see the title **POSTAL LAWS**, vol. 9, p. 572.

SUSPENSIVE CONDITION.—As to suspensive and resolutive conditions under Code of Louisiana, see the title **CONDITIONS**, vol. 3, p. 1006.

SUSPICION.—As to weight of a mere suspicion, see the title **EVIDENCE**, vol. 5, p. 1035.

SWAMP AND OVERFLOWED LANDS.—See the title **PUBLIC LANDS**, vol. 10, p. 220.

SWAMP LANDS.—See the title **PUBLIC LANDS**, vol. 10, p. 220. See, also, **LAND**, vol. 7, p. 825.

SWEARING.—See, generally, the titles **AFFIDAVITS**, vol. 1, p. 200; **OATH**, vol. 8, p. 952. As to false swearing, see the title **PERJURY**, vol. 9, p. 385, and references given.

SYMBOLICAL OR CONSTRUCTIVE DELIVERY.—See the title **SALES**, vol. 10, p. 1043.

SYNALLAGMATIC CONTRACTS.—See the title **CONTRACTS**, vol. 4, p. 567.

SYNDIC.—See the title **INSOLVENCY**, vol. 7, p. 6.

SYNDICATE.—See the title **STOCK AND STOCKHOLDERS**, ante, p. 182.

SYRUP.—See note 1.

TACKING.—See the titles **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 940; **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 510.

TAKE—TAKING—TAKEN.—See the title **EMINENT DOMAIN**, vol. 5, p. 746. See, also, note 2.

1. **Syrup.**—See *United States v. 112 Casks of Sugar*, 8 Pet. 277, 280, 8 L. Ed. 944.

2. **Take effect.**—Where it was provided that none of the legacies, bequests and devices in a will should be executed or taken until the performance of certain things, the words "take effect" were held to have been used as synonymous with or equivalent to the word "executed." *Jones v. Habersham*, 107 U. S. 174, 176, 27 L. Ed. 401.

Taking distinguished from reservation.—In *United States Bank v. Waggener*, 9 Pet. 378, 399, 9 L. Ed. 163, the court said: "It is observable that the words of the article are, that the bank shall not take (not shall not reserve or take) more than at the rate of six per cent. In the construction of the statute of usury, this distinction between the reservation, and taking of usurious interest, has been deemed very material; for the reservation of

usurious interest makes the contract utterly void; but if usurious interest be not stipulated for, but only taken afterwards, then the contract is not void, but the party is only liable to the penalty for the excess. So it was held in *Floyer v. Edwards*, Cowp. 112. But in the case of *United States Bank v. Owens*, 2 Pet. 527, 528, 7 L. Ed. 508, it was said, that in the charter 'reserving' must be implied in the word taking. This expression of opinion was not called for by the certified question, which arose out of the plea; for it was expressly averred in the plea, that in pursuance of the corrupt and unlawful agreement therein stated, the bank advanced and loaned the whole consideration of the note, after deducting a large sum for discount, in the notes of the Bank of Kentucky, at their nominal value." See the title **USURY**.

As to when an appeal is taken, see the

TALESMEN.—See the title JURY, vol. 7, p. 748.

TALLIES OF LOAN.—See EXCHEQUER BILLS, vol. 6, p. 79.

TAPIOCA AND TAPIOCA FLOUR.—See the title REVENUE LAWS, vol. 10, pp. 881, 898.

TARIFF.—See the title REVENUE LAWS, vol. 10, p. 864.

title APPEAL AND ERROR, vol. 2, p. 135.

Taken and impressed into service of United States.—Claims "for property claimed to have been **taken** and impressed

into the service of the United States," does not include losses arising from mere detention and delay of wagon trains. *United States v. Irwin*, 127 U. S. 125, 129, 32 L. Ed. 99.

TAXATION.

BY JAS. F. MINOR.

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See the titles ANIMALS, vol. 1, p. 316; BROKERS, vol. 3, p. 531; CONSTITUTIONAL LAW, vol. 4, p. 1; DOMICILE, vol. 5, p. 473; DUE PROCESS OF LAW, vol. 5, p. 499; INJUNCTIONS, vol. 6, p. 1022; INSPECTION LAWS, vol. 7, p. 16; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; LICENSES, vol. 7, p. 869; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; MANDAMUS, vol. 8, p. 1; MINES AND MINERALS, vol. 8, p. 364; PARTIES, vol. 9, p. 34; PAYMENT,

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As to customs duties, see the title REVENUE LAWS, vol. 10, p. 838. As to taxation of commerce and property engaged therein, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269. As to taxation of dogs under police power, see the title ANIMALS, vol. 1, p. 318. As to taxation of Indians or Indian property or the property of third persons situated within an Indian reservation, see the title INDIANS, vol. 6, pp. 955-957. As to federal encroachment upon states by taxation, see the title CONSTITUTIONAL LAW, vol. 4, pp. 209-213. As to state encroachment on federal powers by taxation, see the title CONSTITUTIONAL LAW, vol. 4, pp. 191-204. As to federal questions as to taxation, see the title APPEAL AND ERROR, vol. 1, p. 333. As to limitation of prosecutions, see the title CRIMINAL LAW, vol. 5, p. 98, et seq. As to mandamus for levy and collection of taxes, see the title MANDAMUS, vol. 8, p. 68, et seq. As to state laws and decisions as controlling in federal courts, see the title COURTS, vol. 4, pp. 1116-1120. As to water rents, see the title WATER COMPANIES AND WATERWORKS.

I. Scope.

This article includes taxation by the states, the federal government, and the territories, except such portions thereof as are treated under the title REVENUE LAWS, vol. 10, p. 838, which includes customs duties, internal revenue laws generally, the taxes on distilled spirits, tobacco, and oleomargarine, iron and its manufactures, ready made clothing, stamp taxes and forfeitures and seizures; and excluding license taxes, which are treated in LICENSES, vol. 7, p. 869, and other portions of this great subject under specific titles, as indicated in the table of cross-references.

II. Classification of Taxes, Definitions and Distinctions.

A. Classification of Taxes.—Direct and Indirect.—The general division of taxes is into direct and indirect; although the latter term is not to be found in the constitution, yet the former necessarily implies it; indirect stands opposed to direct.¹

B. Definitions—1. TAXES GENERALLY.—Generally speaking, a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the government.²

1. **Classification as direct and indirect.**—*Hylton v. United States*, 3 Dall. 171, 176, 1 L. Ed. 556; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 573, 39 L. Ed. 759. See post, "Definitions," II, B.

2. **Tax.**—*New Jersey v. Anderson*, 203 U. S. 483, 492, 51 L. Ed. 284; *United States v. Railroad Co.*, 17 Wall. 322, 326, 21 L. Ed. 597; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 198, 37 L. Ed. 132; *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 475, 46 L. Ed. 283; *Patton v. Brady*, 184 U. S. 608, 619, 46 L. Ed. 713; *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197.

"The inherent and fundamental nature and character of a tax is that of a con-

tribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax." Per Field, J., concurring. *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 599, 39 L. Ed. 759. See, also, *Loan Ass'n v. Topeka*, 20 Wall. 655, 664, 22 L. Ed. 455, quoting Webster.

"Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is

2. **INDIRECT TAXES.**—Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes.³

3. **DIRECT TAXES.—Land and Capitation Taxes.**—It was formerly held for many years, after a period of doubt,⁴ that direct taxes, within the meaning of the constitution, were only capitation taxes as expressed in that instrument, and taxes on real estate.⁵

Income Taxes.—But it is now held, since the income tax decisions, that taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes; and that taxes on personal property, or on the income of personal property, are likewise direct taxes. See post, "Income Taxes," III, C, 3, b. As to distinction from excise tax, see post, "Excise Taxes," II, B, 4.

Tax on State Banks of Issue.—See the title CONSTITUTIONAL LAW, vol. 4, p. 305.

4. **EXCISE TAXES**—*a. In General.*—The designation, excise tax, does not always indicate merely an inland imposition or duty on the consumption of commodities but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently, in this country, in the latter sense than in any other.⁶

necessary for other purposes." *Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L. Ed. 23.

As assessment.—"The term 'assessment' is often used as a synonym of 'taxes.' Indeed, one of the definitions of this term given by Webster is 'a tax.'" *Wells v. Savannah*, 181 U. S. 531, 541, 45 L. Ed. 986. See post, "Distinctions," II, C.

Burden or charge for franchise.—*Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 44, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

"Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'" *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 445, 19 L. Ed. 95.

Duties, imposts and excises.—The words duties, imposts and excises were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like. *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481. See *Hylton v. United States*, 3 Dall. 171, 175, 1 L. Ed. 556.

And indirect taxes are comprehended under the description of duties, imposts or excises. *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 557, 39 L. Ed. 759.

"There may, perhaps, be an indirect tax on a particular article, that cannot be comprehended within the description of duties, or imposts or excises; in such case, it will be comprised under the general denomination of taxes. For the term tax is the genus, and includes: 1. Direct taxes. 2. Duties, imposts and excises. 3.

All other taxes of an indirect kind, and not within any of the classifications enumerated under the preceding heads." *Hylton v. United States*, 3 Dall. 171, 176, 1 L. Ed. 556.

Property tax.—A tax on sleeping cars is not a property tax, because, under the constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 43, 29 L. Ed. 785, followed in *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 29 L. Ed. 791.

3. **Indirect taxes.**—*Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 558, 39 L. Ed. 759; *Hylton v. United States*, 3 Dall. 171, 176, 1 L. Ed. 556, where a tax on expense is said to be an indirect tax. See post, "Excise Taxes," II, B, 4.

The French definition is that "indirect taxes are levied upon the happening of an event or an exchange." *Knowlton v. Moore*, 178 U. S. 41, 47, 44 L. Ed. 969.

4. **Direct taxes.**—*Hylton v. United States*, 3 Dall. 171, 177, 1 L. Ed. 556; *Scholey v. Rew*, 23 Wall. 331, 347, 22 L. Ed. 99. See *quære*, whether a tax, by a general assessment of personal property, within the United States, was a direct tax. *Hylton v. United States*, 3 Dall. 171, 175, 1 L. Ed. 556; *Veazie Bank v. Fenno*, 8 Wall. 533, 546, 19 L. Ed. 482.

5. **Formerly only land and capitation taxes.**—*Springer v. United States*, 102 U. S. 586, 599, 26 L. Ed. 253; *Veazie Bank v. Fenno*, 8 Wall. 533, 546, 19 L. Ed. 482.

In France, "direct taxes bear immediately upon persons, upon the possession and enjoyment of rights." *Knowlton v. Moore*, 178 U. S. 41, 47, 44 L. Ed. 969.

6. **Excise tax.**—*Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 227, 35 L. Ed. 994;

b. *Excise Tax on Doing Business, etc., as Measured by Receipts.*—A tax imposed upon the carrying on of a business, measured by annual receipts over a certain sum, is a special excise tax and not a direct tax.⁷

Pacific Ins. Co. v. Soule, 7 Wall. 433, 443, 445, 19 L. Ed. 95. See EXCISE, vol. 6, p. 79. See, also, the title REVENUE LAWS, vol. 10, p. 861.

Tax on amount of bank circulation.—“In *Veazie Bank v. Fenno*, 8 Wall. 533, 544, 546, 19 L. Ed. 482, a tax was laid on the circulation of state banks or national banks paying out the notes of individuals or state banks, and it was held that it might well be classed under the head of duties, and as falling within the same category as *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95. It was declared to be of the same nature as excise taxation on freight receipts, bills of lading, and passenger tickets issued by a railroad company.” It was held not a direct tax. *Pollock v. Farmers’ Loan, etc., Co.*, 157 U. S. 429, 576, 39 L. Ed. 759. See, also, *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496.

Tax on interest paid on corporate bonds.—“In *Railroad Co. v. Collector*, 100 U. S. 595, 596, 25 L. Ed. 647, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be ‘essentially an excise on the business of the class of corporations mentioned in the statute.’” *Pollock v. Farmers’ Loan, etc., Co.*, 157 U. S. 429, 578, 39 L. Ed. 759.

Carriage tax as excise.—In *Hylton v. United States*, 3 Dall. 171, 1 L. Ed. 556, decided in March, 1796, this court held the act laying the carriage tax of 1794, to be constitutional, because not laying a direct tax, but an excise. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision, and Mr. Justice Wilson gave no reasons. *Pollock v. Farmers’ Loan, etc., Co.*, 157 U. S. 429, 570, 39 L. Ed. 759; *Pollock v. Farmers’ Loan, etc., Co.*, 158 U. S. 601, 627, 39 L. Ed. 1108; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 444, 19 L. Ed. 95.

7. Excise tax on doing business, etc., as measured by receipts.—*Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 413, 48 L. Ed. 496. See, also, *Scholey v. Rew*, 23 Wall. 331, 347, 22 L. Ed. 99; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 446, 19 L. Ed. 95; *Veazie Bank v. Fenno*, 8 Wall. 533, 546, 19 L. Ed. 482.

Sugar refining.—Such was the tax imposed by § 27 of the act of 1898 expressly with reference to the “carrying on or doing the business of * * * refining sugar.” *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 413, 48 L. Ed. 496.

But it was improper to include in the plaintiff’s gross annual receipts interest paid to it upon deposits in bank and dividends received by it upon shares of stock in other companies. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397,

415, 48 L. Ed. 496.

But the receipts from wharfage were properly included in plaintiff’s gross annual receipts upon which the amount of the prescribed tax was to be computed, as the primary use of the wharves was in connection with and in the prosecution of that business. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 414, 48 L. Ed. 496.

Excise tax on business of insurance.—It was held in *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95, that the income tax imposed by the internal revenue act of June 30, 1864, amended July 13, 1866, 13 Stat. 223, 14 Stat. 98, on the amounts insured, renewed and continued by insurance companies, on the gross amount of premiums received, on dividends, undistributed sums and income, was not a direct tax, but an excise duty or tax within the meaning of the constitution. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 411, 48 L. Ed. 496.

The decision rested on narrow ground and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall. *Pollock v. Farmers’ Loan, etc., Co.*, 157 U. S. 429, 576, 39 L. Ed. 759.

“This was in accordance with *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907, and *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904, in which cases there was a difference of opinion on the question whether the tax under consideration was a tax on the property and not upon the franchise or privilege. And see *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025; *Pullman’s Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613.” *Pollock v. Farmers’ Loan, etc., Co.*, 157 U. S. 429, 576, 39 L. Ed. 759.

Tax on professional receipts.—“A tax on professional receipts was recognized by the present chief justice in delivering the opinion of the court on the first hearing of the *Pollock v. Farmers’ Loan, etc., Co.*, 157 U. S. 429, 579, 39 L. Ed. 759, as an excise or duty and therefore indirect, while a tax on the income of personality he thought might be regarded as direct. And upon the rehearing, *Pollock v. Farmers’ Loan, etc., Co.*, 158 U. S. 601, 39 L. Ed. 1108, it was distinctly held that the tax on personal property or on the income thereof was a direct tax.” *Nicol v. Ames*, 173 U. S. 509, 519, 43 L. Ed. 786.

c. *Excise Tax on Sales at Exchanges.*—A tax on a sale at an exchange, board of trade or like place is not a direct tax, but a duty or excise on the privilege which is separate and apart from the business itself.⁸

d. *Duty on Gains, Profits, Incomes and Dividends.*—The duty which the internal revenue acts provided should be assessed, collected, and paid upon gains, profits and incomes was an excise or duty and not a direct tax, within the meaning of the constitution.⁹ And so with taxes on interest and dividends paid by corporations.¹⁰ Although assessed against a corporation, a tax on its dividends or payments of interest is a tax on the income of the stockholder or creditor.¹¹

e. *Tax on Legacies, Successions and Distributive Shares.*—The tax on legacies and distributive shares imposed by the War Revenue Act of 1898, is not direct within the meaning of the constitution, but, on the contrary, is a duty or excise.¹²

f. *Tax on Property with Reference to Origin and Intended Use.*—A tax upon property with reference to its origin and intended use is not a direct tax, but an excise within the power of congress to impose.¹³

8. *Excise tax on sales at exchanges.*—*Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496.

Where it is said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer, in other words, that it is direct because the owner cannot shift the payment of the amount of the tax to some one else, this, however, assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale. *Nicol v. Ames*, 173 U. S. 509, 520, 43 L. Ed. 786.

9. *Duty on gains, profits and incomes.*—*Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95; *Scholey v. Rew*, 23 Wall. 331, 347, 22 L. Ed. 99; *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 235, 27 L. Ed. 711; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 588, 39 L. Ed. 759.

The opinion in *Springer v. United States*, 102 U. S. 586, 595, 26 L. Ed. 253, thus concludes: "Our conclusions are, that direct taxes, within the meaning of the constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty." *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 579, 39 L. Ed. 759.

10. *Interest and dividends paid by corporations.*—"In *Railroad Co. v. Collector*, 100 U. S. 593, 25 L. Ed. 647, followed in *United States v. Erie R. Co.*, 106 U. S. 327, 27 L. Ed. 151, it was held that the internal revenue tax on interest and dividends was an excise tax on the business of corporations, to be paid by the corporations out of their earnings, income and

profits." *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 234, 27 L. Ed. 711. See, also, *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95; *United States v. Erie R. Co.*, 106 U. S. 327, 330, 27 L. Ed. 151, rehearing denied in *United States v. Erie R. Co.*, 107 U. S. 1, 27 L. Ed. 385; *Railroad Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647.

11. *Tax on owners of stock and not the corporations.*—*United States v. Railroad Co.*, 17 Wall. 322, 327, 21 L. Ed. 597; *Barnes v. The Railroads*, 17 Wall. 294, 305, 21 L. Ed. 544; *Stockdale v. Insurance Companies*, 20 Wall. 323, 330, 22 L. Ed. 348; *United States v. Erie R. Co.*, 106 U. S. 327, 330, 27 L. Ed. 151, per Field, J., dissenting; *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 234, 27 L. Ed. 711. See, however, *Railroad Co. v. Collector*, 100 U. S. 595, 598, 25 L. Ed. 647.

Although the effect is the same whether it be considered a tax on the shares or on the corporation. *Stockdale v. Insurance Companies*, 20 Wall. 323, 330, 22 L. Ed. 348.

Except where the stockholder is exempt from such an exaction the tax may properly be assessed against the company required to render the return, and it is the company which is to make the payment and which becomes liable to the penalty in case of default. *Bailey v. Railroad Co.*, 22 Wall. 604, 631, 22 L. Ed. 840; *Barnes v. The Railroads*, 17 Wall. 294, 303, 21 L. Ed. 544. See post, "Payments of Interest from Income of Corporations," III, C, 3, b, (2), (g).

Power of congress and construction of acts.—See post, "Income Taxes," II, C, 3, b.

12. *Tax on legacies and distributive shares.*—*Knowlton v. Moore*, 178 U. S. 41, 83, 44 L. Ed. 969; *Scholey v. Rew*, 23 Wall. 331, 349, 22 L. Ed. 99. See the title SUCCESSION TAXES, ante, p. 288.

13. *Tax on property with reference to origin and intended use.*—*Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713; *Spreckels*

g. *State Excise Tax on Corporate Franchise*.—Property taxation and excise taxation, as authorized in the constitution of the state of Massachusetts, are perfectly distinct, and the two systems are easily distinguished from each other.¹⁴

5. **IMPORTS, EXPORTS AND IMPOSTS THEREON**.—See **EXPORTS AND IMPORTS**, vol. 5, p. 210.

Imports.—Imports are things imported. They are articles which are brought into a country.¹⁵

Imposts.—An impost, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise.¹⁶

Impost or Duty on Imports.—An impost, or duty on imports, is a custom or tax levied on articles brought into a country.¹⁷

C. Distinctions.—Taxation and Taking for Public Use.—Taxation is to be distinguished from a taking of private property for public use.¹⁸

Taxation and Tolls for Road Improvement.—And it is to be distinguished from tolls taken for the improvement of highways.¹⁹

Special Assessments.—And from special assessments.²⁰

Tax and Rental Distinguished.—A charge by a city for the use of its streets is held not a tax but a rental.²¹

Not Debts in Ordinary Sense.—See note.²²

Charge for Right to Purchase Cotton in South during War.—This was not a tax.²³

Sugar Ref. Co. v. McClain, 192 U. S. 397, 412, 48 L. Ed. 496.

Tobacco tax.—Such was the tax imposed by the act of June 13, 1898, upon tobacco, however prepared, manufactured and sold, for consumption or sale. *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713; *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 412, 48 L. Ed. 496.

14. **State excise tax on corporate franchise**.—*Hamilton Co. v. Massachusetts*, 6 Wall. 632, 640, 18 L. Ed. 904. See post, "Corporate Franchise," IV, E, 2.

15. **Definition of imports**.—*Brown v. Maryland*, 12 Wheat. 419, 437, 6 L. Ed. 678; *Woodruff v. Parham*, 8 Wall. 123, 131, 19 L. Ed. 382.

16. **Impost defined**.—*Passenger Cases*, 7 How. 283, 407, 12 L. Ed. 702; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 445, 19 L. Ed. 95. See the title **REVENUE LAWS**, vol. 10, p. 860.

17. **Definition of "impost or duty on imports"**.—*Brown v. Maryland*, 12 Wheat. 419, 437, 6 L. Ed. 678. See the title **REVENUE LAWS**, vol. 10, p. 860.

18. **Distinguished from taking by eminent domain**.—*Mobile County v. Kimball*, 102 U. S. 691, 703, 26 L. Ed. 238. See the titles **DUE PROCESS OF LAW**, vol. 5, p. 586; **EMINENT DOMAIN**, vol. 5, p. 751.

19. **Taxation and tolls for road improvement**.—"Taxes are levied for the support of government, and their amount is regulated by its necessities. Tolls are the compensation for the use of another's property, or of improvements made by him; and their amount is determined by the cost of the property, or of the improvements, and considerations of the return which such values or expenditures should yield." *Sands v. Manistee River*

Imp. Co., 123 U. S. 288, 294, 31 L. Ed. 149. See, also, the title **LICENSES**, vol. 7, p. 871.

20. **Distinguished from special assessment**.—*Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 197, 37 L. Ed. 132. See the title **SPECIAL ASSESSMENTS**, ante, p. 1.

21. **Tax or rental**.—*St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 97, 37 L. Ed. 380. See the title **LICENSES**, vol. 7, pp. 871, 880.

It is said, however, in *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 18, 39 L. Ed. 873, that it is straining no principle of law or of good sense to regard the payment of an annual tax as equivalent, for the purpose of the present inquiry, to the payment of a rent for a grant of public lands by a county to a railroad company. It was the case of a sale, in consideration of money paid down and to be paid in the form of taxes, in addition to the great advantages to inure to the public.

22. **Not debts in ordinary sense**.—*Patton v. Brady*, 184 U. S. 608, 619, 46 L. Ed. 713; *Lane County v. Oregon*, 7 Wall. 71, 75, 19 L. Ed. 101; *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 475, 46 L. Ed. 283. See post, "Nature and Source of Obligation," VI, C. 1, a.

23. **Charge for permission to purchase cotton in states of Confederacy during war**.—*Hamilton v. Dillin*, 21 Wall. 73, 22 L. Ed. 528.

The internal revenue acts of 1862 (12 Stat. at Large 465) and 1864 (13 Id. 15), in imposing specific duties by way of excise on cotton, were not inconsistent with or repugnant to the charge in question. The two charges were different things. One was a payment as a condi-

III. The Taxing Power.

A. In General—1. NATURE AND ORIGIN—*a. Independent of Contract.*—The principles of taxation are not those of contract.²⁴

b. Inherent Incident of Sovereignty.—That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm.²⁵

c. Unlimited in Extent.—The power of taxation, generally, in all independent states, is unlimited as to persons and things, except as they may have been pleased, by contract or otherwise, to restrict themselves.²⁶ The power to tax is the power to destroy.²⁷

tion of trading at all, required by the war power; the other was an excise imposed by the taxing power. *Hamilton v. Dilin*, 21 Wall. 73, 22 L. Ed. 528. See the titles EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 732; WAR.

24. Independent of contract.—*Seattle v. Kelleher*, 195 U. S. 351, 359, 49 L. Ed. 232. See post, "Nature and Source of Obligation," VI, C, 1, a.

Attaches to ownership.—See post, "Liability," VI, C, 1, a.

25. Inherent incident of sovereignty.—*State Bank v. Knoop*, 16 How. 369, 387, 14 L. Ed. 977; *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. Ed. 579; *Osborne v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420, 9 L. Ed. 773; *Passenger Cases*, 7 How. 283, 531, 12 L. Ed. 702, per Woodbury, J., dissenting; *Christ Church v. County of Philadelphia*, 24 How. 300, 302, 16 L. Ed. 602; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 20 L. Ed. 192; *Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787; *The Delaware R. Tax*, 18 Wall. 206, 226, 21 L. Ed. 888; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 42, 22 L. Ed. 282; *Tucker v. Ferguson*, 22 Wall. 527, 575, 22 L. Ed. 805; *Board of Liquidation v. McComb*, 92 U. S. 531, 535, 23 L. Ed. 623; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558; *Transportation Co. v. Wheeling*, 99 U. S. 273, 281, 25 L. Ed. 412; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558; *Railway Co. v. Philadelphia*, 101 U. S. 528, 537, 29 L. Ed. 912; *United States v. Snyder*, 149 U. S. 210, 214, 37 L. Ed. 705; *Nicol v. Ames*, 173 U. S. 509, 515, 43 L. Ed. 786; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679; *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 202, 50 L. Ed. 150.

The power of legislation, and consequently, of taxation, operates on all the persons and property belonging to the body politic; this is an original principle, which has its foundation in society itself; it is granted by all, for the benefit of all, it resides in government, as a part of itself; and need not be reserved, where property of any description, or the right to use it in any manner, is granted to in-

dividuals or corporate bodies. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 897, followed in *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907.

And must be exerted according to the varying conditions of the commonwealth. *Christ Church v. County of Philadelphia*, 24 How. 300, 302, 16 L. Ed. 602.

"While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular." *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079. See post, "Nature and Source of Obligation," VI, C, 1, a.

Presumption against abandonment.—See post, "Exemptions from Taxation," V.

26. Unlimited in extent.—*Passenger Cases*, 7 How. 283, 531, 12 L. Ed. 702, Mr. Justice Woodbury's dissenting opinion; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 42, 22 L. Ed. 282; *Spencer v. Merchant*, 125 U. S. 345, 353, 31 L. Ed. 763; *Nicol v. Ames*, 173 U. S. 509, 515, 43 L. Ed. 786.

"If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the state or corporation which imposes it, which the will of each state and corporation may prescribe." *Weston v. Charleston*, 2 Pet. 449, 466, 7 L. Ed. 481; *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *Loan Ass'n v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679.

27. Unrestrained power to tax is power to destroy.—*Farrington v. Tennessee*, 93 U. S. 679, 688, 24 L. Ed. 558; *McCulloch*

d. *As Legislative Power*—(1) *Rule Stated*.—The power to tax belongs exclusively to the legislative branch of the government.²⁸ It is not a judicial act.²⁹

(2) *Plenary unless Restrained*.—This power is plenary and uncontrollable unless restrained by law or contract.³⁰

(3) *Discretion of Legislature*.—The extent to which the power of taxation shall be exercised, the subjects upon which it shall be exercised, and the mode, are all equally within the discretion of the legislature.³¹ A court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discretely exercised.³²

v. Maryland, 4 Wheat. 316, 4 L. Ed. 579; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482; *The Collector v. Day*, 11 Wall. 113, 127, 20 L. Ed. 122; *Loan Ass'n v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455; *California v. Central Pac. R. Co.*, 127 U. S. 1, 41, 32 L. Ed. 150; *Fairbank v. United States*, 181 U. S. 283, 291, 45 L. Ed. 862.

"As quite recently pointed out by this court in *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969, the often quoted statement of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority." *McCray v. United States*, 195 U. S. 27, 56, 49 L. Ed. 78. See post, "As Legislative Power," III, A, d.

28. As legislative power.—*United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Ware v. Hylton*, 3 Dall. 199, 232, 1 L. Ed. 568; *Heine v. Levee Comm'rs*, 19 Wall. 655, 661, 22 L. Ed. 223; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Wolff v. New Orleans*, 103 U. S. 358, 365, 26 L. Ed. 395; *Louisiana v. Pilsbury*, 105 U. S. 278, 300, 26 L. Ed. 1090; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 31, 31 L. Ed. 607; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763; *Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. Ed. 772. See the title CONSTITUTIONAL LAW, vol. 4, pp. 241, 243.

29. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. *Meriwether v. Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197.

And the judiciary cannot direct a tax to be levied when none is authorized by the legislature. *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225.

Where the state has delegated the power to a body (such as the levee commissioners) which has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any federal

court. It is unreasonable to suppose that the legislature would ever select a federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the state government. *Heine v. Levee Comm'rs*, 19 Wall. 655, 661, 22 L. Ed. 223. See, also, post, "Express Authority of Law Essential, and Construction," III, A, 1, j.

30. Power of taxation plenary in legislature.—*Talbot v. Jansen*, 3 Dall. 133, 163, 1 L. Ed. 540; *Williams v. Supervisors*, 122 U. S. 154, 163, 30 L. Ed. 1088; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 396, 47 L. Ed. 513; *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 204, 50 L. Ed. 150.

"As said by Mr. Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. Ed. 579: 'The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.'" *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 295, 50 L. Ed. 744. See, also, *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 20 L. Ed. 192. See post, "Limitations on Power," III, A, 2; "Jurisdiction and Situs," IV, A, 2.

31. Discretion of legislature.—*Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 20 L. Ed. 192.

"The legislature must therefore determine all questions of state necessity, discretion or policy involved in ordering a tax and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns, and must decide upon the agencies by means of which collections shall be made. 'The judicial tribunals of the state have no concern with the policy of legislation.'" *Patton v. Brady*, 184 U. S. 608, 620, 46 L. Ed. 713; *Thomas v. Gay*, 169 U. S.

(4) *Delegation by Legislature*.—It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate.³³

(5) *Necessity for Representation*.—While the people who pay the taxes are entitled to a voice in the election of those who pass the laws laying the taxes, it is not necessary that everyone taxed be represented by some one for whom he has actually voted, for the property of nonresidents, aliens, women and children, may be taxed.³⁴

(6) *Alienability by Legislature*.—See post, "Exemptions from Taxation," V.

c. *Apportionment*.—**In General**.—When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the state, or lay the greater share or the whole upon that country or portion of the state specially and immediately benefited by the expenditure.³⁵

By Federal Government.—Apportionment is an operation on states, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to states, and is

264, 283, 42 L. Ed. 740; *McCray v. United States*, 195 U. S. 27, 58, 49 L. Ed. 78.

"And whatever authority the states may, under their constitutions, confer upon special tribunals of their own, the federal courts cannot by reason of it take any additional powers which are not judicial." *Meriwether v. Garrett*, 102 U. S. 472, 519, 26 L. Ed. 197.

32. Control by judiciary.—*New York v. Commissioners*, 2 Black 620, 631, 17 L. Ed. 451; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 371, 46 L. Ed. 949; *McCray v. United States*, 195 U. S. 27, 59, 49 L. Ed. 78.

They can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents. *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 371, 46 L. Ed. 949.

"The power to tax belongs exclusively to the legislative branch of the government. *United States v. New Orleans*, 93 U. S. 381, 392, 25 L. Ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts,

but to the people by whom its members are elected.' *Veazie Bank v. Fenno*, 8 Wall. 533, 548, 19 L. Ed. 482; *McCulloch v. Maryland*, 4 Wheat. 316, 428, 4 L. Ed. 579; *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939. See, also, *Kirtland v. Hotchkiss*, 100 U. S. 491, 497, 25 L. Ed. 558. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire. *Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658." *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. Ed. 763. See, also, *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *McCray v. United States*, 195 U. S. 27, 60, 49 L. Ed. 78. See the title CONSTITUTIONAL LAW, vol. 4, pp. 241, 243.

33. Delegation by legislature.—*Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 297, 50 L. Ed. 744.

To municipal corporation.—See post, "Delegation by Legislature," III, E, 1, a.

34. Necessity for representation.—*Thomas v. Gay*, 169 U. S. 264, 276, 42 L. Ed. 740. See, also, *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339. See post, "Object Must Be a Public One," II, A, 2, c.

35. Apportionment.—*Mobile County v. Kimball*, 102 U. S. 691, 703, 26 L. Ed. 238. See, also, *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595; *Laramie County v. Albany County*, 92 U. S. 307, 23 L. Ed. 552; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *American Express Co. v. Michigan*, 177 U. S. 404, 413, 44 L. Ed. 823.

at once easy, certain and efficacious, and leaves nothing to the pleasure of the assessor.³⁶

f. *Taxing Districts.—Power to Create.*—If the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited.³⁷

g. *Validity a Practical Question.*—The validity of a tax law is a practical question, to be determined by a consideration of its actual practical results, rather than theoretical and abstract ideas.³⁸

h. *Taxation as Taking of Property.*—The imposition of taxes is not a taking of property for public uses within the meaning of constitutional and statutory provisions requiring compensation therefor.³⁹

i. *Constitutional Ordinance.—Levy on Gross Receipts to Pay Debt to State.*—The ordinance of the 8th of April, 1865, adopted by the people of Missouri, as part of the constitution of the state established on that day, levying an annual tax on gross receipts to pay what was due the state on bonds issued to and for the railroad, was, as respected the North Missouri Railroad Company, a true exercise of the taxing power of the state, and not a mere change of the order of disbursing the receipts and earnings of the company as prescribed by the act of legislature above named.⁴⁰

36. *Hylton v. United States*, 3 Dall. 171, 180, 1 L. Ed. 556.

Apportionment of direct tax.—See post, "Apportionment," III, C, 3, a, (4).

37. **Power to create taxing district.**—*Williams v. Eggleston*, 170 U. S. 304, 311, 42 L. Ed. 1047; *Spencer v. Merchant*, 125 U. S. 345, 356, 31 L. Ed. 763; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943.

"Unless there be some specific provisions in the state constitution compelling other action the state may treat its entire territory as composing but a single taxing district, and deal with all property as within the district and subject to taxation accordingly." *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 299, 50 L. Ed. 744. See, also, post, "Assessment and Levy," VI; "Uniformity Coextensive with Territory Where Tax Is Paid or Subject Exists," III, A, 2, b, (3), (b); "Taxation for Local and Municipal Uses," III, A, 2, b, (3), (g).

Change or Abolition of Taxing District as Impairment of Obligation of Contract.—See the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 812, 851, et seq.; MANDAMUS, vol. 8, p. 68, et seq.

38. **Validity a practical question.**—*Nicol v. Ames*, 173 U. S. 509, 516, 43 L. Ed. 786.

39. **Taxation as taking of property.**—*Mobile County v. Kimball*, 102 U. S. 691, 703, 26 L. Ed. 238; *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 43 L. Ed. 823; *S. C.*, 173 U. S. 624, 43 L. Ed. 835.

Even though the property taxed receives less benefit from the government imposing the tax than other property subject to the same tax, as a judicial tribunal should not enter into a minute calculation as to benefits and burdens to ascertain if the burdens imposed are out of proportion to the benefits received. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 43 L. Ed. 823, where it is said: "But it is conceivable that the tax be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation." See, also, *Henderson Bridge Co. v. Henderson City*, 173 U. S. 624, 43 L. Ed. 835; *Kelly v. Pittsburgh*, 104 U. S. 78, 82, 26 L. Ed. 658. See the titles DUE PROCESS OF LAW, vol. 5, p. 586; EMINENT DOMAIN, vol. 5, p. 770; SPECIAL ASSESSMENTS, ante, p. 1. See post, "Absolute Equality Unattainable," III, A, 2, b, (3), (a).

Kentucky.—Although the general principle to be deduced from the Kentucky decisions is that the taxation of lands for local purposes which do not receive any benefit, actual or presumed, from the municipal government imposing the taxation is a taking of private property for public use without compensation, and therefore in violation of the constitutional provision on that subject. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 618, 43 L. Ed. 823; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 624, 43 L. Ed. 835.

40. **Levy on gross receipts to pay debt to state.**—*North Missouri R. Co. v. Maquire*, 20 Wall. 46, 22 L. Ed. 287.

j. *Express Authority of Law Essential, and Construction.*—It may be conceded that no tax can be levied without express authority of law, but the statutes are to receive a reasonable construction with a view to carrying out their purpose and intent.⁴¹ But where there is a doubt, it is resolved against the tax.⁴²

k. *Progressive Taxes.*—Some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial.⁴³

1. *Compensation to Taxpayer.*—See post, "Object Must Be a Public One," III, A, 2, a, (3); ante, "Taxation as Taking of Property," III, A, 1, h.

2. *LIMITATIONS ON POWER*—a. *In General.*—But the power may be restricted by positive enactments of the organic law,⁴⁴ or even by statute.⁴⁵ But such limitations may be waived.⁴⁶

b. *Requirement of Equality and Uniformity*—(1) *Under Guaranty of Equal Protection of the Laws in Fourteenth Amendment, and Federal Constitution and Laws Generally.*—See the title CONSTITUTIONAL LAW, vol. 4, p. 393, et seq. "The fourteenth amendment was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways."⁴⁷ The federal constitution imposes no restraints on the states in regard to unequal taxation.⁴⁸

41. Express authority of law essential, and construction.—*Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 629, 49 L. Ed. 614. See *Buck v. Beach*, 206 U. S. 392, 400, 51 L. Ed. 1106, where the ruling of the state court on that question is held conclusive. See, also, *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 610, 29 L. Ed. 477, applying rule to public lands before patent; *Neat v. White*, 181 U. S. 264, 267, 45 L. Ed. 853.

Although in a particular case, the tax was insignificant in amount. But something more substantial than mere conjecture must be urged against a tax to overthrow it. *Plummer v. Coler*, 178 U. S. 115, 137, 44 L. Ed. 998. See, also, ante, "As Legislative Power," III, A, 1, d; post, "Want of Power Fatal to Tax—Construction," III, D, 1, e.

42. Doubt resolved against tax.—*Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 416, 48 L. Ed. 496; *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. Ed. 697; *United States v. Isham*, 17 Wall. 496, 504, 21 L. Ed. 728.

"Though the rule regarding exemptions from general laws imposing taxes may be different. *Cooley on Taxation*, 146." *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. Ed. 697. See post, "Exemptions from Taxation," V.

And this rule applies to congress. *Eidman v. Martinez*, 184 U. S. 578, 583, 46 L. Ed. 697.

Retrospective assessments.—See post, "Assessment of Back Taxes, and Reassessments," VI, A, 4, g.

43. Progressive taxes.—*Knowlton v. Moore*, 178 U. S. 41, 109, 44 L. Ed. 969, where question is discussed.

44. Limitations on power.—*Humboldt Tp. v. Long*, 92 U. S. 642, 647, 23 L. Ed. 752; *Loan Ass'n v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455.

"If the constitution of a state should

declare that no tax shall be levied exceeding a certain per cent of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent, the courts would not hesitate to pronounce a levy in excess of that rate void." *Humboldt Tp. v. Long*, 92 U. S. 642, 647, 23 L. Ed. 752.

"The power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 563, 46 L. Ed. 679.

45. By statute.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455, where it was said that such limitations are unwise.

Requirement that all property be taxed in proportion to value.—See ante, "Taxes Generally," II, B, 1.

46. Waiver.—*Wight v. Davidson*, 181 U. S. 371, 377, 45 L. Ed. 900; *Shutte v. Thompson*, 15 Wall. 151, 159, 21 L. Ed. 123.

47. Fourteenth amendment.—*Armour Packing Co. v. Lacy*, 200 U. S. 226, 235, 50 L. Ed. 451; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 293, 50 L. Ed. 744.

Weight of finding of trial court, on question of undervaluation.—Where it is charged in the bill that there was a systematic undervaluation of other property in the state which resulted in denying to this plaintiff the equal protection of the law, and the trial court found against this charge, it is enough to say that generally the finding of a trial court is accepted upon a question of fact, when the testimony respecting it is conflicting. *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 302, 50 L. Ed. 744.

48. Under federal constitution generally.—*Davidson v. New Orleans*, 96 U. S. 97,

Unjust and Oppressive Taxation.—The constitution of the United States does not profess in all cases to protect property from unjust and oppressive taxation by the states. That is left to the state constitutions and state laws.⁴⁹

Classification.—Nor does it prevent classification of property as to mode and rate of assessment, and the purpose, whether state or local, to which applied.⁵⁰

Discrimination against Nonresidents.—Where the only discrimination made was between improved and unimproved lands, without regard to the residence of the owners and the accidental circumstances that more improved lands were owned by residents than by nonresidents, this does not show a violation of or a purpose to violate, an act of congress, providing for the admission of the state to the Union and forbidding the property of nonresidents to be taxed at a greater rate than that of residents.⁵¹

105, 24 L. Ed. 616; *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 295, 42 L. Ed. 1037. See, also, *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939.

"And it was said in *Merchants, etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236: 'Indeed, this whole argument of a right under the federal constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania* (134 U. S. 232, 33 L. Ed. 892).'" *Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 296, 42 L. Ed. 1037. See, also, *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 192, 36 L. Ed. 121; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 371, 46 L. Ed. 949; *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. Ed. 663.

Requiring business to bear expense of supervision.—See the title CONSTITUTIONAL LAW, vol. 4, p. 373.

49. Unjust and oppressive taxation.—*Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, 400, 27 L. Ed. 976; *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 192, 196, 36 L. Ed. 121; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 42, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87. See the title CONSTITUTIONAL LAW, vol. 4, pp. 242, 258, 271, 393, et seq.

"It is not enough to justify the overthrow, by judicial decision, of a state law imposing taxation, simply to show that such law operates unjustly. So far as the courts of the Union are concerned, they must recognize and, when necessary to do so in cases within their jurisdiction, enforce the statutes of the several states, unless those statutes encroach upon legitimate national authority, or violate some right granted or secured by the constitution of the United States." *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 641, 38 L. Ed. 846, followed in *Dela-ware, etc., Canal Co. v. Pennsylvania*, 156

U. S. 200, 39 L. Ed. 396; *Kirtland v. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558.

50. Classification.—*Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 300, 50 L. Ed. 744; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. Ed. 414; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 31 L. Ed. 1031; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 538, 40 L. Ed. 247.

The mere fact that all of a certain class of property in the state, such as railroad property, is taken into account in determining the average rate at which such property shall be taxed, does not carry with it such proof of injustice and inequality as to compel the courts in all cases to strike the latter down. *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 300, 50 L. Ed. 744. See post, "Classification of Property for Taxing Purposes," III, A, 2, b, (3), (c).

The court may fairly take judicial notice of the fact that a state is traversed in almost every direction by railroads, and that while it is possible that there may be a county or two without one, yet it is an exception, and to hold that for each railroad the average rate must be determined from the property in the localities, immediately contiguous or through which its road passes, might well introduce into the matter of taxation a confusion and inequality resulting in far greater injustice than the uniformity established by the present system. *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 300, 50 L. Ed. 744. See ante, "Taxing Districts," III. See the title CONSTITUTIONAL LAW, vol. 4, p. 393, et seq.

51. Discrimination against nonresidents.—*Beeson v. Johns*, 124 U. S. 56, 60, 31 L. Ed. 360.

In an action to set aside and declare void a tax deed for discrimination against nonresidents in the assessment on which it was based (as contrary to an ordinance of congress), while not deciding that in no case of a settled purpose to discriminate in the taxation of lands in a county or state against owners residing in another state would such a sale be held void, in this case there is no reason for holding the tax sale complained of here

Due Process of Law in Assessment.—See post, “Due Process of Law,” VI, A, 4.

As to Requirement of Equal Protection of Laws.—See the title CONSTITUTIONAL LAW, vol. 4, p. 393, et seq.

(2) *Under Requirement That Duties, Imposts and Excises Shall Be Uniform Throughout the United States*—(a) *In General.*—The word “duties, imposts and excises” in § 8 of article 1 of the constitution requiring them to be uniform, “were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.”⁵² It is uniform if it operates with the same effect in all places when the subject of it is found. It is a geographical uniformity.⁵³ But the uniformity clause applies only to commerce between ports of the several states.⁵⁴

Head-Money Tax.—So also as to head-money taxes, or excise duties on the business of bringing passengers from foreign countries into this. They are uniform if they operate alike wherever such passengers can be landed.⁵⁵

Application to District of Columbia.—See the title REVENUE LAWS, vol. 10, p. 965.

Distribution of Railroad Property for Taxing Purposes.—See post, “Classification of Property for Taxing Purposes,” III, A, 2, b, (3), (c).

(b) *Assessment of Distillers.*—The 20th section of the act of July 20th, 1868

to be void on that account. If a tax were levied under a law of the state which required either the assessment, or the rate levied upon that assessment, to be more favorable to the resident owners of the property than those who resided in another state, all assessments and sales under such a statute might possibly be declared to be void. But where the question relates to the action of a single assessor, or of a township or county board of equalization, and does not profess to be carried on with any purpose of making such discrimination, the mere errors in assessment should be corrected by proceedings which the law allows before such sale or before a deed is finally made. There is no sufficient evidence in this case of any purpose to discriminate against the owner of the lands in controversy, nor of any actual injury to him by the assessment which was made upon his property. *Beeson v. Johns*, 124 U. S. 56, 59, 31 L. Ed. 360.

52. Meaning of words, duties, imposts and excises.—*Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481.

Duties, imposts and excises must be uniform throughout the United States. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482; *Hylton v. United States*, 3 Dall. 171, 181, 1 L. Ed. 556; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *Scholey v. Rew*, 23 Wall. 331, 347, 22 L. Ed. 99; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 557, 39 L. Ed. 759; *S. C.*, on rehearing 158 U. S. 601, 618, 39 L. Ed. 1108.

53. Uniform in all places where subject is found.—*Head-Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *Hylton v. United States*, 3 Dall. 171, 181, 1 L. Ed. 556; *Nicol v. Ames*, 173 U. S. 509, 522, 43 L. Ed. 786. See, also, *Knowlton v. Moore*,

178 U. S. 41, 106, 44 L. Ed. 969; *Patton v. Brady*, 184 U. S. 608, 622, 46 L. Ed. 713; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 592, 39 L. Ed. 759.

54. Uniformity clause inapplicable to foreign territory.—*Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Downes v. Bidwell*, 182 U. S. 244, 278, 45 L. Ed. 1088. See the title CONSTITUTIONAL LAW, vol. 4, p. 118.

Inapplicable to insular possessions.—*Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088; *Dooley v. United States*, 183 U. S. 151, 46 L. Ed. 128. See the title CONSTITUTIONAL LAW, vol. 4, p. 116.

And correlatively congress could lawfully impose a duty upon imports from Porto Rico, notwithstanding the provision of the constitution that all duties, imposts and excises shall be uniform throughout the United States. *Dooley v. United States*, 183 U. S. 151, 157, 46 L. Ed. 128.

Applicability to local taxes within territories.—See the title CONSTITUTIONAL LAW, vol. 4, p. 117.

Export tax on merchandise carried between states.—While this does not seem to be expressly forbidden it would be extremely difficult, if not impossible, to lay an export tax upon merchandise carried from one state to another, without a violation of the first paragraph of art. 1, § 8, that “all duties, imposts, and excises shall be uniform throughout the United States.” *Dooley v. United States*, 183 U. S. 151, 157, 46 L. Ed. 128.

55. Head-money tax.—*Head-Money Cases*, 112 U. S. 580, 594, 28 L. Ed. 798; *Patton v. Brady*, 184 U. S. 608, 622, 46 L. Ed. 713. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 332, 378.

(to the effect that in no case shall a distiller be assessed for a less amount of spirits than 80 per cent of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent, he shall also be assessed upon the excess), laying, as it does, a tax uniform in its operation, and establishing one rule for all distillers, is constitutional. It is an excise.⁵⁶

(c) *War Revenue Act Taxing Sales at Exchanges and Boards of Trade*.—The War Revenue Act of 1898, taxing sales at exchanges and boards of trade and exempting all other sales, was held constitutional over an objection that it was not uniform; because such a sale differs from other sales, and hence forms a proper basis for a classification which excludes all sales made elsewhere from taxation.⁵⁷

(d) *Taxes Other than Duties, Imposts, Excises or Direct Taxes*.—"If there are any other species of taxes that are not direct, and not included within the words duties, impost, or excise, they may be laid by the rule of uniformity or not; as congress shall think proper and reasonable."⁵⁸

(3) *Under Provisions of State Constitutions Requiring Uniformity and Equality*—(a) *Absolute Equality Unattainable*.—Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with, when designed and manifest departures from the rule are avoided.⁵⁹ The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.⁶⁰

Oppressive Exercise of Power.—See ante, "As Legislative Power," III, A, 1, d; post, "Discretion of Legislative Body," III, D, 1, c.

56. Assessment on producing capacity of distillers.—United States v. Singer, 15 Wall. 111, 112, 21 L. Ed. 49.

57. Act taxing sales at exchanges.—Nicol v. Ames, 173 U. S. 509, 43 L. Ed. 786.

Nor is this act objectionable upon the ground that it only taxes those who make sales and not those who make purchases, and those who sell products or merchandise, and not those who sell bonds, stocks, etc., because it is not necessary to constitute the compliance with the uniformity of the excise tax law that the exercise of every privilege should be taxed. Nicol v. Ames, 173 U. S. 509, 43 L. Ed. 786.

The Union Stock Yards of Chicago answer all the purposes of an exchange or board of trade, and they in truth amount in substance to the same thing. Nicol v. Ames, 173 U. S. 509, 527, 43 L. Ed. 786.

58. Taxes other than duties, imposts, excises or direct taxes.—Hylton v. United States, 3 Dall. 171, 173, 1 L. Ed. 556. See, also, Veazie Bank v. Fenno, 8 Wall. 533, 546, 19 L. Ed. 482.

59. Absolute equality in taxation can never be attained.—Stanley v. Supervisors, 121 U. S. 535, 550, 30 L. Ed. 1000; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 504, 22 L. Ed. 189; State Railroad Tax

Cases, 92 U. S. 575, 612, 23 L. Ed. 663; Railway Co. v. Philadelphia, 101 U. S. 528, 537, 29 L. Ed. 912; Head Money Cases, 112 U. S. 580, 594, 28 L. Ed. 798; Patton v. Brady, 184 U. S. 608, 622, 46 L. Ed. 713; Travellers' Ins. Co. v. Connecticut, 185 U. S. 364, 371, 46 L. Ed. 949.

Inequality in resulting benefits.—"The cases, both state and federal, are numerous in which it has been held that taxes, otherwise lawful, are not invalidated by the allegation, or even the fact that the resulting benefits are unequally shared." Thomas v. Gay, 169 U. S. 264, 278, 42 L. Ed. 740. See Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Waggoner v. Evans, 170 U. S. 588, 592, 42 L. Ed. 1154.

60. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 301, 50 L. Ed. 744; State Railroad Tax Cases, 92 U. S. 575, 607, 23 L. Ed. 663; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. Ed. 414. See, also, Williams v. Supervisors, 122 U. S. 154, 163, 30 L. Ed. 1088; Columbus, etc., R. Co. v. Wright, 151 U. S. 470, 482, 38 L. Ed. 238; Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421, 31 L. Ed. 1031; Florida Cent., etc., R. Co. v. Reynolds, 183 U. S. 471, 46 L. Ed. 283; Coulter v. Louisville, etc., R. Co., 196 U. S. 599, 49 L. Ed. 615.

Universality Not Essential.—The requirement of equality and uniformity does not require that taxation shall be universal. It simply requires that when different kinds of property are taxed, the rate of taxation shall be the same on all.⁶¹

(b) *Uniformity Coextensive with Territory Where Tax Is Paid or Subject Exists.*—Under a constitutional provision that the legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law, the object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a state tax, it must be uniform all over the state. If a county or city tax, it must be uniform throughout such county or city. But the rule does not require that taxes for the same purposes shall be imposed in different territorial subdivisions at the same time.⁶²

Right of Legislature to Make Distinctions between Territorial Subdivisions.—Where the difference between the different portions of territory is plain and palpable, the right of the legislature to recognize that difference and to provide for a difference in taxation cannot be denied without imposing, as said by Judge Cooley, restraints upon the constitutional power of the legislature, which cannot in reason be justified. Whether there is such a difference would generally be for the legislature to determine, although it cannot be said that the courts could not, in any possible state of facts, review that determination.⁶³

(c) *Classification of Property for Taxing Purposes.*—**In General.**—A state may in its wisdom classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the constitution of the United States.⁶⁴

61. **Universality not essential.**—*Louisiana v. Pilsbury*, 105 U. S. 278, 291, 26 L. Ed. 1090; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 705, 28 L. Ed. 569.

62. **Uniformity coextensive with territory where tax is laid.**—*Township of Pine Grove v. Talcott*, 19 Wall. 666, 675, 22 L. Ed. 227; *Gilman v. Sheboygan*, 2 Black 510, 517, 17 L. Ed. 305; *Foster v. Pryor*, 189 U. S. 325, 332, 47 L. Ed. 835. See *Wright v. Louisville, etc., R. Co.*, 195 U. S. 219, 220, 49 L. Ed. 167, construing the Georgia provision, and *Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903, construing Ohio provision.

But the uniformity must be extended to all property subject to taxation, so that all property must be taxed alike, equally, which is taxing by a uniform rule. *Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903. See, also, *Nicol v. Ames*, 173 U. S. 509, 522, 43 L. Ed. 786; *Gilman v. Sheboygan*, 2 Black 510, 517, 17 L. Ed. 305, where the same words are used.

"The foundation of the rule which may be said generally to obtain, that there shall be uniformity in taxation of the same kind of property in the same taxing district, rests on the assumption that in such district the circumstances regarding the property to be taxed are ordinarily the same in substance, although there may, and necessarily must be, some dif-

ferences as to the extent to which the different owners of property may be benefited by the taxes collected thereon, and it is to be assumed that an alteration as to rate would work an unjust and illegal discrimination in taxing property situated alike." *Foster v. Pryor*, 189 U. S. 325, 332, 47 L. Ed. 835.

63. **Right of legislature to make distinctions between territorial subdivision.**—*Foster v. Pryor*, 189 U. S. 325, 334, 47 L. Ed. 835; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658. See ante, "Taxing Districts," III, A, 1, f.

"When the difference is deep and radical between the two domains in which the same kind of property may be situated, the law which makes them one district for taxation, so that all the property of the same kind in the same district must be taxed alike, and no reasonable distinction be permitted, must itself be so plain and urgent that no other intention can be suggested." *Foster v. Pryor*, 189 U. S. 325, 332, 47 L. Ed. 835.

Territory attached to county for special purpose.—See post, "Of Counties," III, E, 3.

Excise taxes.—See ante, "Under Requirement That Duties, Imposts and Excises Shall Be Uniform Throughout the U. S.," III, A, 2, b, (2).

64. **General rule as to classification.**—*Connolly v. Union Sewer Pipe Co.*, 184

Requirement That Taxes Be Proportional.—Under the condition annexed to the power to impose and levy assessments, rates, and taxes, as given in the constitution of Massachusetts, that the taxes shall be proportional "upon all the inhabitants of, persons resident, and estates lying within the commonwealth," the due exercise of that power requires an estimate, or valuation, of all the property in the state, and that assessment upon each individual shall be according to his proportion of that property.⁶⁵

According to Occupation.—The taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations.⁶⁶

Buyers and Producers.—Exercising its taxing power, it has been decided that a state may make a discrimination between those who buy and those who

U. S. 540, 562, 46 L. Ed. 679; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Kentucky Railroad Tax Cases, 115 U. S. 321, 337, 29 L. Ed. 414; Pacific Express Co. v. Seibert, 142 U. S. 339, 351, 35 L. Ed. 1035; Western Union Tel. Co. v. Indiana, 165 U. S. 304, 309, 41 L. Ed. 725; Florida Cent., etc., R. Co. v. Reynolds, 183 U. S. 471, 480, 46 L. Ed. 283.

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. Ed. 666; Magoun v. Illinois Trust, etc., Bank, 170 U. S. 283, 294, 42 L. Ed. 1037. If the classification be proper and legal, then there is the requisite uniformity in that respect." Nicol v. Ames, 173 U. S. 509, 521, 43 L. Ed. 786. See, also, Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, 43 L. Ed. 909; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102; McHenry v. Alford, 168 U. S. 651, 666, 42 L. Ed. 614; Kidd v. Alabama, 188 U. S. 730, 733, 47 L. Ed. 669. See the title CONSTITUTIONAL LAW, vol. 4, p. 394, et seq.

Legislative discretion.—"There is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." Kentucky Railroad Tax Cases, 115 U. S. 321, 337, 29 L. Ed. 414; Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 302, 50 L. Ed. 744.

Ferries and ferry companies.—Where the act establishing a ferry declares that the ferry shall be subject to the same taxes which were then or might thereafter be imposed on other ferries within

the state, and under the same regulations and forfeitures, but does not intimate that the state shall not impose on it such other taxes within its constitutional power as to it may seem fit, the most favorable construction for the owner of the franchise that could be placed upon its charter is that it provided for equality of taxation, that is to say, that the property of the ferry company should be valued and taxed by the same rule as other like property, and that the same exactions and forfeitures only as were imposed on like property, similarly situated, should be imposed on it. All that could be reasonably claimed under its charter is that it should be subjected to no higher state and municipal taxation and no greater license fees than other like property similarly situated. Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 372, 27 L. Ed. 419. See the titles FERRIES, vol. 6, p. 281; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 367, et seq.

Necessity for board of equalization.—See post, "Boards of Revision or Equalization, etc.," VI, F, 4.

Classification as to mode of assessment.—See the title CONSTITUTIONAL LAW, vol. 4, p. 395.

Classification in the collection of back taxes.—Florida Cent., etc., R. Co. v. Reynolds, 183 U. S. 471, 480, 46 L. Ed. 283. See the title CONSTITUTIONAL LAW, vol. 4, p. 396.

Taxes levied by congress in district.—See post, "Taxes Levied by Congress in District of Columbia," III, A, 2, b, (4).

65. Requirement that taxes be proportional.—Provident Institution v. Massachusetts, 6 Wall. 611, 624, 18 L. Ed. 907.

"The legislature could not select any company or individual or any specific article of property and assess them by themselves, as that would be a violation of that provision of the constitution which requires that the taxes shall be proportional." Provident Institution v. Massachusetts, 6 Wall. 611, 625, 18 L. Ed. 907.

66. According to occupation.—Billings v. Illinois, 188 U. S. 97, 102, 47 L. Ed. 400.

raise or grow products; and exempt producers from taxation of the methods employed in marketing their products.⁶⁷

Personalty and Realty.—The fact that the taxes in question are levied on personal property only, and thus exempt real property, cannot be urged as an objection to the validity of a taxing act.⁶⁸

Constitutional Requirement of Uniformity.—But the contrary has been held under a constitution requiring the rule of taxation to be uniform.⁶⁹

Lands According to Ownership or Use.—See the title CONSTITUTIONAL LAW, vol. 4, p. 402.

Classification Based on Differences between Different Portions of Territory.—See ante, "Uniformity Coextensive with Territory Where Tax Is Laid or Subject Exists," III, A, 2, b, (3), (b).

Corporations.—See post, "Classification," IV, C, 1, b.

Railroad Property.—See post, "Railroad and Canal Companies," IV, C, 3, h.

(d) *Local Apportionment of Unlocated Personal Property.*—The state may fix the situs for taxation of unlocated personal property.⁷⁰

(e) *Commutation of Taxes.*—The clauses of a state constitution (Illinois), which provide that taxes shall be levied so that each person shall pay in proportion to the value of his property; and that where corporate authorities of counties, cities, etc., are authorized to levy and collect taxes for corporate purposes, the taxes shall be uniform in respect to persons and property, as construed by the state courts, do not forbid the legislature commuting with individuals or corporate bodies the burdens of general or specific taxes or assessments, of the character of those in question, for what they may deem an equivalent.⁷¹

License Tax.—See the title LICENSES, vol. 7, p. 883, et seq. See, also, post, "Occupations and Callings," IV, J.

(f) *Undervaluation of Property.*—A gross undervaluation of property is within the principle applicable to an entire omission of property. If it were otherwise the power and duty of the legislature to impose taxes and to equalize their burdens would be defeated by the fraud of public officers, perhaps induced by the very property owners who afterwards claim its illegal advantage.⁷²

(g) *Taxation for Local and Municipal Uses.*—Principles of taxation established by the constitution, requiring taxation of all property within the taxing district, forbidding the exemption of any except such as the constitution declares may be exempted, and requiring that taxes shall be equal and uniform, do not

67. **Buyers and producers.**—Billings v. Illinois, 188 U. S. 97, 102, 47 L. Ed. 400; American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102.

68. **Personalty and realty.**—Thomas v. Gay, 169 U. S. 264, 281, 42 L. Ed. 740. See the title CONSTITUTIONAL LAW, vol. 4, p. 395.

69. **The constitution of Wisconsin** requires the rule of taxation to be uniform; and this means that all kinds of property not absolutely exempt must be taxed alike, by the same standard of valuation, equally with other taxable property, and coextensively with the territory to which it applies. Gilman v. Sheboygan, 2 Black 510, 17 L. Ed. 305.

And a tax for a special purpose upon the city of Sheboygan and levied exclusively upon real property was a discrimination in favor of personal property, in conflict with the constitution of the state, and therefore void. Gilman v. Sheboygan, 2 Black 510, 17 L. Ed. 305.

70. **Local apportionment.**—Columbus, etc., R. Co. v. Wright, 151 U. S. 470, 483, 38 L. Ed. 238. See post, "Railroad and Canal Companies," IV, C, 3, h; "Apportionment of Valuation and Unit Rule," VI, B, 3.

71. **Commutation of taxes.**—Chicago v. Sheldon, 9 Wall. 50, 55, 19 L. Ed. 594.

So of a law taxing a corporation in a percentage of its gross earnings in lieu of other taxes. McHenry v. Alford, 168 U. S. 651, 673, 42 L. Ed. 614. See post, "Railroad and Canal Companies," IV, C, 3, h. See, also, post, "Exemptions from Taxation," V.

Tax on shares of stock assessed against corporation.—See ante, "In General," IV, C, 2, d, (1).

72. **Undervaluation of property.**—Weyerhaeuser v. Minnesota, 176 U. S. 550, 558, 44 L. Ed. 583.

"If an officer omits to assess property or grossly undervalues it, he violates his duty, and the property and its owners es-

prohibit the legislature from declaring what districts shall be liable to taxation for local uses, or what property.⁷³

(h) *Exemptions Not Prohibited*.—The requirement of uniformity does not prevent exemption from taxation from being made.⁷⁴

(i) *As Affecting Mode and Time of Assessment and Collection*.—Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also in the mode of assessment upon the taxable valuation.⁷⁵

(4) *Taxes Levied by Congress in the District of Columbia*.—The power of congress, legislating as a local legislature for the district, to levy taxes for district purposes only, in like manner as the legislature of a state may tax the people of a state for state purposes, is expressly admitted and has never been doubted.⁷⁶ In the exercise of this power, congress, like any state legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.⁷⁷

(5) *Double Taxation*—(a) *In General*.—Double taxation is never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both

cape their just share of the public burdens." *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 558, 44 L. Ed. 583. See post, "Uniformity and Equality," VI, A, 7.

73. Local taxation.—*United States v. Memphis*, 97 U. S. 284, 292, 24 L. Ed. 937; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658.

"The rule of equality and uniformity, prescribed in cases of taxation for state and county purposes, does not require that all property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent." *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 705, 28 L. Ed. 569. See *Louisiana v. Pilsbury*, 105 U. S. 278, 295, 26 L. Ed. 1090.

County tax.—Where the tax is for the exclusive benefit of the county, and it fixes the rate, it is a county tax, and so long as a county taxes all property within its jurisdiction ad valorem and at the same rate, the uniformity required by the constitution is observed, and this is true no matter what functionary acting by law for the county does the necessary ministerial acts. *Columbus, etc., R. Co. v. Wright*, 151 U. S. 470, 477, 38 L. Ed. 238.

Held inapplicable to municipal taxation.—*Louisiana v. Pilsbury*, 105 U. S. 278, 290, 26 L. Ed. 1090.

It is no ground of objection to the validity of the act of Louisiana providing for the levy of a tax by the city of New Orleans, that the tax prescribed is to be levied upon real estate and slaves to the exclusion of personal property, and in each municipality in proportion to its indebtedness; on the ground that it violated the rule of equality and uniformity required by the constitution of 1845. *Louisiana v. Pilsbury*, 105 U. S. 278, 290,

26 L. Ed. 1090. See, also, ante, "Taxing Districts," III, A, 1, f.

74. Exemptions not prohibited.—In *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344, it was said that "it is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordered that it should be uniform." *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 449, 41 L. Ed. 1069. See, also, *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 302, 50 L. Ed. 744. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 401. See, also, post, "Exemptions from Taxation," V.

75. Mode of assessment.—*Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903. See, also, post, "Assessment and Levy," VI.

76. Taxes levied by congress in District of Columbia.—*Gibbons v. District of Columbia*, 116 U. S. 404, 407, 29 L. Ed. 680; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98; *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087.

77. Exemptions and classifications.—*Gibbons v. District of Columbia*, 116 U. S. 404, 408, 29 L. Ed. 680, where the tax on agricultural lands was less than that on all other real and personal property in the district. See, also, *Welch v. Cook*, 97 U. S. 541, 24 L. Ed. 1112; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087. See, also, ante, "Classification of Property for Taxing Purposes," III, A, 2, b, (3), (c); post, "Territorial Extent," III, C, 1, i; "Of the States," III, D.

taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition.⁷⁸

Federal Constitution Inapplicable.—The federal constitution imposes no restraints on the states against double taxation by them.⁷⁹

(b) *Mortgaged Property.*—Where a statute authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgagor, and does not provide for both taxing to the mortgagee the money secured by the mortgage, and also taxing to the mortgagor the whole mortgaged property, as did the statutes of other states, the validity of which has been affirmed in various state courts, taking all the provisions of the statute into consideration, there is no double taxation.⁸⁰

(c) *Capital Stock and Shares Held by Stockholders.*—The shares held by the stockholders are distinct from the capital stock of the corporation, and the taxation of both is not necessarily double taxation.⁸¹ The tax on an individual in

78. Double taxation.—*Tennessee v. Whitworth*, 117 U. S. 129, 137, 29 L. Ed. 830, followed in *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833. See *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. Ed. 411; *Bank v. Tennessee*, 161 U. S. 134, 147, 40 L. Ed. 645.

"No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the constitution of the United States does not go so far. *Coe v. Errol*, 116 U. S. 517, 524, 29 L. Ed. 715; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Dyer v. Osborne*, 11 R. I. 321, 327; *Cooley, Taxation*, 2d ed. 221, n. One aspect of the problem was touched in the case of *Blackstone v. Miller*, at the present term, 188 U. S. 189, 47 L. Ed. 439. The state of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all." *Kidd v. Alabama*, 188 U. S. 730, 732, 47 L. Ed. 669.

79. Federal constitution inapplicable.—*Davidson v. New Orleans*, 96 U. S. 97, 105, 24 L. Ed. 616. See ante, "Under Guaranty of Equal Protection of Laws in Fourteenth Amendment, and Federal Constitution and Laws Generally," III, A, 2, b, (1).

80. Mortgaged property.—*Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 424, 42 L. Ed. 803.

The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as indebtedness within the state

for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the state is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the state. The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 424, 42 L. Ed. 803.

"Nor is any such discrimination made between mortgagors and mortgagees, or between resident and nonresident mortgagees, as to deny to the latter the equal protection of the laws." *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 425, 42 L. Ed. 803. See the title CONSTITUTIONAL LAW, vol. 4, p. 398.

81. Capital stock and shares held by stockholders.—*Sturges v. Carter*, 114 U. S. 511, 521, 29 L. Ed. 240; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830; *Shelby County v. Union, etc., Bank*, 161 U. S. 149, 154, 40 L. Ed. 650.

"It is well settled by the decisions of this court that the property of shareholders in their shares, and the property of the corporation in its capital stock, are distinct property interests, and, where that is the legislative intent clearly expressed, that both may be taxed. *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *The Delaware R. Tax*, 13 Wall. 206, 21 L. Ed. 888; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558." *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. Ed. 411. See, also, *Bank v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 354, 49 L. Ed. 1077; *Tennessee v. Whitworth*, 117 U. S. 129,

respect to his shares in a corporation is not regarded as a tax upon the corporation itself.⁸² And the same is true of bank stock.⁸³

(d) *Capital and Property Represented*.—Where the capital and the property into which it has been converted are both taxed, it is double taxation.⁸⁴

c. *Object Must Be a Public One*.—**Rule Stated**.—There are limitations of such powers as arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established.⁸⁵ For this the protection he receives is sufficient compensation.⁸⁶

135, 29 L. Ed. 830, followed in *S. C.*, 117 U. S. 139, 29 L. Ed. 833; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 677, 43 L. Ed. 850; *Bank v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645; *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *Bradley v. People*, 4 Wall. 459, 18 L. Ed. 433; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.

As to exemptions, see post, "Corporate Stock," V, G, 4, a. See, also, post, "Corporate Stock," IV, C, 2, d. See, generally, the title STOCK AND STOCKHOLDERS, ante, p. 187.

82. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 517, 51 L. Ed. 901.

83. **Bank stock**.—*Bank v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645; *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *Farrington v. Tennessee*, 95 U. S. 679, 687, 692, 24 L. Ed. 558; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901.

When shares of bank stock are taxed so much per share of a certain par value, it shows that it is the share which is intended to be taxed, and not the cash or other actual capital of the bank. *National Bank v. Commonwealth*, 9 Wall. 353, 360, 19 L. Ed. 701. See post, "Banks and Bank Stock," IV, C, 3, a.

84. Where it is apparent from the charter that the subscribers of shares and those claiming under them were to be the holders of the stock of the corporation, and that the money paid into the treasury upon subscriptions was to be used by the corporation in building and equipping its railroad, and in this way the capital of the corporation was to be converted into the railroad and its appurtenances, a tax upon the railroad, therefore, after its completion, is necessarily a tax upon the capital, and such being the case, the taxation of both railroad and capital would be, so far as the corporation is concerned, double taxation. *Tennessee v. Whitworth*, 117 U. S. 129, 135, 29 L. Ed. 830, followed in *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833. See, as to exemptions, post, "Corporate Stock," V, G, 4, a.

85. **Object must be a public one**.—*Loan Ass'n v. Topeka*, 20 Wall. 655, 664, 22 L.

Ed. 455; *Olcott v. Supervisors*, 16 Wall. 678, 689, 21 L. Ed. 382; *Cole v. La Grange*, 113 U. S. 1, 6, 28 L. Ed. 896; *Spencer v. Merchant*, 125 U. S. 345, 353, 31 L. Ed. 763; *Kelly v. Pittsburgh*, 104 U. S. 78, 81, 26 L. Ed. 658, where it was said that, if for a public purpose, it was authorized; *Livingston County v. Darlington*, 101 U. S. 407, 416, 25 L. Ed. 1015; *Thomas v. Gay*, 169 U. S. 264, 276, 42 L. Ed. 740.

The taxing power cannot be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefited thereby. *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455.

86. The taking of property by taxation requires no other compensation than the taxpayer receives in being protected by the government to the support of which he contributes. But, so far as respects the use, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent domain. Each is a taking by the state for the public use, and not to promote private ends. *Cole v. La Grange*, 113 U. S. 1, 8, 28 L. Ed. 896; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 60, 22 L. Ed. 287; *Thomas v. Gay*, 169 U. S. 264, 276, 42 L. Ed. 740.

Inequality of benefit immaterial.—And the tax is not rendered illegal by the fact that an individual tax payer is not benefited as much as others, or not at all. *Union Transit Co. v. Kentucky*, 199 U. S. 194, 203, 50 L. Ed. 150; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658.

"Subject to these individual exceptions, the rule is that in classifying property for taxation some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood v. Baker*, 172 U. S. 269. It is often said protection and payment of taxes are correlative obligations." *Union Transit Co. v. Kentucky*, 199 U. S. 194, 203, 50 L. Ed. 150.

Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. *Cole v. La Grange*, 113 U. S. 1, 6, 28 L. Ed. 896.

As to what are public as distinguished from private uses, see note.⁸⁷ And it is the duty of the legislature and of the courts to enforce the distinction, although the courts should interpose only when a violation of this principle is clear. The course and usage of government as to what objects have been considered public ones in the past, is a criterion, although perhaps not the only criterion, of rightful taxation in this regard.⁸⁸

d. *Retrospective Taxation*.—See the title CONSTITUTIONAL LAW, vol. 4, p. 438. See, also, post, "Revival and Extension of Tax," III, C, 1, e.

e. *Obligation of Contract*.—In General.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 758, 804.

As Affected by Exemptions.—See post, "Exemptions from Taxation," V.

Taxation of Debts by Retention of Interest.—A law imposing a tax on the interest stipulated to be paid on loans within the state, and requiring the debtor to deduct the amount of the tax from each installment of interest or dividend, as it matures, impairs the obligation of the contract as to nonresident creditors so far as the law is applicable to loans made before its enactment, because it diminishes the amount of interest to which the creditors are entitled by the terms of their contract.⁸⁹

87. **Public uses in general.**—"The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children." Union, etc., Transit Co. v. Kentucky, 199 U. S. 194, 202, 50 L. Ed. 150. See, also, Livingston County v. Darlington, 101 U. S. 407, 411, 25 L. Ed. 1015, where the establishment of a state reform school was held such a purpose.

"Taxes for schools, for the support of the poor, for protection against fire, and for waterworks." Kelly v. Pittsburgh, 104 U. S. 78, 81, 26 L. Ed. 658.

So of items styled city tax and city buildings.—Kelly v. Pittsburgh, 104 U. S. 78, 81, 26 L. Ed. 658.

Highways, turnpikes, canals, and railways, although owned by individuals under public grants, or by private corporations, are publici juris. Roberts v. Northern Pac. R. Co., 158 U. S. 1, 17, 39 L. Ed. 873. See, also, Rogers v. Burlington, 3 Wall. 654, 665, 18 L. Ed. 79; Olcott v. Supervisors, 16 Wall. 678, 21 L. Ed. 382; Tp. of Pine Grove v. Talcott, 19 Wall. 666, 676, 22 L. Ed. 227; Loan Ass'n v. Topeka, 20 Wall. 655, 661, 22 L. Ed. 455; Livingston County v. Darlington, 101 U. S. 407, 416, 25 L. Ed. 1015.

The construction of a railroad to or through a county or incorporated town is, under the Tennessee decisions, in the one case, a county, and in the other a corporate purpose, for which the legislature may invest such county or town respectively with the power to impose taxes. County of Tipton v. Locomotive Works, 103 U. S. 523, 528, 26 L. Ed. 340.

So in Illinois. Anderson v. Santa Anna, 116 U. S. 356, 363, 29 L. Ed. 633. See, generally, the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618.

Taxation to pay public debts and private aid bonds compared.—A legitimate use of the moneys so raised by taxation is to pay the debts of the city. Taxation to pay the bonds in aid of an individual is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person. Such was the West Virginia Act of 1860 levying a tax to pay bonds in aid of private enterprise. Parkersburg v. Brown, 106 U. S. 487, 501, 27 L. Ed. 238.

Payment of debts of state.—Pacific R. Co. v. Maguire, 20 Wall. 36, 44, 22 L. Ed. 282.

Aid to private manufacturer.—Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. Ed. 455. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 622.

Appropriation of fund or property in hand.—Loan Ass'n v. Topeka, 20 Wall. 655, 659, 22 L. Ed. 455. See the title MUNICIPAL CORPORATIONS, vol. 8, p. 588.

Payment of bounties for enlistment.—Livingston County v. Darlington, 101 U. S. 407, 416, 25 L. Ed. 1015.

Establishment of Union depot.—Millard v. Roberts, 202 U. S. 429, 50 L. Ed. 1090.

88. Loan Ass'n v. Topeka, 20 Wall. 655, 665, 22 L. Ed. 455.

89. **Taxation of debts by retention of interest.**—Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760; Dewey v. Des Moines, 173 U. S. 193, 204, 43 L. Ed. 665. See post, "Corporate Bonds and Securities," IV, C, 2, e; "State and Municipal Securities," IV, D, 2.

f. *Specification of Object for Which Levied*.—See the title *STATUTES*, ante, p. 62.

g. *Interference with Interstate Commerce*.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 372, 441, et seq.

3. *JURISDICTION AND CONSTRUCTION*.—**Jurisdiction**.—See post, "Jurisdiction and Situs," IV, A, 2.

Construction.—See ante, "Express Authority of Law Essential, and Construction," III, A, 1, j; post, "Want of Power Fatal to Tax—Construction," III, D, 1, e. See the title *STATUTES*, ante, pp. 141, 168.

B. State and Federal Powers Compared and Distinguished—1. *POWER CONCURRENT*.—The power of taxation under the constitution as a general rule, and as has been repeatedly recognized in adjudged cases in the federal supreme court, is a concurrent power in the state and federal governments.⁹⁰

2. *CLAIM OF UNITED STATES PREFERRED*.—But the claim of the United States, as the supreme authority, must be preferred, in the case of a tax on the same subject by both governments.⁹¹

C. Of the United States—1. *IN GENERAL*—a. *Powers of Congress Generally Stated*.—A general power is given to congress to lay and collect taxes of every kind or nature, without any restraint except only on exports; but two rules are prescribed for their government, namely, uniformity and apportionment: Three kinds of taxes, to wit, duties, imposts and excises by the first rule, and capitation or other direct taxes, by the second rule.⁹²

90. Power concurrent in state and federal governments.—Van Allen *v. The Assessors*, 3 Wall. 573, 585, 18 L. Ed. 229; McCulloch *v. Maryland*, 4 Wheat. 316, 429, 4 L. Ed. 579; Gibbons *v. Ogden*, 9 Wheat. 1, 198, 6 L. Ed. 23; Providence Bank *v. Billings*, 4 Pet. 514, 7 L. Ed. 939; Holmes *v. Jennison*, 14 Pet. 540, 590, 10 L. Ed. 579; Dobbins *v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022; Prigg *v. Pennsylvania*, 16 Pet. 539, 662, 10 L. Ed. 1060, where it is said to be exercised by each independently of the other; Hamilton Co. *v. Massachusetts*, 6 Wall. 632, 639, 18 L. Ed. 904; Lane County *v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; The Collector *v. Day*, 11 Wall. 113, 123, 20 L. Ed. 122; State Tonnage Tax Cases, 12 Wall. 204, 214, 20 L. Ed. 370; Transportation Co. *v. Wheeling*, 99 U. S. 273, 276, 281, 25 L. Ed. 412; Van Brocklin *v. Tennessee*, 117 U. S. 151, 177, 29 L. Ed. 845; Pollock *v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; Knowlton *v. Moore*, 178 U. S. 41, 60, 44 L. Ed. 969; Snyder *v. Bettman*, 190 U. S. 249, 252, 47 L. Ed. 1035.

"The general government and a state exercise concurrent powers in taxing the people of the state. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent." Passenger Cases, 7 How. 283, 399, 12 L. Ed. 702; Ward *v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449. See the title *CONSTITUTIONAL LAW*, vol. 4, pp. 177, 179.

Restrictions on state's power.—See post, "In General," III, D, 1.

Direct taxation.—Pollock *v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 620, 39 L. Ed. 1108. See S. C. on former hearing in 157 U. S. 429, 39 L. Ed. 759.

91. Claim of United States preferred.—Pollock *v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; Brown *v. Maryland*, 12 Wheat. 419, 448, 6 L. Ed. 678; Holmes *v. Jennison*, 14 Pet. 540, 590, 10 L. Ed. 579; Lane County *v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; Ward *v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; Railroad Co. *v. Husen*, 95 U. S. 465, 472, 24 L. Ed. 527; Van Brocklin *v. Tennessee*, 117 U. S. 151, 177, 29 L. Ed. 845.

Direct taxation.—The same is true as to direct taxation. Pollock *v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 39 L. Ed. 759; S. C., on rehearing, 158 U. S. 601, 602, 39 L. Ed. 1108.

92. Powers of congress generally stated—Section 8, art. 1, of constitution.—Hylton *v. United States*, 3 Dall. 171, 174, 181, 1 L. Ed. 556; Holmes *v. Jennison*, 14 Pet. 540, 590, 10 L. Ed. 579; Dobbins *v. Erie County*, 16 Pet. 435, 447, 10 L. Ed. 1022; License Tax Cases, 5 Wall. 462, 471, 18 L. Ed. 497; Lane County *v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101; Pacific Ins. Co. *v. Soule*, 7 Wall. 433, 446, 19 L. Ed. 95; Austin *v. Aldermen*, 7 Wall. 694, 19 L. Ed. 224; Veazie Bank *v. Fenno*, 8 Wall. 533, 540, 19 L. Ed. 482; The Collector *v. Hubbard*, 12 Wall. 1, 18, 20 L. Ed. 272; Henderson's Distilled Spirits, 14 Wall. 44, 59, 20 L. Ed. 815; Springer *v. United States*, 102 U. S. 586, 593, 26 L. Ed. 253; Van Brocklin *v. Tennessee*, 117 U. S. 151, 177, 29 L. Ed. 845; United States *v. Snyder*, 149 U. S. 210, 214, 37 L. Ed. 705; Pollock *v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 557, 39 L. Ed. 759; S. C., on rehearing, 158 U. S. 601, 617, 39 L. Ed. 1108; Nicol *v. Ames*, 173 U. S. 509, 515, 524, 43 L. Ed. 786; Patton *v. Brady*, 184 U. S. 608, 46 L. Ed. 713; McCray *v.*

Vested in Congress Exclusively—Construction.—Power to lay and collect taxes for federal purposes is vested in congress exclusively.⁹³

b. *Unlimited within Limits of Constitution*—(1) *In General.*—Where the power of taxation, exercised by congress, is warranted by the constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government.⁹⁴

(2) *Infringement on Rights of States.*—The United States have no power under the constitution to tax either the instrumentalities or the property of a state.⁹⁵

United States, 195 U. S. 27, 56, 49 L. Ed. 78.

Scope of section and uniformity required.—See ante, "Under Requirement that Duties, Imports and Excises Shall Be Uniform Throughout the United States," III, A, 2, b, (2).

"The power, in the 8th section of the 1st article, to lay and collect taxes, included a power to lay direct taxes (whether capitation or any other), and also duties, imposts and excises; and every other species or kind of tax whatsoever, and called by any other name. Duties, imposts and excises were enumerated, after the general term taxes, only for the purpose of declaring that they were to be laid by the rule of uniformity." *Hylton v. United States*, 3 Dall. 171, 174, 1 L. Ed. 556.

"And these two classes, taxes so-called, and 'duties, imposts and excises,' apparently embrace all forms of taxation contemplated by the constitution. As was observed in *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 557, 39 L. Ed. 759." *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481.

93. Vested in congress exclusively—Construction.—*Oulton v. Savings Institution*, 17 Wall. 109, 121, 22 L. Ed. 618; *Barnes v. The Railroads*, 17 Wall. 294, 299, 21 L. Ed. 544; *United States v. Snyder*, 149 U. S. 210, 215, 37 L. Ed. 705.

Construction.—"Power to lay and collect taxes for federal purposes, being vested exclusively in congress, it becomes necessary, whenever the validity of such a tax is drawn in question, to examine the act imposing the tax, as the question in every case must necessarily depend upon its true construction, unless it appears that the tax is not apportioned as required, or not uniform, or the object taxed is one not taxable for such a purpose." *Barnes v. The Railroads*, 17 Wall. 294, 299, 21 L. Ed. 554. See ante, "Validity a Practical Question," III, A, 1, g.

Bill incidentally laying a tax not a revenue bill.—See the title **STATUTES**, ante, p. 74.

94. In general.—*Pacific Ins. Co. v. Soule*, 7 Wall. 433, 443, 19 L. Ed. 95; *License Tax Cases*, 5 Wall. 462, 471, 13 L. Ed. 497; *Austin v. Alder*, 10 Wall.

694, 19 L. Ed. 224; *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 557, 39 L. Ed. 759; *Nicol v. Ames*, 173 U. S. 509, 515, 43 L. Ed. 786; *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713; *McCray v. United States*, 195 U. S. 27, 56, 49 L. Ed. 78.

Reaches only existing subjects.—Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a state in order to tax it. *License Tax Cases*, 5 Wall. 462, 471, 18 L. Ed. 497.

Congress may tax the property within a state, of every description, owned by its citizens, on the basis provided in the constitution, the same as a state may tax it. *Passenger Cases*, 7 How. 283, 400, 420, 12 L. Ed. 702.

Occupations.—See the title **LICENSES**, vol. 7, p. 871. See, also, post, "Occupations and Callings," IV, J.

Prior to the confederation it had been exclusively in the states. *Ware v. Hylton*, 3 Dall. 199, 232, 1 L. Ed. 568. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, p. 177.

Fifth and tenth amendments.—"Whilst undoubtedly both the fifth and tenth amendments qualify, in so far as they are applicable, all the provisions of the constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the constitution upon congress." *McCray v. United States*, 195 U. S. 27, 61, 49 L. Ed. 78.

95. Infringement on rights of states.—*Van Brocklin v. Tennessee*, 117 U. S. 151, 177, 29 L. Ed. 845; *The Collector v. Day*, 11 Wall. 113, 20 L. Ed. 122; *Ambrosini v. United States*, 187 U. S. 1, 7, 47 L. Ed. 49; *Snyder v. Bettman*, 190 U. S. 249, 253, 47 L. Ed. 1035, where it was said that the question in each case is whether the tax is direct or incidental; since it has often been held that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. See the title

c. *Presumption of Lawful Exercise*.—And the power is presumed to be lawfully exercised by congress until the contrary is shown.⁹⁶

d. *Increase of Tax during Current Year*.—And congress may increase taxation during the current year, if necessary to meet expenses.⁹⁷

e. *Revival and Extension of Tax*.—It was a legitimate exercise of the taxing power by which a tax, which might be supposed to have expired, was revived and continued in existence for two years longer.⁹⁸

f. *Estoppel by Contract*.—Quære, whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power shall not be exercised.⁹⁹

g. *Operates on Individuals, Not States*.—Individuals are the objects of taxation, without reference to states, except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals; it cannot be exerted on states.¹

h. *Representation*.—Representation is not made the foundation of taxation under the constitution.²

i. *Territorial Extent*—(1) *In General*.—The power of congress to levy and collect taxes, duties, imposts and excises, is coextensive with the territory of the United States.³

(2) *In District of Columbia*.—The power of congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia, includes the power of taxing it.⁴

CONSTITUTIONAL LAW, vol. 4, p. 209, et seq.

State and municipal securities nontaxable.—*Mercantile Bank v. New York*, 121 U. S. 138, 162, 30 L. Ed. 895, followed in *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904. See the title CONSTITUTIONAL LAW, vol. 4, p. 212.

Bonds taken in the exercise of a function strictly belonging to the state and city in their ordinary governmental capacity are exempted as nontaxable by the United States. *Ambrosini v. United States*, 187 U. S. 1, 8, 47 L. Ed. 49. See the title REVENUE LAWS, vol. 10, p. 1012.

Interest on subsidy bonds to railroad companies.—See ante, "Payments of Interest from Income of Corporation," III, C, 3, b, (2), (g).

State property.—See post, "Public or Governmental Property," IV, M.

State and municipal securities.—See post, "State and Municipal Securities," IV, D, 2.

96. Presumption of lawful exercise.—*Nicol v. Ames*, 173 U. S. 509, 515, 43 L. Ed. 786.

97. Increase during current year.—Congressional provision need not reach through an entire year and at the beginning finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; but there inheres in congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question

there can be no doubt. Taxation may run *pari passu* with expenditure. *Patton v. Brady*, 184 U. S. 608, 620, 46 L. Ed. 713.

98. Revival and extension of tax.—*Stockdale v. Insurance Companies*, 20 Wall. 323, 333, 22 L. Ed. 348; *Railroad Co. v. Rose*, 95 U. S. 78, 24 L. Ed. 376. See post, "War Revenue Acts, and Act of 1870," III, C, 3, b, (2), (b); "Assessment of Back Taxes and Reassessments," VI, A, 4, g.

99. Estoppel by contract.—*Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009.

1. Operates upon individuals, not states.—*Hylton v. United States*, 3 Dall. 171, 178, 1 L. Ed. 556.

2. Representation.—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98. See ante, "Necessity for Representation," III, A, 1, d, (5).

3. Territorial extent.—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98. See, however, the title REVENUE LAWS, vol. 10, p. 862.

4. In District of Columbia.—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. Ed. 680; *Parsons v. District of Columbia*, 170 U. S. 45, 56, 42 L. Ed. 943; *Willard v. Presbury*, 14 Wall. 676, 20 L. Ed. 719; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. Ed. 1098; *Welch v. Cook*, 97 U. S. 541, 24 L. Ed. 1112; *Shoemaker v. United States*, 147 U. S. 282, 37 L. Ed. 170; *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270; *Wilson v. Lambert*, 168 U. S. 611, 42 L. Ed. 599; *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087.

Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the

(3) *In the Territories.*—The power extends also to the territories.⁵

Tax Laws Operative in Territories.—The laws of taxation are operative in the territories.⁶

j. *Objects of Taxation.*—**Payment of Debts, Common Defense and Welfare.**—Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States.⁷ Except for purposes within the exclusive province of the states.⁸ But it has no power to lay taxes to pay the debts of a state, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union, and here its power ends.⁹

2. **EXCISES**—a. *In General.*—The only limitation upon the power of congress in the imposition of excise taxes is that they shall be "uniform throughout the United States."¹⁰

compensation or damages awarded to the owners of lands appropriated to the public use for a highway shall be assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the district, in proportion to the benefits. *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270; *Wight v. Davidson*, 181 U. S. 371, 378, 45 L. Ed. 900. See the title SPECIAL ASSESSMENTS, ante, p. 1. And see ante, "Taxes Levied by Congress in District of Columbia," III, A, 2, b, (4).

5. **Territories.**—That the general grant of power to lay and collect taxes is made in terms which comprehend the district and territories as well as the states, is incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community. *Loughborough v. Blake*, 5 Wheat. 317, 322, 5 L. Ed. 98; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. Ed. 680; *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087.

Under the general territorial system, as expressed in the various organic acts, the power of taxation is absolute, save as restricted by the constitution or congressional enactments. *Talbott v. Silver Bow County*, 139 U. S. 438, 448, 35 L. Ed. 210.

6. **Tax laws operative in territories.**—*Dred Scott v. Sandford*, 19 How. 393, 514, 15 L. Ed. 691.

Property in Indian reservation.—See the title INDIANS, vol. 6, pp. 956, 957.

7. **Objects—Payment of debts, common defense and general welfare.**—*Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L. Ed. 23; *Passenger Cases*, 7 How. 283, 446, 12 L. Ed. 702; *Veazie Bank v. Fenno*, 8 Wall. 533, 540, 19 L. Ed. 482; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *Van Brocklin v. Tennessee*, 117 U. S. 151, 159, 29 L. Ed. 845; *Nicol v. Ames*, 173 U. S. 509, 515, 43 L. Ed. 786.

8. **Purposes within exclusive province of states excepted.**—*Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L. Ed. 23.

9. **Power to tax for benefit of state directly.**—*Passenger Cases*, 7 How. 283, 446, 12 L. Ed. 702.

10. **Excises—Uniformity.**—United States

v. Singer, 15 Wall. 111, 121, 21 L. Ed. 49; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 442, 19 L. Ed. 95. See ante, "Under Requirement That Duties, Imposts and Excises Shall Be Uniform Throughout the United States," III, A, 2, b, (2).

That congress had the power to impose excise taxes is so completely established as to require only statement. *McCray v. United States*, 195 U. S. 27, 50, 49 L. Ed. 78; *Patton v. Brady*, 184 U. S. 608, 619, 46 L. Ed. 713; *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969; *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786; *In re Kollock*, 165 U. S. 526, 41 L. Ed. 813; *Binns v. United States*, 194 U. S. 486, 492, 48 L. Ed. 1087.

Even although it be true that the effect of the tax in question is to repress the manufacture of the article on which it is laid. *McCray v. United States*, 195 U. S. 27, 63, 49 L. Ed. 78.

"Taxes of this sort have been repeatedly sustained by this court, and distinguished from direct taxes under the constitution. As in *Hylton v. United States*, 3 Dall. 171, 1 L. Ed. 556, on the use of carriages; in *Nicol v. Ames*, 173 U. S. 509, 43 L. Ed. 786, on sales at exchanges or boards of trade; in *Knowlton v. Moore*, 178 U. S. 41, 44 L. Ed. 969, on the transmission of property from the dead to the living; in *Treat v. White*, 181 U. S. 264, 45 L. Ed. 853, on agreements to sell shares of stock denominated 'calls' by New York stock brokers; in *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713, on tobacco manufactured for consumption." *Thomas v. United States*, 192 U. S. 363, 370, 48 L. Ed. 481.

Excise taxes coupled with unapportioned direct tax.—It was held in *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 637, 39 L. Ed. 1108, that although an excise tax upon businesses, privileges, employments and vocations is not a direct tax and need not be apportioned, yet, when coupled with direct taxes in the same statute, the excise tax must fall with the direct tax when it must be presumed that congress would not have enacted it alone.

Legislative discretion.—See the title

Definitions and Distinctions.—See ante, "Excise Taxes," II, B, 4.

b. *On Incomes and Receipts.*—See post, "Income Taxes," III, C, 3, b. As to definitions and distinctions, see ante, "Excise Taxes," II, B, 4.

3. **DIRECT TAXES**—a. *In General*—(1) *Power of Congress Concurrent with States' Power.*—The states retained the power of direct taxation, but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference.¹¹ And it extends throughout the United States,¹² although it need not be extended to the District of Columbia or the territories.¹³

(2) *In District of Columbia.*—Congress has authority to impose a direct tax on the District of Columbia, in proportion to the census directed to be taken by the constitution.¹⁴

(3) *In Territories.*—It has been held that congress may require direct taxes to be laid and collected in the territories as well as in the states.¹⁵

(4) *Apportionment.*—**Rule Stated.**—The constitution provides that representatives and direct taxes shall be apportioned among the several states according to numbers; and that no direct tax shall be laid except according to the enumeration provided for.¹⁶

Reason of Rule.—It would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed. If any inequality arose, it was stipulated for.¹⁷

(5) *Property Already Paying an Excise.*—Doubtless a general tax may be cast upon property once charged with an excise; and the power to tax it as property, subject to constitutional limitations as to the mode of taxing property,

CONSTITUTIONAL LAW, vol. 4, p. 241, et seq.

11. **Power of congress concurrent with states' power.**—*Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 618, 620, 39 L. Ed. 1108; *Van Brocklin v. Tennessee*, 117 U. S. 151, 179, 29 L. Ed. 845.

12. **Throughout the United States.**—*Loughborough v. Blake*, 5 Wheat. 317, 319, 5 L. Ed. 98.

13. **Need not be extended to district or territories.**—"If, then, a direct tax be laid at all, it must be laid on every state, conformable to the rule provided in the constitution. Congress has clearly no power to exempt any state from its due share of the burden. But this regulation is expressly confined to the states, and creates no necessity for extending the tax to the district or territories." *Loughborough v. Blake*, 5 Wheat. 317, 323, 5 L. Ed. 98.

14. **In District of Columbia.**—*Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98.

15. **In territories.**—*Pacific Ins. Co. v. Soule*, 7 Wall. 433, 446, 19 L. Ed. 95; *Loughborough v. Blake*, 5 Wheat. 317, 5 L. Ed. 98.

16. **Apportionment.**—*Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 555, 39 L. Ed. 759; *Hylton v. United States*, 3 Dall. 171, 173, 181, 1 L. Ed. 556; *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 19 L. Ed. 482; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *Scholey v. Rew*, 23

Wall. 331, 347, 22 L. Ed. 99; *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 618, 627, 39 L. Ed. 1108.

The census referred to is in that clause of the constitution which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the states, and the failure to extend a particular census to the district did not affect its validity, or prevent congress from extending a direct tax to the district. *Loughborough v. Blake*, 5 Wheat. 317, 320, 5 L. Ed. 98.

Weight of action of congress.—The action of congress in laying a tax without apportionment is entitled to weight in support of its not being a direct tax. The constitution evidently contemplated no taxes as direct taxes, but only such as congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases, where it can reasonably apply; and the subject taxed must ever determine the application of the rule. *Hylton v. United States*, 3 Dall. 171, 173, 174, 181, 1 L. Ed. 556.

Nonexistence of tax when rule made.—"A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed." *Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 632, 39 L. Ed. 1108.

17. **Reason of rule.**—*Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 619, 621, 632, 39 L. Ed. 1108.

might not be defeated by the fact that it has already paid an excise.¹⁸

b. *Income Taxes*—(1) *Tax on Incomes from Lands and Personality*.—In **General**.—Taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.¹⁹ And on the rehearing of this case the same principle was extended to the income from personality, and a tax thereon held direct.²⁰ A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the constitution, and not a duty leviable without apportionment.²¹

Income Tax Act of 1894.—The tax imposed by §§ 27-37, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the constitution, and, therefore unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.²²

(2) *Former Taxes on Incomes, Gains, etc., as Duties and Excises*—(a) *Definition and Distinction*.—Former acts laying taxes on incomes, gains, profits, etc., are distinguished as being duties or excises and not direct taxes.²³

18. Property already paying an excise.—Patton v. Brady, 184 U. S. 608, 621, 46 L. Ed. 713.

19. Tax on incomes from lands and personality.—Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 581 (see, also, pp. 558, 573), 39 L. Ed. 759. Same case on rehearing reaffirmed in 158 U. S. 601, 637, 39 L. Ed. 1108. See, also, Nicol v. Ames, 173 U. S. 509, 519, 43 L. Ed. 786; Thomas v. Gay, 169 U. S. 264, 274, 42 L. Ed. 740; Knowlton v. Moore, 178 U. S. 41, 47, 44 L. Ed. 969.

In all the cases, from that of Hylton v. United States, 3 Dall. 171, 1 L. Ed. 556, to that of Springer v. United States, 102 U. S. 586, 602, 26 L. Ed. 253, it has been held that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land. Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 579, 39 L. Ed. 759.

20. Income from personality.—Pollock v. Farmers' Loan, etc., Co., 158 U. S. 601, 637, 39 L. Ed. 1108.

21. Tax on whole income.—Pollock v. Farmers' Loan, etc., Co., 158 U. S. 601, 625, 627, 39 L. Ed. 1108.

English rule.—Income taxes have always been classed by the law of Great Britain as direct taxes. Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 572, 39 L. Ed. 759; S. C., on rehearing, 158 U. S. 601, 630, 39 L. Ed. 1108.

Distinguished from excise taxes.—See ante, "Excise Taxes," II, B, 4.

22. Income tax act of 1894.—Pollock v. Farmers' Loan, etc., Co., 158 U. S. 601, 627, 39 L. Ed. 1108.

So far as it levied a tax on the rents or income of real estate, it had already been held invalid in Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 583, 39 L. Ed. 759, where it was said (p. 586): That as to the other questions argued at the bar, to wit:

and income from real estate invalidated the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?—the justices who heard the argument were equally divided, and, therefore, no opinion is expressed.

In Pollock v. Farmers' Loan, etc., Co., 158 U. S. 601, 635, 39 L. Ed. 1108, the income tax act of 1894 was considered only in respect of the tax on income derived from real estate, and from invested personal property, and so much of it as bore on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such, was not commented on. See next section for distinctions as to former acts taxing incomes.

23. Definition and distinctions.—Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 39 L. Ed. 759; S. C., on rehearing, 158 U. S. 601, 39 L. Ed. 1108. See ante, "Duty on Gains, Profits, Incomes and Dividends," II, B, 4, d.

Former income taxes considered and distinguished.—"The act of August 5, 1861 (12 Stat. 292, 294, c. 45), imposed a tax of twenty millions of dollars, which was apportioned and to be levied wholly on real estate, and also levied taxes on incomes whether derived from property or profession, trade or vocation (12 Stat. 309), and this was followed by the acts of July 1, 1862 (12 Stat. 432, 473, c. 119); March 3, 1863 (12 Stat. 713, 723, c. 74); June 30, 1864 (13 Stat. 223, 281, c. 173); March 3, 1865 (13 Stat. 469, 479, c. 78); March 10, 1866 (14 Stat. 4, c. 15); July 13, 1866 (14 Stat. 98, 137, c. 184); March 2, 1867 (14 Stat. 471, 477, c. 169); and July 14, 1870 (16 Stat. 256, c. 255). The

(b) *War Revenue Acts and Act of 1870*.—As to construction, see post, "Disposition of Surplus," X, D.

Act of 1864.—The power of taxation by the federal government upon the subjects and in the manner prescribed by the income tax act of 1864 is undoubted.²⁴

Act of 1862.—This act was part of a system of taxing incomes, earnings, and profits, adopted during the war between the states, and abandoned as soon after the war was ended as it could safely be done.²⁵

Duration.—These provisions continued in force until August 1, 1870, inclusive,²⁶ after which the internal revenue act of July, 1870, went into effect, so that

differences between the latter acts and that of August 15, 1894, call for no remark in this connection. These acts grew out of the war of the rebellion, and were, to use the language of Mr. Justice Miller, 'part of the system of taxing incomes, earnings, and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely.' " *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 573, 39 L. Ed. 759, citing *Railroad Co. v. Collector*, 100 U. S. 595, 598, 25 L. Ed. 647.

"*Scholey v. Rew*, 23 Wall. 331, 22 L. Ed. 99, was the case of a succession tax which the court held to be 'plainly an excise tax or duty' upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy." *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 577, 39 L. Ed. 759.

"All these cases are distinguishable from that in hand, and this brings us to consider that of *Springer v. United States*, 102 U. S. 586, 602, chiefly relied on and urged upon us as decisive. That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax, not levied in accordance with the constitution. Unless the tax were wholly invalid, the defense failed. The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in. The original record discloses that the income was not derived in any degree from real estate but was in part professional as attorney at law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action." *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 578, 39 L. Ed. 759.

"While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in

the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct. Be this as it may, it is conceded in all these cases, from that of *Hylton* to that of *Springer*, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land." *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 578, 39 L. Ed. 759. See ante, "Excise Taxes," II, B, 4.

24. United States v. Railroad Co., 17 Wall. 322, 327, 21 L. Ed. 597; *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 19 L. Ed. 95.

Intention to tax all incomes over six hundred dollars.—The *Collector v. Hubbard*, 12 Wall. 1, 16, 20 L. Ed. 272.

25. Act of 1862.—*Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 235, 27 L. Ed. 711; *Railroad Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 573, 39 L. Ed. 759.

26. Duration.—The limitation in time to the operation of these war revenue laws, contained in the acts of 1864, 1866, and 1867, did not apply to §§ 120 and 122 of the act of 1864, taxing the dividends and interest payments of certain corporations, so these continued in force until August 1, 1870. *Railroad Co. v. Rose*, 95 U. S. 78, 24 L. Ed. 376; *Stockdale v. Insurance Companies*, 20 Wall. 323, 333, 22 L. Ed. 348.

A railroad company paid to the holders of its bonds the entire amount of semi-annual interest accruing thereon from January 1, to July 1, 1870. Held, that the proper internal revenue officer of the United States rightfully assessed against the company a tax of five per cent upon the amount so paid. *Railroad Co. v. Rose*, 95 U. S. 78, 24 L. Ed. 376; *Stockdale v. Insurance Companies*, 20 Wall. 323, 333, 22 L. Ed. 348.

A railroad company paid, Aug. 1, 1870, to the holders of its bonds \$61,495 as interest then due. Held, that the company was liable to the United States to a tax of five per cent on that amount. *Railroad Co. v. United States*, 101 U. S. 543, 25 L. Ed. 1068. See ante, "Revival and Extension of Tax," III, C, 1, c.

interest payments and dividends declared after August 1, 1870, were taxable under the latter act.²⁷ But this was only necessarily so decided as to dividends, and a later case held, without referring to this case, that interest payments so made during the last five months of 1870, were not taxable under the act of 1870,²⁸ and payments of interest after December 31, 1871, were not so taxable.²⁹

(c) *Advances in Value of Property as Gain or Income*.—The advance in the value of personal property, such as United States bonds, during a series of years does not constitute the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property, under a statute taxing "annual" gains, profits and income.³⁰

(d) *Receipts from Carriage of Mails by Railroad*.—Statute of 1866, taxing same, construed not to require an express contract for carrying the mails to be proved. The law implied that a contract was entered into prior to the time when the service commenced, and the company was liable for that tax.³¹

(e) *Receipts from Passengers on Steamboats*.—Under the act of July 13, 1866, laying on the owners of steamboats a tax of "2½ per cent of the gross receipts from passengers," the owners of a night boat were chargeable with the tax on berth and stateroom receipts, as well as on the receipts from transporta-

27. Time of Taking Effect—Act of 1870.—Under the internal revenue act of July, 1870, which enacts that "there shall be levied and collected for and during the year 1871, a tax of 2½ per cent on the amount of all interest paid by corporations, and on the amount of dividends of earnings hereafter declared by them," and which directs that such interest and dividends shall not after the 1st of August, 1870, be taxed under prior acts; interest paid and dividends declared during the last five months of the year 1870, are taxable, as well as those declared during the year 1871, it appearing that income of other sorts was meant to be so taxed, and there being no apparent reason why income derived through corporations should not be taxed like income generally. *Blake v. National Banks*, 23 Wall. 307, 23 L. Ed. 119, followed in *Blake v. Fourth Nat. Bank*, 154 U. S. 616, 23 L. Ed. 121 (memo. decision afterwards reported).

28. Contra as to interest.—"The act of July 14, 1870, 16 Stat. 260, ch. 255, § 15, did not impose an internal revenue tax on interest coupons of the bonds of a railroad company payable and paid during the last five months of that year." *United States v. Indianapolis, etc.*, R. Co., 113 U. S. 711, 712, 28 L. Ed. 1140.

29. Railroad Co. v. United States, 101 U. S. 543, 25 L. Ed. 1068; *United States v. Indianapolis, etc.*, R. Co., 113 U. S. 711, 28 L. Ed. 1140.

The act of July 14, 1870, above cited, did not impose an internal revenue tax on interest coupons payable and paid January 1, 1872, although from earnings of 1871. *United States v. Indianapolis, etc.*, R. Co., 113 U. S. 711, 712, 28 L. Ed. 1140.

No provision was made for a pro rata distribution of the burden over the time the interest was accumulating, and as the tax could only be levied for and during

the year 1871, if the interest was in good faith not payable in that year, the tax was not demandable, either in whole or in part. *Railroad Co. v. United States*, 101 U. S. 543, 550, 25 L. Ed. 1068. See, also, post, "Time of Accrual Determines Taxability," III, C, 3, b, (2), (f), cc; "Payments of Interest from Income of Corporations," III, C, 3, b, (2), (g).

Profits used for construction not taxed by act of 1870.—*Marquette, etc., R. Co. v. United States*, 123 U. S. 722, 31 L. Ed. 302. See post, "Profits Carried to Account of Fund or Used in Construction," III, C, 3, b, (2), (h).

30. Advances in value of property as gain or income.—*Gray v. Darlington*, 15 Wall. 63, 21 L. Ed. 45.

"The assessment, collection, and payment prescribed are to be made upon the annual products or income of one's property or labor, or such gains or profits as may be realized from a business transaction begun and completed during the preceding year." *Gray v. Darlington*, 15 Wall. 63, 65, 21 L. Ed. 45.

There were exceptions, of profits upon sales of real property, where the property had been purchased, not only within the preceding year, but within the two previous years, and another exception was implied from the provision of the statute which required all gains, profits, and income derived from any source whatever, in addition to the sources enumerated, to be included in the estimation of the assessor. *Gray v. Darlington*, 15 Wall. 63, 65, 21 L. Ed. 45.

31. Receipts from carriage of mails by railroad.—*Railroad Co. v. United States*, 101 U. S. 543, 25 L. Ed. 1068, citing *Stockdale v. Insurance Companies*, 20 Wall. 323, 22 L. Ed. 348; *Railroad Co. v. Rose*, 95 U. S. 78, 24 L. Ed. 376.

tion fares, to which they were an extra charge which passengers might pay or not.³²

(f) *Tax on Dividends*—aa. *Power to Tax*.—A railroad company may be taxed for federal purposes, and that the dividends of such a company are the proper objects of such taxation is also self-evident. Congress may tax such a dividend before it is paid to the holders of the securities, either as the property of the company or of the shareholders, at the election of congress, nor can either party have any just ground of complaint if proper regulations are enacted to apportion and distribute the burden.³³ But the tax may be deducted from the dividend and if the stockholder is exempt, so is the dividend.³⁴

Tax Paid by Bank on Shares of Stock Not Deducted.—Where a state statute taxing bank stock required the bank to pay such tax out of the dividends on the stock, and a federal statute taxed all dividends declared by such banks, the bank could not omit to return the part of the dividends so paid for state taxes, but was taxable on the whole dividend.³⁵

bb. *To Depositors in Savings Bank*.—Where depositors in a savings bank do not received a fixed rate of interest independently of what the bank itself may make or lose in lending their money, but receive a share of such profits as the bank, by lending their money, may, after deducting expenses, etc., find that it has made, such share of profits is a "dividend" within the meaning of the internal revenue act of 1864, as amended by the act of 1866, and not "interest," and was taxable thereunder.³⁶

cc. *Time of Accrual Determines Taxability*.—The fact that the dividend was not declared within the period in which it was earned does not prevent its being taxed as of that period. If it accrued in that period it is taxable then.³⁷ The

32. Receipts from passengers on steamboats.—*Steamboat Co. v. The Collector*, 18 Wall. 478, 21 L. Ed. 769.

Effect of act of 1865 as repeal of proviso exempting certain steamboats.—*Steamboat Co. v. The Collector*, 18 Wall. 478, 21 L. Ed. 769.

33. Power to tax dividends.—*Barnes v. The Railroads*, 17 Wall. 294, 306, 21 L. Ed. 544. See, also, *Stockdale v. Insurance Companies*, 20 Wall. 323, 22 L. Ed. 348; *Bailey v. Railroad Co.*, 22 Wall. 604, 632, 22 L. Ed. 840.

34. Deduction from dividend and exemption of stockholder.—*Stockdale v. Insurance Companies*, 20 Wall. 323, 330, 22 L. Ed. 348. See, also, *United States v. Railroad Co.*, 17 Wall. 322, 327, 21 L. Ed. 597; *Bailey v. Railroad Co.*, 22 Wall. 604, 631, 22 L. Ed. 840.

"Payment of the tax by the company is an absolute requirement, just as much so as if the company was the actual holder of the bonds and the real owner of the dividends, whether they deduct and withhold the amount from the dividends or not, and the fact that the company is permitted to do so, if they see fit, does not in the slightest degree change the relation of the company to the United States, as the taxpayers under that section of the law imposing internal revenue duties." *Barnes v. The Railroads*, 17 Wall. 294, 305, 21 L. Ed. 544.

Deduction from payment to nonresident alien.—Such a tax is not invalidated by the provision that the amount of it may be withheld from the dividend or the in-

terest due or payable to the stockholder or the bondholder, who is a citizen or a subject of a foreign government with no residence in this country. *Railroad Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647. See post, "Payments of Interest from Income of Corporation," III, C, 3, b, (2), (g).

35. Tax on shares not deducted.—*Central Nat. Bank v. United States*, 137 U. S. 355, 363, 34 L. Ed. 703.

36. To depositors in savings bank.—*Cary v. Savings Union*, 22 Wall. 38, 22 L. Ed. 779.

37. Time of accrual determines taxability.—*Barnes v. The Railroads*, 17 Wall. 294, 21 L. Ed. 544.

"It is as competent for congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards, and it is clear that congress did direct that all such gains and profits, whether divided or otherwise, should be included in estimating the annual gains, profits, or income liable to taxation under the provisions of that act. Annual gains and profits, whether divided or not, are property, and, therefore, are taxable." *The Collector v. Hubbard*, 12 Wall. 1, 18, 20 L. Ed. 272. See, also, *Stockdale v. Insurance Companies*, 20 Wall. 323, 330, 22 L. Ed. 348; *Bailey v. Railroad Co.*, 106 U. S. 109, 114, 116, 27 L. Ed. 81.

The 117th section of the internal revenue act of 1864, which required a stockholder in companies mentioned in the section, to return as income all gains and profits in them to which he should be entitled,

subject matter of the tax is the net earnings of the company for the year for which they are taxed, which have been actually realized by it, or which the law assumes to have been.³⁸ But no tax, in contemplation of the law, accrues upon the fund, except for the year in which the fund itself accrued, and when this has been once paid on undivided profits these profits cannot be taxed again, when they are embraced in a dividend declared and paid.³⁹

dd. *Dividends in Scrip*.—Scrip dividends as well as dividends in money, it must be admitted, are proper objects of taxation under § 22 of the internal revenue act, or income tax law, of 1864.⁴⁰

ee. *Tax on Surplus Not Deducted*.—Where a railroad company pays a tax on its undistributed surplus under the act of 1864, it is thereby paying a tax upon its own property, and such payment cannot be regarded as a payment of the tax upon a stock dividend thereafter declared by the railroad company, to be credited on or deducted therefrom.⁴¹

whether the same were "divided or otherwise," embraces not only dividends declared, but profits not divided and invested partly in real estate, machinery, and raw material, and partly applied to the payment of debts incurred in previous years. *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272. See, also, ante, "War Revenue Acts and Act of 1870," III, C, 3, b, (2), (b), as to time of taking effect and duration of those acts.

Construction of act of 1864, as amended March 2, 1867, as to time of accrual of taxable dividends.—*Barnes v. The Railroads*, 17 Wall. 294, 21 L. Ed. 544.

38. Net earnings realized in fact or by presumption of law.—*Bailey v. Railroad Co.*, 106 U. S. 109, 115, 27 L. Ed. 81. See *Railroad Co. v. Collector*, 100 U. S. 595, 598, 25 L. Ed. 647.

"In reference to a dividend declared as of earnings for the current year and paid as such to stockholders, whether in money or in scrip, no proof would be admissible, for the purpose of avoiding the tax, that no earnings had in fact been made. The law conclusively assumes in such a case that a dividend declared and paid is a dividend earned." *Bailey v. Railroad Co.*, 106 U. S. 109, 115, 27 L. Ed. 81. See, also, *Little Miami, etc., R. Co. v. United States*, 108 U. S. 277, 278, 27 L. Ed. 724; *Central Nat. Bank v. United States*, 137 U. S. 355, 365, 34 L. Ed. 703.

39. Payment of tax for year of accrual exhausts power.—*Bailey v. Railroad Co.*, 106 U. S. 109, 116, 27 L. Ed. 81.

While it would be altogether admissible to go back, for the purpose of assessing a tax upon a proper fund which had accrued during a previous year and escaped taxation, the tax imposed would be for the omitted year. *Bailey v. Railroad Co.*, 106 U. S. 109, 114, 27 L. Ed. 81.

40. Dividends in scrip.—*Bailey v. Railroad Co.*, 22 Wall. 604, 631, 22 L. Ed. 840; *S. C.*, 106 U. S. 109, 112, 27 L. Ed. 81.

Interest certificates issued as evidence to the stockholders that an equal amount of the earnings of the company beyond

current expenses had been expended for the objects stated in the preamble of the certificates, and to show that the respective stockholders were entitled to reimbursement of such expenditures at some convenient future period, and also to show that the stockholders were entitled to dividends on the same whenever dividends were paid on the shares of the capital stock; and that the certificates were to be paid out of the future earnings of the company, or to be converted, at the option of the company, into stock, if thereafter authorized to exercise that function, by whatever name called, are taxable as dividends in scrip. *Bailey v. Railroad Co.*, 106 U. S. 109, 112, 113, 27 L. Ed. 81; *Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840.

Effect of consolidation.—And where the said company afterwards became consolidated with another under authority of law, the new corporation being made expressly liable for all obligations of either of the two old companies, the new company was liable to the tax on the dividend in scrip, which the old one was bound to pay and had failed to return or pay. *Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840.

Evidence from companies' reports admissible to show payment of dividends.—*Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840.

The certificates are not conclusive as to amount of earnings accrued during the period while the income tax act was in force, which had not been assessed for taxation as profits carried to construction or other account, as its earnings were only taxable for that period from September 1, 1862, to December 19, 1868. The declaration in the certificates could not be conclusive of anything not inconsistent with it, for an estoppel only prohibits contrary allegations. Proof was admissible as to how far the certificates represented such earnings. *Bailey v. Railroad Co.*, 106 U. S. 109, 117, 27 L. Ed. 81.

41. Tax on surplus not deducted.—*Logan County v. United States*, 169 U. S. 255, 263, 43 L. Ed. 737.

(g) *Payments of Interest from Income of Corporations.—Must Be from Income.*—Only payments made in fact or in legal effect from the income were taxable.⁴²

Presumption from Payment.—But where the interest is paid, the presumption is conclusive that every other circumstance existed to justify the assessment of the tax.⁴³

Railroad Companies.—Railroad companies indebted for any money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, subject to interest or with coupons representing interest, were, by the 122d section of the act of the 13th of July, 1866, made liable to the internal revenue tax imposed by that section.⁴⁴

Interest on Subsidy Bonds to Railroad Corporations.—See note.⁴⁵

Time of Payment Not Accrual Determines Liability.—The "tax of two

42. Payments out of income alone taxable.—"Although the tax is imposed on interest paid, the evident intention of congress was to tax only such payments as were either in fact or in legal effect made from the income. As was said in *Railroad Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647, 'the tax * * * is essentially an excise on the business of the class of corporations mentioned in the statute.'" *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 235, 27 L. Ed. 711.

43. Presumption from payment.—*Improvement Co. v. Slack*, 100 U. S. 648, 659, 25 L. Ed. 609, followed in *Railway Co. v. Slack*, 100 U. S. 659, 25 L. Ed. 611; *Bailey v. Railroad Co.*, 106 U. S. 109, 115, 27 L. Ed. 81; *Little Miami, etc., R. Co. v. United States*, 108 U. S. 277, 278, 27 L. Ed. 724; *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 235, 27 L. Ed. 711.

Even if the receipts of the company derived from the public use of their railroad were insufficient to pay the semi-annual interest of the bonds, they are not protected from such a tax by the proviso added by the one hundred and twenty-second section of the amendatory act. (14 Stat. 139.) Because, if the interest was in fact paid by the plaintiffs, it is of no consequence where they obtained the money, it being clear that in order to raise the question there must be an actual failure to make the payment. *Improvement Co. v. Slack*, 100 U. S. 648, 658, 25 L. Ed. 609, followed in *Railway Co. v. Slack*, 100 U. S. 659, 25 L. Ed. 611.

"But when it appears that at the end of a civil war, during which interest had fallen in arrear, and earnings had been substantially suspended, the company, in reorganizing its affairs for future business, either funded its past due coupons in a new issue of bonds, or paid them from the proceeds of the sales of new bonds, no such presumption can arise, and if the facts are established they will constitute a complete defense to a suit for the recovery of a tax charged on such payments of interest. Any other construction would be in violation of the whole spirit and purpose of the statute. The bondholder would undoubtedly be taxable

for his income derived in that way, but the payment would not be one upon which the company could be taxed." *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 235, 27 L. Ed. 711.

44. Railroad companies.—*Barnes v. The Railroads*, 17 Wall. 294, 299, 21 L. Ed. 544.

It was held in *Improvement Co. v. Slack*, 100 U. S. 648, 657, 25 L. Ed. 609, upon the facts as detailed in the opinion, q. v., that the plaintiffs were a railroad company, and that their road was a railroad, within the income tax law of 1864. *Barnes v. The Railroads*, 17 Wall. 294, 299, 21 L. Ed. 544, followed in *Railway Co. v. Slack*, 100 U. S. 659, 25 L. Ed. 611. See, also, *Railroad Co. v. Rose*, 95 U. S. 78, 24 L. Ed. 376.

45. Government subsidy bonds assumed by corporation.—Where, though in form government bonds, the subsidy act makes them a mortgage lien on the property of the company, and ultimately payable by the company, principal and interest, 12 Stat. 492, 493, and if an obligation had been imposed by the statute to pay both principal and interest as they respectively fell due, it would have made substantially and in effect the bonds of the company, and fairly taxable under the internal revenue act. *Sioux City, etc., R. Co. v. United States*, 110 U. S. 205, 208, 28 L. Ed. 120.

Municipal aid bonds.—Under the act of 1862 taxing interest payments by railroad companies, whether the tax upon the interest paid by a railroad company upon bonds issued by a city in its aid, was a tax laid on the securities of a municipality, and whether, if so, it was lawfully laid, was a question which the city was not in a condition to raise, the tax having been paid under protest, and she having received notice of all that was done, could, under the statutes of the United States, have stepped in and tested the legality of the assessment and collection, by instituting proper proceedings to recover the money. *Baltimore v. Baltimore Railroad*, 10 Wall. 543, 544, 19 L. Ed. 1043.

and one-half per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date," by any railroad company, is a tax on the interest, not as it accrues, but when it is paid.⁴⁶

As Expense Incident to Issue.—The payment of such tax by the corporation is not an "expense incidental to the issue" of the bonds, chargeable to a city issuing the bonds in aid of the corporation, under an agreement to pay such expenses.⁴⁷

Bonds Held by Nonresident Aliens.—The interest thereon is taxable and the corporation may be required to pay the tax.⁴⁸

Requirement of Payment of State Tax on Corporate Bonds.—See post, "Corporate Bonds and Securities," IV, C, 2, e.

(h) *Profits Carried to Account of Fund or Used in Construction.*—Earnings used for construction, or carried to the account of a fund, were not to be taxed unless they represented profits of the company on its business as a whole, after an annual striking of balances between gains and losses.⁴⁹

Earnings Set Aside Annually to Meet Accruing Interest Payable at Future Day.—Such funds are taxable under the internal revenue act as amended in 1866, as profits carried to the account of a fund.⁵⁰

46. Time of payment not accrual determines liability.—*Railroad Co. v. United States*, 101 U. S. 543, 25 L. Ed. 1068; *United States v. Indianapolis R. Co.*, 113 U. S. 711, 28 L. Ed. 1140.

In *Railroad Co. v. United States*, 101 U. S. 543, 25 L. Ed. 1068, the court, at p. 550, said: "We are aware that at the present term we held, in *Railroad Co. v. Collector* (100 U. S. 595, 25 L. Ed. 647) that the tax levied under the act now in question was essentially a tax on the business of the corporation, and that in order to secure its payment it was laid on the subjects to which the earnings were to be applied in the usual course of business, but as this tax could not be levied until 1872, and there is no finding of any earnings in 1871, we see nothing to be taxed under that rule. In *Barnes v. The Railroads*, 17 Wall. 294, 309, 21 L. Ed. 544, it appeared expressly that the dividends were declared out of the earnings of 1869." As to time of taking effect, see ante, "War Revenue Acts and Acts of 1870," III, C, 3, b, (2), (b).

47. As expense incidental to issue.—*Baltimore v. Baltimore Railroad*, 10 Wall. 543, 551, 19 L. Ed. 1043.

48. Bonds held by nonresident aliens.—It was held in a case decided in 1882, on the authority of *Railroad Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647, that a railroad company was liable for the tax imposed by § 122 of the act of 1864, on the interest paid on its bonds, although the same were held by nonresident aliens and the interest was payable abroad.

In *United States v. Erie R. Co.*, 106 U. S. 327, 27 L. Ed. 151, reaffirmed in *S. C.*, 107 U. S. 1, 27 L. Ed. 385, Mr. Justice Field dissented strongly, on the ground that the tax was a tax on the bondholder, not the corporation, and could not be exacted of an alien nonresident owner through the agency of the corporation. He relied on *United States v.*

Railroad Co., 17 Wall. 322, 21 L. Ed. 597, and *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88, where it was held that the internal revenue act of June 30th, 1864, did not lay a tax on the income of a nonresident alien, arising from bonds held by him of a railroad company incorporated by states of the Union, and situated in them. See ante, "Duty on Gains, Profits, Incomes and Dividends," II, B, 4, d; post, "Corporate Stock," IV, C, 2, d.

49. Profits carried to account of fund or used in construction.—The tax of five per cent on the profits of a railroad company "carried to the account of any fund or used in construction," provided for by the act of June 30th, 1864, c. 173, § 122, 13 Stat. 284, amended by the act of July 13th, 1866, c. 184, 14 Stat. 139, was not upon earnings "carried to the account of any fund or used for construction," but upon profits. *Little Miami, etc., R. Co. v. United States*, 108 U. S. 277, 278, 27 L. Ed. 724. See, also, *Sioux City, etc., R. Co. v. United States*, 110 U. S. 205, 207, 28 L. Ed. 120.

50. Earnings set aside annually to meet accruing interest payable at a future day.—*Sioux City, etc., R. Co. v. United States*, 110 U. S. 205, 28 L. Ed. 120.

So where a railroad corporation received subsidy bonds from the government under the act of 1862, the accruing interest on the subsidy bonds loaned by the government to the company, being payable by the company at a future day, to wit, at the maturity of the bonds, and a sufficient amount of the company's annual net earnings is laid aside (as it should be) to meet that interest when it shall become due. *Sioux City, etc., R. Co. v. United States*, 110 U. S. 205, 207, 28 L. Ed. 120, citing *Union Pac. R. Co. v. United States*, 99 U. S. 402, 25 L. Ed. 274.

"Where, as in the present case, the interest is to be provided for by a fund, in

Taxable Only Once.—It follows also from this view of the purpose of the law, that a fund taxed in one year, as the profits of a railroad company, used for construction or carried to the account of any fund, has been taxed once for all, and cannot, as part of the earnings of the company, be assessed a second time.⁵¹

Earnings Expended in Repairs.—Earnings expended in repairs for keeping the property up to normal condition were not taxable, but new constructions only, and then only their increased value over the old ones replaced, if any.⁵²

Undistributed Earnings of Bank.—The requirement by statute on all banks to pay a tax of a certain sum, per cent, on all undistributed earnings made or added during the year to their contingent funds, is a charge of a certain sum upon the banks, and without assessment makes the banks a debtor for the sum prescribed,⁵³ and applies to savings banks without stockholders or capital stock.⁵⁴

Under Act of 1870.—And a railroad company is not liable, under the act of July 14, 1870, c. 255, § 15, 16 Stat. 260, for a tax of two and one-half per centum on its profits for 1871, not divided, but used for construction during that year, as it was under the act of 1864, by its express terms.⁵⁵

(i) *State Not Taxable.*—A state is not within the terms of these internal revenue laws.⁵⁶

(j) *Dividends and Interest Paid Out within Confederate Lines.*—The internal revenue laws were intended to reach all persons and corporations within the dominion of the United States against whom they could for the time being be enforced by judicial process or otherwise. They were broad enough in their language to embrace all, and could be limited only in their operation by the power of the United States to enforce them and included earnings made inside the Confederate lines and distributed as interest and dividends.⁵⁷

(k) *Computation and Payment.*—The computation of the tax must necessarily be made on the basis of the currency in which the payments of interest were made.⁵⁸

the nature of a sinking fund, to be laid by for the purpose, the case comes within the express terms of the internal revenue act; and no deduction of such accruing interest can be made from the taxable net earnings of the company." *Sioux City, etc., R. Co. v. United States*, 110 U. S. 205, 208, 28 L. Ed. 120.

51. Taxable only once.—*Bailey v. Railroad Co.*, 106 U. S. 109, 116, 27 L. Ed. 81.

52. Earnings expended in repairs and maintenance.—*Grant v. Hartford, etc., R. Co.*, 93 U. S. 225, 23 L. Ed. 878.

53. Undistributed earnings of bank.—*Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80.

54. The 9th section of the internal revenue act of 1866 subjects to the tax of 5 per cent laid on the undistributed sum or sums made and added during the year to their surplus or contingent funds, by banks and savings institutions generally, such sum or sums, when made and added to such funds even by savings banks without stockholders or capital stock, and which do the business of receiving deposits, to be lent or invested for the sole benefit of their depositors. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80.

55. Under act of 1870.—*Marquette, etc., R. Co. v. United States*, 123 U. S. 722, 724, 31 L. Ed. 302.

56. "Person" or "corporation" does not include state.—The term corporation as used in the acts of congress touching internal revenue does not include a state, consequently the income of the state of Georgia from the Western and Atlantic railroad, property owned, controlled, and managed by that state, has not been made by law a subject of taxation. *United States v. Railroad Co.*, 17 Wall. 322, 328, 21 L. Ed. 597.

57. Dividends and interest paid out within Confederate lines.—*Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 233, 27 L. Ed. 711.

A railroad company in the Southern States was liable for a tax upon its income during the war under the internal revenue law of 1862 earned from the use of its rolling stock within the Confederate lines, and divided in Confederate money, its road being, at the time the dividends were earned, in the military possession of the United States. *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 27 L. Ed. 711.

58. Computation.—*United States v. Erie R. Co.*, 107 U. S. 1, 27 L. Ed. 385, denying an application for rehearing in this case, decided at same term, 106 U. S. 327, 27 L. Ed. 151.

The tax had to be paid in legal tender currency equal in value to the coin owing. "If there were now any differ-

Effect of Compromise.—Where a compromise of claim for such tax was made, but only payments of interest for a certain period were referred to in the correspondence and the receipt given by the government officers, a claim for taxes on interest payments made prior thereto was not barred thereby.⁵⁹

(3) *Tax on Incomes from Municipal Securities.*—A tax laid by congress on incomes from municipal securities is unconstitutional, as taxing an instrumentality of the states.⁶⁰

4. **STAMP TAXES.**—See the title *REVENUE LAWS*, vol. 10, p. 1012, et seq.

D. Of the States—1. **IN GENERAL**—a. *Concurrent in State and Federal Governments.*—See ante, "State and Federal Powers Compared and Distinguished," III, B.

b. *Nature and Extent.*—Taxation is a sacred right, essential to the existence of government; an incident of sovereignty; the right of legislation is coextensive with the incident, to attach it upon all persons and property within the jurisdiction of a state, and over which its power extends.⁶¹ Except as restrained by

ence in value between coin and currency, it would have been proper to render the judgment for the coin or its equivalent in currency. *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740. As there is no such difference, a general judgment for the amount due is all that is necessary. The amount of the debt was always a fixed sum in pounds sterling." *United States v. Erie R. Co.*, 107 U. S. 1, 2, 27 L. Ed. 385, reaffirming *United States v. Erie R. Co.*, 106 U. S. 327, 330, 27 L. Ed. 151.

Where the income was received in coin, the difference between coined money and legal tender currency had to be added to his return when made in coined money, and he had to pay the tax or duty upon the amount thus increased in legal tender currency. *Pacific Ins. Co. v. Soule*, 7 Wall. 433, 442, 19 L. Ed. 95.

59. **Compromise does not include prior payments made but unknown to collectors.**—*Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 236, 27 L. Ed. 711.

60. **Incomes from municipal securities.**—*Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 630, 39 L. Ed. 1108; *S. C.*, on former hearing, 157 U. S. 429, 39 L. Ed. 759. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 212.

61. **Extent.**—*Dobbins v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *Ware v. Hylton*, 3 Dall. 199, 232, 1 L. Ed. 568; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Gibbons v. Ogden*, 9 Wheat. 1, 199, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 448, 6 L. Ed. 678; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420, 567, 9 L. Ed. 773; *License Cases*, 5 How. 504, 588, 12 L. Ed. 256; *Passenger Cases*, 7 How. 283, 452, 12 L. Ed. 702; *Nathan v. Louisiana*, 8 How. 73, 82, 12 L. Ed. 992; *Gilman v. Sheboygan*, 2 Black 510, 513, 17 L. Ed. 305; *Society for Savings v. Coite*, 6 Wall. 594, 604, 19 L. Ed. 397, followed in *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 639, 18 L. Ed. 904; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.

Ed. 101; *Thomson v. Pacific Railroad*, 9 Wall. 579, 591, 19 L. Ed. 792; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L. Ed. 370; *Ward v. Maryland*, 12 Wall. 418, 426, 20 L. Ed. 449; *State Tax on R. Gross Receipts*, 15 Wall. 284, 293, 21 L. Ed. 164; *Railroad Co. v. Peniston*, 18 Wall. 5, 29, 21 L. Ed. 787; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 62, 22 L. Ed. 287; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *Transportation Co. v. Wheeling*, 99 U. S. 273, 276, 25 L. Ed. 412; *Kirtland v. Hotchkiss*, 100 U. S. 491, 497, 25 L. Ed. 558; *Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703; *Van Brocklin v. Tennessee*, 117 U. S. 151, 155, 29 L. Ed. 845; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 446, 38 L. Ed. 1041; *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 561, 39 L. Ed. 759; *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 427, 42 L. Ed. 803; *Stockard v. Morgan*, 185 U. S. 27, 37, 46 L. Ed. 785; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 397, 47 L. Ed. 513; *Carstairs v. Cochran*, 193 U. S. 10, 16, 48 L. Ed. 596; *Leigh v. Green*, 193 U. S. 79, 87, 48 L. Ed. 623.

A state may impose taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the constitution and laws of the United States; and upon all property within the state, mingled with and forming part of the great mass of property therein. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493, 30 L. Ed. 694.

"In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, state and federal. The chief justice, in *McCulloch v. Maryland* (4 Wheat. 316, 4 L. Ed. 579), endeavored to fix this boundary upon the subject of taxation. He observed, 'if we measure the power of

express or implied constitutional limitations.⁶²

Means and Instrumentalities of Federal Government, and Waiver of Exemption.—It is well settled that the states cannot exercise this authority in respect to any of the instrumentalities which the general government may create for the performance of its constitutional functions. It is equally well settled, that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the lawmaking power of the nation;

taxation residing in a state by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property unimpaired, which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states and safe for the Union.” *New York v. Commissioners*, 2 Black 620, 634, 17 L. Ed. 451. See, also, *State Freight Tax*, 15 Wall. 232, 21 L. Ed. 146; *State Tax on R. Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164; *Osborne v. Mobile*, 16 Wall. 479, 21 L. Ed. 470; *Moran v. New Orleans*, 112 U. S. 69, 74, 28 L. Ed. 653. See the title CONSTITUTIONAL LAW, vol. 4, pp. 177, 191, et seq.

Property held directly under state grant.—And there is no reason or justice in withholding from the operation of this power, property held directly under the grant of the state. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 567, 9 L. Ed. 773.

Property employed in commerce.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 453, et seq.

Taxation in exercise of police power.—The fact that a law passed in the exercise of the police power incidentally lays a tax, does not affect its validity. *McClean v. Denver*, etc., R. Co., 203 U. S. 38, 55, 51 L. Ed. 78. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 426, 473, et seq. See, also, the titles INSPECTION LAWS, vol. 7, p. 16; POLICE POWER, vol. 9, p. 468.

Taxation of labor agents as not abridging freedom of contract.—See the title DUE PROCESS OF LAW, vol. 5, p. 564.

62. Constitutional limitations.—*Dobbins v. Erie County*, 16 Pet. 435, 10 L. Ed. 1022; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 304; *Providence Bank v. Billings*, 4 Pet. 514, 564, 7 L. Ed. 939; *Holmes v.*

Jennison, 14 Pet. 540, 590, 10 L. Ed. 579; *Passenger Cases*, 7 How. 283, 452, 12 L. Ed. 702; *Nathan v. Louisiana*, 8 How. 73, 82, 12 L. Ed. 992; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558; *Van Brocklin v. Tennessee*, 117 U. S. 151, 155, 29 L. Ed. 845. See, also, *Ware v. Hylton*, 3 Dall. 199, 232, 1 L. Ed. 568.

“Power to tax for the support of the state governments exists in the states independently of the national government; and it may well be assumed that where there is no cession of contradictory or inconsistent jurisdiction in the United States, nor any restraining compact in the constitution, the power in the states to tax for the support of the state authority reaches all the property within the state which is not properly regarded as the instruments or means of the federal government.” *Transportation Co. v. Wheeling*, 99 U. S. 273, 279, 25 L. Ed. 412; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481. See, also, *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Kirtland v. Hotchkiss*, 100 U. S. 491, 497, 25 L. Ed. 558; *Society for Savings v. Coite*, 6 Wall. 594, 604, 18 L. Ed. 897; *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101; *Ward v. Maryland*, 12 Wall. 418, 428, 20 L. Ed. 449; *Railroad Co. v. Peniston*, 18 Wall. 5, 29, 21 L. Ed. 787; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 707, 28 L. Ed. 569.

Or where the nature of the power granted, or the terms in which the grant is made, are of character to show that state legislation upon the subject would be repugnant to the federal grant, or that the framers of the constitution intended that the power should be exclusively exercised by congress. *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449.

Kentucky.—*Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 621, 43 L. Ed. 823; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 624, 43 L. Ed. 835.

Impairment of obligation of contract.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 785, et seq., 804, et seq., 850, 861. See, also, ante, “Obligation of Contract,” III, A, 2, e.

but the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.⁶³

United States Notes.—On the same principle United States notes are exempt from state taxation.⁶⁴

63. Exemption of means and instrumentalities of federal government.—*Austin v. Aldermen*, 7 Wall. 694, 699, 19 L. Ed. 224; *Ambrosini v. United States*, 187 U. S. 1, 7, 47 L. Ed. 49. See the title CONSTITUTIONAL LAW, vol. 4, p. 191, et seq.

The power to borrow money cannot be affected or diminished by the taxing power of the state. *Hibernia Sav., etc., Society v. San Francisco*, 200 U. S. 310, 313, 50 L. Ed. 495. See *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451; *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *The Banks v. The Mayor*, 7 Wall. 16, 19 L. Ed. 57; *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60; *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845. See the title CONSTITUTIONAL LAW, vol. 4, pp. 196, et seq., 301.

This principle, however, does not apply to obligations, such as checks and warrants intended for immediate use, and designed merely to stand in the place of money, until presented at the treasury and the money actually drawn thereon. In such case the tax is virtually a tax upon the money which may be drawn immediately upon presentation of the checks. *Hibernia Sav., etc., Society v. San Francisco*, 200 U. S. 310, 314, 50 L. Ed. 495.

Federal Securities Nontaxable.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 196-199. See, also, *Mitchell v. Commissioners*, 91 U. S. 206, 23 L. Ed. 302; *Hibernia, Sav., etc., Society v. San Francisco*, 200 U. S. 310, 50 L. Ed. 495; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. Ed. 456; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895; *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 49 L. Ed. 614; *Shotwell v. Moore*, 129 U. S. 590, 32 L. Ed. 827.

Spirits in bonded warehouses.—See the title REVENUE LAWS, vol. 10, p. 863.

64. United States notes.—*Shotwell v. Moore*, 129 U. S. 590, 32 L. Ed. 827; *Mitchell v. Commissioners*, 91 U. S. 206, 23 L. Ed. 302; *Bank v. Supervisors*, 7 Wall. 26, 19 L. Ed. 60. See the title CONSTITUTIONAL LAW, vol. 4, pp. 196, 197.

Conversion into exempt funds to evade taxes.—Where a depositor in a bank a day or two previous to that fixed by statute, drew out the balance of his general deposit account on a check, and receiving the amount of it in legal-tender

notes, put them into a package, which he enclosed in an envelope, and placed with the bank as a special deposit, writing his name thereon, and requesting the bank to put it in its safe for him, which was done, shortly afterwards restoring them to his credit as a general deposit, and since it is found as a matter of fact that the whole transaction was made for the purpose of evading taxation on the amount of his general deposit on the day it was exchanged for greenbacks, and that there was no purpose of permanently changing the amount of the deposit in the bank subject to his order, and, as such, liable to taxation, it was a fraud upon the revenue laws of the state of Ohio, and the notes are not exempt. *Shotwell v. Moore*, 129 U. S. 590, 595, 32 L. Ed. 827. See, also, *Mitchell v. Commissioners*, 91 U. S. 206, 23 L. Ed. 302, where the facts were similar and the court denounces such conduct in the following language: "United States notes are exempt from taxation by or under state or municipal authority; but a court of equity will not knowingly use its extraordinary powers to promote any such scheme as this plaintiff devised to escape his proportionate share of the burdens of taxation. His remedy, if he has any, is in a court of law." *Shotwell v. Moore*, 129 U. S. 590, 596, 32 L. Ed. 827.

Although there does not appear to be any valid objection if the thing done had been in the ordinary course of business, and the conversion of his general deposit in the bank into a private package of greenbacks, exempt from taxation, were free from illegal purpose or fraudulent motive. *Shotwell v. Moore*, 129 U. S. 590, 595, 32 L. Ed. 827.

A state may require a statement by a taxpayer of "the monthly average amount or value," for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects within that time invested in, or converted into, bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities, on a certain day, and may provide that any indebtedness created in the purchase of such bonds or securities shall not be deducted from credits, and this does not tax the citizen for the greenbacks which he may have held at any time during the year. Its purpose is not to enable that state to tax the securities of the United States, but to permit it to tax other investments, moneys on hand and on deposit subject to order, while it combines in the same exemption the securities of the general government and those of the

Limited to Subjects within Its Jurisdiction.—But no principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. See post, "Necessity for Jurisdiction," IV, A, 2, a.

Burden of Proof of Exception.—Presumptively all property within the territorial limits of a state is subject to its taxing power. Whoever insists that any particular property is not so subject has the burden of proof and must make it entirely clear that, by contract or otherwise, the property is beyond its reach.⁶⁵

Property of U. S. and within Localities under Their Exclusive Control.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 149, et seq.; 193, et seq. As to Indian reservation, see the title INDIANS, vol. 7, p. 955.

Property in Military Reservation.—Where, in the cession of jurisdiction over a military reservation to the United States, the right to tax railroad and other corporate property therein was expressly reserved, and the United States tacitly accepted the cession, such property is taxable by the state.⁶⁶

c. Discretion of Legislative Body.—See ante, "Discretion of Legislature," III, A, 1, d, (3). If the right to impose the tax exists, the extent to which it shall be exercised, the subjects and the mode, are all equally within the discretion of the legislatures to which the states commit the exercise of the power, or the municipalities to which it has been delegated.⁶⁷ The federal supreme court can afford the citizen of a state no relief from the enforcement of her laws prescribing the mode and subjects of taxation, if they neither trench upon federal authority nor violate any right recognized or secured by the constitution of the

state. *Shotwell v. Moore*, 129 U. S. 590, 600, 32 L. Ed. 827.

Nontaxable United States bonds substituted for taxable securities.—*Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 632, 49 L. Ed. 614. See the title INSURANCE, vol. 7, p. 83.

65. Burden of proof of exception.—*Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 35, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87. See *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 29 L. Ed. 770; *Wells v. Savannah*, 181 U. S. 531, 45 L. Ed. 986.

"A local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the national constitution unless that conclusion be unavoidable." *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 615, 43 L. Ed. 823; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 624, 43 L. Ed. 835.

Where there is no pledge, express or implied, that this power should not thereafter be exercised, it is not to be presumed. *Gilman v. Sheboygan*, 2 Black 510, 513, 17 L. Ed. 305. See post, "Exemptions from Taxation," V.

66. Property in military reservation.—*Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 540, 29 L. Ed. 264.

So as to the Fort Leavenworth military reservation in Kansas. *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 540, 29 L. Ed. 264. See, also, post, "Public Property," V, G, 2.

67. Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 561, 39 L. Ed. 759; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 577, 9 L. Ed. 773; *Nathan v. Louisiana*, 8 How. 73, 82, 12 L. Ed. 992; *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997; *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *Society for Savings v. Coite*, 6 Wall. 594, 608, 18 L. Ed. 897, followed in *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179; *Railroad Co. v. Peniston*, 18 Wall. 5, 30, 21 L. Ed. 787; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 498, 22 L. Ed. 595; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 709, 28 L. Ed. 569; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 396, 47 L. Ed. 513; *New York v. Commissioners*, 2 Black 620, 633, 17 L. Ed. 451; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 62, 22 L. Ed. 287.

Except as restrained by its own constitution and that of the United States, and by the condition that the power could not be so used as to burden or embarrass the operations of the federal government. *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 707, 28 L. Ed. 569; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179; *Austin v. Aldermen*, 7 Wall. 694, 699, 19 L. Ed. 224; *Carstairs v. Cochran*, 193 U. S. 10, 16, 48 L. Ed. 596.

United States, the prudence of the measure not being a judicial question.⁶⁸ And there is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to objects and methods.⁶⁹

d. *Waiver*.—But the omission of one legislature or a dozen legislatures to tax a certain class of property which is otherwise taxable, does not destroy the power of the state to lay a tax thereon when it chooses to do so.⁷⁰

e. *Want of Power Fatal to Tax—Construction*.—If the state has not the power to levy a tax, it will not be inquired whether another tax which it might lawfully impose would have the same ultimate incidence.⁷¹

Construction.—The constitutionality, or unconstitutionality, of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid.⁷²

f. *Unjust and Oppressive Taxation*.—See ante, "Requirement of Equality and Uniformity," III, A, 2, b. And see the title CONSTITUTIONAL LAW, vol. 4, pp. 208, 242, et seq. As to discriminating tax, see the title CONSTITUTIONAL LAW, vol. 4, pp. 475, 477.

g. *Tax on Transfers or Execution of Power of Appointment*.—See the title CONSTITUTIONAL LAW, vol. 4, p. 400. A transfer tax, not being a direct tax

68. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558; *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451; *In re Tyler*, 149 U. S. 164, 187, 37 L. Ed. 689. See, also, *Providence Bank v. Billings*, 4 Pet. 514, 563, 7 L. Ed. 939. See the title CONSTITUTIONAL LAW, vol. 4, pp. 177, et seq., 208.

69. **No supervision by nation**.—*Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 292, 50 L. Ed. 744; *State Tonnage Tax Cases*, 12 Wall. 204, 212, 20 L. Ed. 370; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 446, 38 L. Ed. 1041.

Where a state, except in cases of unconstitutional discrimination has the power to tax, there is no authority in this court, nor in the United States, to control its action, however unreasonable or oppressive. The power of the state, except in such cases, is absolute and supreme. *Low v. Austin*, 13 Wall. 29, 35, 20 L. Ed. 517, following *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 389; *Kirtland v. Hotchkiss*, 100 U. S. 491, 499, 25 L. Ed. 558; *Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335.

And so as to excessive valuation of property and review in federal courts.—*Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658. See, also, *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Kenard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 208, 242, et seq.

70. **Waiver**.—*Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 44, 50 L. Ed. 65; *Twenty-Third St. R. Co. v.*

New York State Board, 199 U. S. 53, 50 L. Ed. 87. See, also, post, "Definition and Necessity," VI, A, 1. As to power of state to divest itself of taxing power see the title CONSTITUTIONAL LAW, vol. 4, pp. 320, 321.

71. **Want of power fatal to tax—Construction**.—*Home Sav. Bank v. Des Moines*, 205 U. S. 503, 519, 51 L. Ed. 901; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850.

Estoppel of resident of Alexandria County to question validity of tax under laws of Virginia.—See the title DISTRICT OF COLUMBIA, vol. 5, p. 406.

72. **Construction**.—"This was decided in the cases of *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451, in *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897 and *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907." *State Freight Tax*, 15 Wall. 232, 272, 21 L. Ed. 146. See ante, "Express Authority of Law Essential and Construction," III, A, 1, j.

Construction of state constitution and laws.—What the constitution of a state requires, or what the statutes of the state require as to taxation, must be left to be decided by the Supreme Court of the state, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfies the constitution of the state as a tax on the corporation, is not open to our review or objection. *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 115, 46 L. Ed. 456. See, also, *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382. See the title COURTS, vol. 4, p. 1116, et seq., for full treatment.

As federal question.—See the title APPEAL AND ERROR, vol. 1, p. 741, et seq.

upon property, but a charge upon a privilege exercised or enjoyed under the law of the state, does not, when imposed in cases where the property passing consists of securities exempt by statute, impair the obligation of a contract within the meaning of the constitution of the United States.⁷³

2. PARTICULAR SUBJECTS OF TAXATION.—See post, "Subjects of Taxation," IV.

3. INFRINGEMENT ON RIGHTS OF FEDERAL GOVERNMENT.—As to property means and instrumentalities of federal government, see ante, "Nature and Extent," III, D, 1, b. And see the title CONSTITUTIONAL LAW, vol. 4, p. 191, et seq. As to taxation of federal corporation, see post, "By States," IV, C, 1, a.

E. Of Municipal Corporations—1. IN GENERAL—a. *Delegation by Legislature*—(1) *In General*.—The legislative branch of the government has the exclusive power of taxation, but may delegate it to municipal corporations,⁷⁴ at its discretion.⁷⁵ When municipal corporations are authorized or directed to levy a tax, or to appropriate its proceeds, the state through them is doing indirectly what it might do directly.⁷⁶ And if there is no power in the legislature which passed such a statute to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute.⁷⁷ But there is a wide difference between a tax prescribed by a legislative body, having full authority over the subject, and one imposed by a municipal corporation, acting under a limited and delegated authority.⁷⁸

73. Tax on transfers or execution of power of appointment.—Orr v. Gilman, 183 U. S. 278, 289, 46 L. Ed. 196.

74. Delegation by legislature.—United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Wolff v. New Orleans, 103 U. S. 358, 365, 26 L. Ed. 395; Louisiana v. Pilsbury, 105 U. S. 278, 300, 26 L. Ed. 1090; Louisiana v. New Orleans, 109 U. S. 285, 289, 27 L. Ed. 936.

The legislature can delegate to municipal corporation authority to levy taxes for local purpose upon property within its corporate limits, subject of course to constitutional limitations. Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 43 L. Ed. 823.

75. At its discretion.—The extent to which it may be delegated is a matter of discretion. Louisiana v. Pilsbury, 105 U. S. 278, 300, 26 L. Ed. 1090; Louisiana v. New Orleans, 109 U. S. 285, 289, 27 L. Ed. 936.

Lands used for agriculture only.—Land of this character, which its owner has not laid off into town lots, but insists on using for agricultural purposes, and through which no streets are run or used, can, by the legislature, be subjected to the taxes of a city—the water tax, the gas tax, the street tax, and others of similar character. Its right to do so cannot be questioned by a federal court. Kelly v. Pittsburgh, 104 U. S. 78, 81, 26 L. Ed. 658. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 398, 404; MUNICIPAL CORPORATIONS, vol. 8, p. 559.

Ordinance fixing rent of public building not a taxing statute.—St. Louis v. Western Union Tel. Co., 148 U. S. 92, 98, 37

L. Ed. 380. See ante, "Distinctions," II, C.

Not a taking of private property for public use without just compensation.—See the title DUE PROCESS OF LAW, vol. 5, p. 586.

Distinguished from special assessment.—Peake v. New Orleans, 139 U. S. 342, 350, 35 L. Ed. 131. See the title SPECIAL ASSESSMENTS, ante, p. 1.

76. **Indirectly state action.**—Railroad Co. v. County of Otse, 16 Wall. 667, 676, 21 L. Ed. 375; New Orleans v. Clark, 95 U. S. 644, 654, 24 L. Ed. 521; Gilman v. Sheboygan, 2 Black 510, 17 L. Ed. 305; New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co., 125 U. S. 18, 31, 31 L. Ed. 607. Sometimes, as in Connecticut, municipal corporations as well as the state may levy taxes on the taxable property of the citizens, but all taxes, state and municipal, are collected by the municipal authorities. Society for Savings v. Coite, 6 Wall. 594, 609, 18 L. Ed. 897, followed in Provident Institution v. Massachusetts, 6 Wall. 611, 18 L. Ed. 907.

77. **Want of power in legislature fatal.**—Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. Ed. 455.

78. **Wide difference between municipal and state taxation.**—Parsons v. District of Columbia, 170 U. S. 45, 51, 42 L. Ed. 943.

Construction of act repealing exemption as only authorizing state taxation.—It was held in Savannah v. Jesup, 106 U. S. 563, 568, 27 L. Ed. 276, that under an act requiring taxation, for the benefit of the state, of all the property of railroad companies, and which, therefore, operated as a withdrawal of the then existing right of limited exemption from taxation, the legislature making the returns to the

Subsequently Incorporated Municipal Corporations.—The power granted to municipal corporations to tax property within their jurisdiction extends to subsequently incorporated municipal corporations. Municipal corporations incorporated subsequent to the incorporation of a Canal and Banking Company come within the provisions of a reservation in its charter of the power, for municipal corporations and other corporations, to tax the Canal and Banking Company for local purposes, and they may therefore tax the company for such purposes, although not in existence when the company was organized.⁷⁹

(2) *Implied Delegation.*—When such corporations are created, the power of taxation is vested in them as an essential attribute for all the purposes of their existence, unless its exercise be in express terms prohibited.⁸⁰ If what the law requires to be done can only be done through taxation, then taxation is authorized to the extent that may be needed, unless it is otherwise expressly declared. The power to tax in such cases is not an implied power, but a duty growing out of the power to contract. The one power is as much express as the other.⁸¹

b. *Corporate Authority and Purpose.*—When a state constitution declares that the corporate authorities of the various municipal corporations may be vested with the taxing power for corporate purposes, this defines and limits the power of the legislature to confer the power to corporate authorities and pur-

comptroller general by the railroad companies of their property the only basis of the taxation to which, by its provisions, they are to be thereafter subjected, the mode prescribed by the statute for the payment of taxes by railroad companies had reference exclusively to taxes to be paid to the state, and not to municipal corporations, and therefore certain taxes assessed by the city of Savannah, for the years 1877 and 1878, upon land within its limits, belonging to the Atlantic and Gulf Railroad Company, were unauthorized by law.

79. **Subsequently incorporated municipal corporations.**—*Central R., etc., Co. v. Wright*, 164 U. S. 327, 41 L. Ed. 454.

80. **Essential attribute of existence.**—*United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225; *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125; *The Mayor v. Ray*, 19 Wall. 468, 475, 22 L. Ed. 164; *Wolff v. New Orleans*, 103 U. S. 358, 365, 26 L. Ed. 395; *Bailey v. Magwire*, 22 Wall. 215, 226, 22 L. Ed. 850; *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

The power of taxation is given to them for the purpose of raising the means of carrying on their functions, and the creation of such special power is exclusive of others. *The Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164; *Mayor v. Lindsey*, 19 Wall. 485, 22 L. Ed. 180; *Louisiana v. New Orleans*, 109 U. S. 285, 289, 27 L. Ed. 936. See, also, *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 97, 37 L. Ed. 380.

Constitutional provisions.—It is sometimes made the subject of a constitutional provision, so as to remove all doubt. *County of Tipton v. Locomotive Works*, 103 U. S. 523, 528, 26 L. Ed. 340.

81. *Quincy v. Jackson*, 113 U. S. 332, 338, 28 L. Ed. 1001. See, also, *United States v. County of Macon*, 99 U. S. 582,

25 L. Ed. 331; *Ralls County Court v. United States*, 105 U. S. 733, 735, 26 L. Ed. 1220; *Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238. See, also, *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

"In *Loan Ass'n v. Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455, the court, after observing that the validity of a contract, which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose, said: 'It is, therefore, to be inferred that, when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.'" *Quincy v. Jackson*, 113 U. S. 332, 337, 28 L. Ed. 1001. See *United States v. New Orleans*, 98 U. S. 381, 393, 25 L. Ed. 225; *Ralls County Court v. United States*, 105 U. S. 733, 735, 26 L. Ed. 1220; *United States v. County of Macon*, 99 U. S. 582, 589, 25 L. Ed. 331, followed in *S. C.*, 144 U. S. 568, 36 L. Ed. 544; *Thomson v. Lee County*, 3 Wall. 327, 18 L. Ed. 177; *Campbell v. Kenosha*, 5 Wall. 194, 18 L. Ed. 610; *Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238; *Otoe County v. Baldwin*, 111 U. S. 1, 15, 28 L. Ed. 331; *Scotland County Court v. Hill*, 140 U. S. 41, 46, 35 L. Ed. 351; *Commercial Bank v. Iola*, 154 U. S. 617, 22 L. Ed. 463; *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 19, 39 L. Ed. 873. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, pp. 621, 643, 647.

"In *United States v. County of Macon* (99 U. S. 582, 25 L. Ed. 331), there was a special limitation on the power to tax coupled with the authority to contract, and because the legislature saw fit to say how much of a tax in addition to that

poses.⁸² Taxation by municipal or public corporations must be for a corporate purpose. A corporate purpose must be one germane to the general scope of the object for which the corporation was created.⁸³ In imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied.⁸⁴

By the phrase "**corporate authorities**" must be understood those municipal officers who were selected with some reference to the creation of municipal indebtedness, and who were either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent.⁸⁵

c. *Public Purpose*.—The purpose for which the tax is laid must be a public one, for the tax to be valid.⁸⁶ Taxes for schools, for the support of the poor, for protection against fire, and for waterworks, are for public purposes in which the whole community have an interest, and for which, by common consent, property owners everywhere in this country are taxed.⁸⁷

Streets and Sidewalks.—See note.⁸⁸

d. *Limitations of Power*.—(1) *In General*.—It is not unusual to affix limits to the exercise of the power of taxation for any one year,⁸⁹ or to require a vote

otherwise provided might be levied to meet the new and extraordinary obligation which was contemplated, it was held that a prohibition against anything more was necessarily to be inferred." *Ralls County Court v. United States*, 105 U. S. 733, 736, 26 L. Ed. 1220.

82. Corporate authority and purpose.—*Livingston County v. Darlington*, 101 U. S. 407, 411, 25 L. Ed. 1015; *Weightman v. Clark*, 103 U. S. 256, 257, 26 L. Ed. 392; *Ottawa v. Carey*, 108 U. S. 110, 121, 27 L. Ed. 669. See the titles **MUNICIPAL CORPORATIONS**, vol. 8, p. 589; **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 621, et seq.

83. What is a corporate purpose.—*Weightman v. Clark*, 103 U. S. 256, 260, 26 L. Ed. 392; *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363. See, also, *Campbell v. Kenosha*, 5 Wall. 194, 201, 18 L. Ed. 610.

"What may be made a corporate purpose is not always easy to decide, but it has never been supposed that if legislative authority had not been granted to a municipal corporation to do a particular thing, that thing could be a purpose of that corporation." *Ottawa v. Carey*, 108 U. S. 110, 121, 27 L. Ed. 669. See the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 589.

Limitation to taxation for ordinary municipal purposes and debts contracted therefor.—*Commissioners v. Loague*, 129 U. S. 493, 501, 32 L. Ed. 780.

Securing location of reform school.—*Livingston County v. Darlington*, 101 U. S. 407, 25 L. Ed. 1015. See the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 574.

Works of internal improvement.—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 621, et seq.

Wagon bridge across Platte River, in Nebraska.—*United States v. Dodge County*, 110 U. S. 156, 28 L. Ed. 103.

84. Purpose may be prescribed in im-

posing tax.—*New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521.

"In directing, therefore, a particular tax by such corporation, and the appropriate exercise a power through its subordination of the proceeds to some special municipal purpose, the legislature only name agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent." *New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521.

85. Corporate authorities.—*Quincy v. Cooke*, 107 U. S. 549, 554, 27 L. Ed. 549.

The city council, and not the voters, of an incorporated city are its corporate authorities within the meaning of the Illinois, constitution of 1848. *Quincy v. Cooke*, 107 U. S. 549, 554, 27 L. Ed. 549.

86. Purpose must be a public one.—*Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238; *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125. See the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 588.

87. Schools, poor, fire protection, waterworks.—*Kelly v. Pittsburgh*, 104 U. S. 78, 81, 26 L. Ed. 658.

88. Streets and sidewalks.—*Mobile v. Eslava*, 16 Pet. 234, 10 L. Ed. 948.

89. Limitations of power.—The Mayor *v. Ray*, 19 Wall. 468, 475, 22 L. Ed. 164; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Louisiana v. New Orleans*, 109 U. S. 285, 289, 27 L. Ed. 936. See, also, as to limitations on power of municipal taxation, the titles **MANDAMUS**, vol. 8, pp. 69, 70, 72, 74, 76; **MUNICIPAL CORPORATIONS**, vol. 8, p. 590, et seq.; **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, pp. 643, 644.

In Wisconsin.—The supreme court of the state of Wisconsin in the interpretation of the provision of the constitution of that state which provides "that the leg-

of the majority of the voters to validate a tax beyond a certain limit.⁹⁰

(2) *Limitation on Special Tax Does Not Prevent Payment Out of General Levy.*—Where a special tax by a county was authorized to pay certain bonds, but a limitation was, however, prescribed for the special tax which was allowed to be levied, that was a special tax, distinct from and in addition to the ordinary tax which, by other statutes, the county court was authorized to levy; and as there is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds, none can fairly be implied, and an unpaid balance is payable out of the general funds raised otherwise.⁹¹

(3) *Limitation of Taxation for Ordinary Purposes Inapplicable to Specially Authorized Expenditures.*—See note.⁹²

islature, in organizing municipal corporations, shall restrict their power to tax, assess, borrow money, contract debts, and loan their credit," has declared that the legislature cannot confer on a municipal corporation unlimited power to levy taxes and raise money, beyond what was proper for purely municipal purposes. *Campbell v. Kenosha*, 5 Wall. 194, 201, 18 L. Ed. 610.

Adaption of new constitution as removing limitation.—*East St. Louis v. Amy*, 120 U. S. 600, 601, 30 L. Ed. 798. See the title MUNICIPAL CORPORATIONS, vol. 8, p. 593.

Where the subsequent constitution abrogated that part of the charter which limited the power of the city to tax for the payment of its bonded debt incurred after that constitution went into effect, the court could "compel a levy en masse to pay the whole debt and interest, when the constitution only required the council to provide for the collection of an annual tax to pay the interest as it falls due, and the principal within twenty years. *East St. Louis v. Amy*, 120 U. S. 600, 602, 30 L. Ed. 798, distinguishing *East St. Louis v. Zibley*, 110 U. S. 321, 28 L. Ed. 162.

90. Requirement of submission to vote.—*Stewart v. Jefferson Police Jury*, 116 U. S. 135, 136, 29 L. Ed. 588, applying such a law to a parish in Louisiana.

The law which required the court, when rendering a judgment against the parish, to order the levy of a tax sufficient to pay the judgment, was repealed by this Louisiana act of 1872. *Stewart v. Jefferson Police Jury*, 116 U. S. 135, 137, 29 L. Ed. 588. See the title MANDAMUS, vol. 8, p. 69.

Power conferred by different provisions of charter.—*Louisiana v. United States*, 103 U. S. 289, 292, 26 L. Ed. 358. See the title MANDAMUS, vol. 8, p. 70.

91. Limitation on special tax does not prevent payment out of general levy.—*United States v. County of Clark*, 96 U. S. 211, 214, 24 L. Ed. 628; *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771, distinguished in *United States v. County of Macon*, 99 U. S. 582, 589, 25 L. Ed. 331, followed in *S. C.*, 144 U. S. 568, 36 L. Ed. 544; *Knox County Court v. United States*, 109 U. S. 229, 27 L. Ed. 914. See the title MUNICIPAL, COUNTY, STATE AND

FEDERAL SECURITIES, vol. 8, pp. 684, 685.

Special tax not leviable for year prior to issue of bonds.—*United States v. County of Clark*, 95 U. S. 769, 24 L. Ed. 545. See the title MANDAMUS, vol. 8, p. 72.

The fact that the bonds, when delivered in 1874, had attached to them coupons for interest, which, apparently, had accrued prior to their delivery, could not enlarge the power of the county court, or confer upon it authority to levy in any year more than one special tax of one-twentieth of one per cent. *United States v. County of Clark*, 95 U. S. 769, 773, 24 L. Ed. 545.

The county court had no authority by law to levy, in addition to said special tax, a county tax exceeding the rate of one-half of one per cent on the valuation of the taxable property in the county, the limit of its power to tax, and it appears by the record that the county tax was levied and collected for the year 1874. *United States v. County of Clark*, 95 U. S. 769, 24 L. Ed. 545.

92. Limitation of taxation for ordinary purposes inapplicable to specially authorized expenditures.—*Quincy v. Jackson*, 113 U. S. 332, 335, 336, 28 L. Ed. 1001; *United States v. Dodge County*, 110 U. S. 156, 28 L. Ed. 103, the case of a wagon bridge across the Platte river in Nebraska authorized by statute as a work of internal improvement.

"In giving authority to incur obligations for such extraordinary indebtedness, the legislature did not restrict its corporate authorities to the limit of taxation provided for ordinary debts and expenses." *Quincy v. Jackson*, 113 U. S. 332, 337, 28 L. Ed. 1001. See, also, *Loan Ass'n v. Topeka*, 20 Wall. 655, 660, 22 L. Ed. 455; *Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490, followed in *United States v. Burlington*, 154 U. S., appx., 568, 19 L. Ed. 495, construing an Iowa legislative charter.

It does not apply to a case where a judgment has been recovered against the city. Such a case, on the contrary, falls within the provisions of a law making obligatory the levy of a tax as early as practicable sufficient to pay off the judgment with interest and costs; the extent

(4) *Revocation and Subsequent Limitation.*—But the legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the constitution of the United States, and, in particular, shall not impair the obligation of its contracts by abrogating or lessening the means of their enforcement.⁹³ The power of taxation on the part of a municipal corporation is not private property, or a vested right of property, in its hands, which, when once conferred upon it by an act of the legislature, cannot be subsequently modified or repealed.⁹⁴ It is revoked by subsequent legislation inconsistent therewith.⁹⁵ Nor is it a contract within the protection of the federal constitution, as far as the corporation is concerned.⁹⁶

As Deprivation of Property under Fourteenth Amendment.—Conceding that judgments against a municipality, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership, and may have a pecuniary value, the owners cannot be said to be deprived of them so long as they continue an existing liability against the city. They have no such vested right in the taxing power of the city as to render its diminution by the state to a degree affecting the present collection of their judgments a deprivation of their property in the sense of the fourteenth amendment. A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it.⁹⁷

of the limitation, in such a case, is the only limitation of the amount to be levied. *Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490, followed in *United States v. Burlington*, 154 U. S., appx., 568, 19 L. Ed. 495.

A general law limiting the amount of the annual tax by a county to "defray the expenses of the county," which it has always been the policy of the state to restrict, does not apply to a tax necessary to meet negotiable bonds issued under authority of law. *Ralls County Court v. United States*, 105 U. S. 733, 736, 26 L. Ed. 1220. See the title **MUNICIPAL CORPORATIONS**, vol. 8, p. 591.

93. Power of revocation and subsequent limitation.—*Wolff v. New Orleans*, 103 U. S. 358, 365, 26 L. Ed. 395; *Supervisors v. United States*, 4 Wall. 435, 444, 18 L. Ed. 419; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Riggs v. Johnson County*, 6 Wall. 166, 194, 18 L. Ed. 768; *Louisiana v. Pilsbury*, 105 U. S. 278, 300, 26 L. Ed. 1090; *Louisiana v. New Orleans*, 109 U. S. 285, 289, 27 L. Ed. 936; *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 71, 30 L. Ed. 73. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 848, et seq. See, also, *id.*, p. 822, et seq.

Effect of change in municipality on liabilities and taxing power.—See the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 846, et seq.; **MUNICIPAL CORPORATIONS**, vol. 8, p. 564.

94. Not property or a vested right.—*Williamson v. New Jersey*, 130 U. S. 189, 199, 32 L. Ed. 915.

95. Revoked by subsequent inconsistent legislation.—*Williamson v. New Jersey*, 130 U. S. 189, 195, 32 L. Ed. 915.

Thus a special act giving a township the right to tax a poor farm conveyed by it to a city so long as it should be embraced in the limits of said township, was repealed by a subsequent general tax law of the state, which enacted that the property of the cities of the state, and all buildings used exclusively for charitable purposes, etc., should be exempt from taxation; and after repealing certain acts named, repealed all other acts or parts of acts, whether special or local or otherwise, inconsistent with its provisions. *Williamson v. New Jersey*, 130 U. S. 189, 191, 195, 32 L. Ed. 915.

Statute apportioning entire assessment.—A charter power conferred upon the authority of a municipal corporation to assess the taxes of railroad and telegraph companies is repealed by a statute providing the general scheme for assessing and taxing the property of such companies as a whole and distributing the taxes ratably among the different municipalities according to the number of miles of line in each. *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098.

96. Not a contract with the corporation.—*Williamson v. New Jersey*, 130 U. S. 189, 199, 32 L. Ed. 915; *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518; *State Bank v. Knopp*, 16 How. 369, 380, 14 L. Ed. 977; *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597.

97. As deprivation of property under fourteenth amendment.—*Louisiana v. New Orleans*, 109 U. S. 285, 289, 27 L. Ed. 936. "Whether or not the state, in so limiting the power of the city to raise funds by taxation that it cannot satisfy all claims against it recognized by law,

(5) *Equality and Uniformity*.—See ante, "Taxation for Local and Municipal Uses," III, A, 2, b, (3), (g).

e. *Right to Enforce Levy*.—A judgment creditor has no right to a levy of taxes which he did not have before the judgment. The judgment has the effect of a judicial determination of the validity of his demand and of the amount that is due, but it gives him no new rights in respect to the means of payment.⁹⁸ But where an act declares that a municipality owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax, a positive duty to lay such tax is imposed, if same is necessary to pay such debts.⁹⁹ The fact that money has once been raised by taxation to meet the payment, which has been lost, is no defense to a suit to compel a levy to pay bonds. The claim of the bondholders continues until payment is actually made to them. If the funds are lost after collection, and before they are paid over, the loss falls on the county and not the creditors.¹

f. *Situs for Taxation*.—See post, "Situs as Determining Taxability," IV, A, 2, b.

g. *Appropriation of Taxes*.—See post, "Disposition and Expenditure of Taxes," X.

2. OF CITIES, TOWNS, ETC.—A city is a municipal corporation, a political subdivision of the state, charged with certain specified duties of government within its territorial limits, and for the full discharge of those duties it is authorized to levy taxes.²

Property in Annexed District.—Property brought by annexation within municipal limits is subject to taxation.³

Lands of Nonresidents.—The corporation of Alexandria has power to tax the lots and lands of nonresidents, and it is not necessary that the lots should be half-acre lots.⁴

though not resting upon contract, does a wrong to the relators, which a wise policy and a just sense of public honor should not sanction, is not a question upon which this court can pass. If the action of the state does not fall within any prohibition of the federal constitution, it lies beyond the reach of our authority." *Louisiana v. New Orleans*, 109 U. S. 285, 290, 27 L. Ed. 936. See post, "Right to Enforce Levy," III, E, 1, c. See, also, the title DUE PROCESS OF LAW, vol. 5, pp. 540, 544.

98. **Right to enforce levy.**—*United States v. County of Macon*, 99 U. S. 582, 591, 25 L. Ed. 331, followed in *S. C.*, 144 U. S. 568, 36 L. Ed. 544. See the title MANDAMUS, vol. 8, pp. 70, 73.

99. **Duty to levy special tax.**—*Supervisors v. United States*, 4 Wall. 435, 445, 18 L. Ed. 419; *Galena v. Amy*, 5 Wall. 705, 18 L. Ed. 560.

A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature. *South Dakota v. North Carolina*, 192 U. S. 286, 319, 48 L. Ed. 448. See, also, ante, "Revocation and Subsequent Limitation," III, E, 1, a, (4).

Mandamus to compel levy.—See the title MANDAMUS, vol. 8, pp. 68, 77.

1. **Loss of funds after collection no payment.**—*Ralls County Court v. United States*, 105 U. S. 733, 738, 26 L. Ed. 1220.

2. **Of cities, towns, etc.**—*Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

Although some of the funds derived from a city tax may have been used for public improvement, that does not change the character of the tax. *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

The city of Parkersburg had, by § 15 of the act of March 17, 1860, authority to levy and collect an annual tax on the real estate and personal property and tithables in the city, and upon all other subjects of taxation under the revenue laws of the state, which taxes are to be for the use of the city. *Parkersburg v. Brown*, 106 U. S. 487, 501, 27 L. Ed. 238.

The boundary of the city of Henderson, Kentucky, as defined by its charter granted February 11, 1867, extended "to low-water mark on the Ohio River on the Indiana shore," and it had the power (with certain exceptions not material to be noticed here) to levy and collect taxes at a prescribed rate upon all property within its limits made taxable by law for state purposes. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 594, 43 L. Ed. 823; *Henderson Bridge Co. v. Henderson City*, 173 U. S. 624, 43 L. Ed. 835.

3. **Property in annexed district.**—*Alexander v. Alexander*, 5 Cranch 1, 3 L. Ed. 19.

4. **Lands of nonresidents.**—*Alexander v. Alexander*, 5 Cranch 1, 3 L. Ed. 19.

License Taxes.—See the title *LICENSES*, vol. 7, p. 869. See, also, note.⁵

3. **OF COUNTIES.**—Where necessary for the full discharge of its duties imposed by law, a county is authorized to levy taxes,⁶ even though not yet incorporated when an act expressly giving the power was enacted.⁷

Limitation of Amount of Levy.—The right and duty of a county to levy a tax of fifty cents on the \$100, of valuation to pay its liabilities, is not exhausted

5. **License taxes.**—A municipality may exact under an ordinance a sum sufficient to cover all expenses of police supervision of the property and instrumentalities used by a public service company within its limits. *Postal Tel. Cable Co. v. Taylor*, 192 U. S. 64, 65, 69, 48 L. Ed. 342. See the title *LICENSES*, vol. 7, p. 869. See, also, post, "Occupations and Callings," IV, g.

License tax for use of streets.—See the title *LICENSES*, vol. 7, pp. 871, 876-7, 879-80.

A municipality may levy a tax in the nature of rental for occupancy of certain portions of the streets. *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 47 L. Ed. 995. See, also, the titles *INTER-STATE AND FOREIGN COMMERCE*, vol. 7, p. 269; *STREET RAILWAYS*, ante, p. 252; *STREETS AND HIGHWAYS*, ante, p. 259; *TELEGRAPHS AND TELEPHONES*.

License tax on insurance companies.—An act of legislature imposing a tax upon an insurance company for the privilege of doing business in the state, does not preclude a municipal corporation from also levying a tax upon the company. *Marcy v. Tp. of Oswego*, 92 U. S. 637, 23 L. Ed. 748; *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. Ed. 825. See the title *INSURANCE*, vol. 7, p. 83.

6. **Power of counties.**—*Central R., etc., Co. v. Wright*, 164 U. S. 327, 337, 41 L. Ed. 454; *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 672, 41 L. Ed. 590.

"Although taxes in Iowa are levied and collected by the counties, all is done under the authority of the state, and the counties are charged with whatever is done by the state affecting the rights of the taxpayer." *Litchfield v. County of Webster*, 101 U. S. 773, 781, 25 L. Ed. 925, followed in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928.

Statute requiring annual tax construed.—Under a state statute (Kentucky) by which it was made the duty of the county court to levy a tax annually to pay the interest for that year, on county aid bonds, and to appoint a person to collect such tax, in view of the provision that the railroad company might pay the interest on the bonds to the county and stop the tax for that year, it is manifest that it was not intended that the interest should be allowed to accumulate and a tax covering several years' interest be levied at one time. Neither was it intended that a separate levy should be made for each bondholder, but only one tax was au-

thorized to be levied by the county court, and such tax was to pay all the interest for the year and such part of the principal as might be proper for the sinking fund. *Bass v. Taft*, 137 U. S. 458, 463, 34 L. Ed. 752. See the title *MANDAMUS*, vol. 8, pp. 72, 75.

Unorganized territory attached to county.—The unorganized territory in Nebraska west of Lincoln County and the unorganized county of Cheyenne having been attached by statute to the county of Lincoln, in Nebraska, for revenue purposes, the authorities of Lincoln County were the proper authorities to levy taxes upon property thus placed under their charge. *Railroad Co. v. Peniston*, 18 Wall. 5, 6, 21 L. Ed. 787.

Indian reservation attached to county for judicial purposes.—The order of the supreme court of Oklahoma Territory, made by virtue of § 9, of the Oklahoma act of 1890, attaching an Indian reservation to Noble County for judicial purposes, did not make it a part of the judicial district of that county, nor did the subsequent act of the legislature in substance place the reservation under the general taxing jurisdiction of Noble County, and therefore make it a part of the same taxing district, so that, being a part of the same district, the personal property in the reservation must be taxed at the same rate, and for all the purposes that personal property is taxed in the organized county of Noble, and render invalid for want of uniformity, the provisions of the act of 1899, limiting the taxation of property in such reservation to an assessment for territorial and court purposes only. *Foster v. Pryor*, 189 U. S. 325, 329, 47 L. Ed. 835.

"The general laws providing for taxation in an organized county do not authorize such taxation in a reservation, even after it has been attached to a county for judicial purposes. There must be special legislative authority for it. *Wagoner v. Evans*, 170 U. S. 588, 592, 42 L. Ed. 1154." *Foster v. Pryor*, 189 U. S. 325, 332, 47 L. Ed. 835.

There is no provision of the act of congress of 1890, organizing the territory, or the other act of 1886, in regard to territories then or thereafter to be organized, that was violated by the territorial act of 1899. *Foster v. Pryor*, 189 U. S. 325, 335, 47 L. Ed. 835.

7. **Under statute passed prior to incorporation.**—*Central R., etc., Co. v. Wright*, 164 U. S. 327, 337, 41 L. Ed. 454.

by the levy for a given year of 30 cents for county purposes and 20 cents by the township boards for township and bridge purposes, the township being a separate organization.⁸

County and District Taxes Distinguished.—Where in effect the county court and the sheriff of the county were made the officers and agents of a levee district for the levy and collection of the special tax which was required to pay a debt incurred in levee work, this tax was not a county tax, but a district tax, levied and assessed under the authority of law by the county court. In levying the tax the court acted for the district, not the county, and the county assumed no liability.⁹

4. OF TOWNSHIPS.—A township having legally incurred an obligation to pay the bonds in question, it was competent for the legislature, at any time, to make provision for its being met by taxation upon any kind of property within the township that was subject to taxation for public purposes.¹⁰

5. OF PARISH.—The measure of the taxing power of a parish in the state of Louisiana in the years 1874, 1875 and 1876 was the act of the legislature of Louisiana of 1872, which with certain exceptions prohibited parish tax levies in excess of 100 per cent of the state tax for that year.¹¹

6. PARTICULAR SUBJECTS OF TAXATION.—See post, "Subjects of Taxation," IV.

IV. Subjects of Taxation.

A. General Principles—1. TAXABILITY THE RULE.—See post, "Exemptions from Taxation," V. See, also, ante, "Express Authority of Law Essential, and Construction," III, A, 1, j; "Requirement of Equality and Uniformity," III, A, 2, b. See, generally, ante, "Nature and Origin," III, A, 1.

2. JURISDICTION AND SITUS—*a. Necessity for Jurisdiction*—(1) *In General*.—It is essential to the validity of a tax that the property shall be within the jurisdiction of the taxing power.¹²

8. **Limitation of amount of levy.**—*Maccon County v. Huidekoper*, 134 U. S. 332, 336, 33 L. Ed. 914. See, also, *United States v. County of Clark*, 96 U. S. 211, 24 L. Ed. 628; *Knox County Court v. United States*, 109 U. S. 229, 27 L. Ed. 914. See the titles MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 643; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650. See, also, the title MANDAMUS, vol. 8, p. 68, et seq. See ante, "Limitations of Power," III, E, 1, d.

9. **County and district taxes distinguished.**—*Meath v. Phillips County*, 108 U. S. 553, 554, 27 L. Ed. 819.

The drafts drawn by levee inspectors on the levee treasurer of the county of Phillips, under the authority of the act of February 16th, 1869, "to provide for making and repairing levees in Desha and Phillips counties," and the renewal bonds or scrip issued by the county clerk of the county under the provisions of the act of January 15th, 1861, to amend the act of February 16th, 1859, did not constitute an indebtedness of the county for which bonds of the county might be demanded under the act of April 29th, 1873, "to authorize certain counties to fund their outstanding indebtedness," or a money judgment or decree recovered against the county. *Meath v. Phillips*

County, 108 U. S. 553, 554, 27 L. Ed. 819; *County of Cass v. Johnston*, 95 U. S. 360, 24 L. Ed. 416; *Davenport v. Dodge County*, 105 U. S. 237, 26 L. Ed. 1018, distinguished on the facts, as involving bonds lawfully issued in the names of the counties. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 783.

10. **Of townships.**—*Cape Girardeau County Court v. Hill*, 118 U. S. 68, 71, 30 L. Ed. 73.

A congressional township is, by the laws of Illinois, merely a corporation for school purposes. It cannot, therefore, levy a tax upon persons or property within its jurisdiction, to aid in building railroads, as this would not be a corporate purpose. *Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392.

11. **Of parish.**—*Stewart v. Jefferson Police Jury*, 116 U. S. 135, 29 L. Ed. 588. See the title MANDAMUS, vol. 8, p. 69.

12. **Necessity for jurisdiction.**—*Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 205, 50 L. Ed. 150; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179; *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 646, 38 L. Ed. 846; *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 427, 42 L. Ed. 803; *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 396, 47 L. Ed. 513; *Fargo v. Hart*, 193 U. S. 490, 499, 48 L. Ed.

Presumption.—It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the state.¹³

(2) *Nonresidency of Owner Does Not Prevent Taxation.*—Property owned by persons residing in another state, if not exempt from taxation for other reasons, cannot be exempt by reason of being owned by nonresidents of the state. It is settled beyond all contradiction or question, that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their

761; Delaware, etc., *R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077; Union, etc., *Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150; Metropolitan Life Ins. Co. *v. New Orleans*, 205 U. S. 395, 51 L. Ed. 853; *Buck v. Beach*, 206 U. S. 392, 400, 51 L. Ed. 1106. See, also, Pittsburgh, etc., *R. Co. v. Backus*, 154 U. S. 421, 431, 31 L. Ed. 1031; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 23, 41 L. Ed. 49; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. Ed. 189; *McCulloch v. Maryland*, 4 Wheat. 316, 429, 4 L. Ed. 579; *Providence Bank v. Billings*, 4 Pet. 514, 564, 7 L. Ed. 939; *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 599, 15 L. Ed. 254; *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 431, 20 L. Ed. 192; *Morgan v. Parham*, 16 Wall. 471, 476, 21 L. Ed. 303; *The Delaware R. Tax*, 18 Wall. 206, 21 L. Ed. 888; *Kirtland v. Hotchkiss*, 100 U. S. 491, 497, 25 L. Ed. 558; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 29 L. Ed. 158; Delaware, etc., *Canal Co. v. Pennsylvania*, 156 U. S. 200, 39 L. Ed. 396; *Dewey v. Des Moines*, 173 U. S. 193, 203, 43 L. Ed. 665. See ante, "Nature and Extent," III, D, 1, b. See the title DUE PROCESS OF LAW, vol. 5, p. 541, et seq.

Where there is jurisdiction neither as to persons nor property, the imposition of a tax would be ultra vires and void, as if the legislature of a state should enact that the citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever. *St. Louis v. Ferry Co.*, 11 Wall. 423, 430, 20 L. Ed. 192. See post, "Situs as Determining Taxability," IV, A, 2, b.

"The jurisdiction to tax exists only in regard to persons and property or upon the business done within the state, and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a nonresident personally liable to pay a tax of the nature of the one in question. All subjects over which the sovereign power of the state extends are objects of taxation. *Cooley on Taxation*, 1st ed., pp. 3, 4; *Burroughs on Taxation*, § 6. The power of the state to tax extends to all objects within the sovereignty of the state.

(Per Mr. Justice Clifford, in *Hamilton Co. v. Massachusetts*, 6 Wall. 632, at 638, 18 L. Ed. 904.) The power to tax is, however, limited to persons, property and business within the state, and it cannot reach the person of a nonresident. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319, 21 L. Ed. 179. In *Cooley on Taxation*, 1st ed., p. 121, it is said that 'a state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its power.' These are elementary propositions, but they are referred to only for the purpose of pointing out that a statute imposing a personal liability upon a nonresident to pay such an assessment as this oversteps the sovereign power of a state." *Dewey v. Des Moines*, 173 U. S. 193, 203, 43 L. Ed. 665.

An attempt to escape proper taxation in one state does not confer jurisdiction to tax property asserted to be in another which really lies outside and beyond the jurisdiction of that state. Jurisdiction of that state to tax is not conferred or strengthened by reason of the motive which may have prompted the owner to send into that state these evidences of debts owing him by residents of the other state. *Buck v. Beach*, 206 U. S. 392, 402, 51 L. Ed. 1106.

Property, even of a domestic corporation, cannot be taxed if it is permanently out of the state. *New York Cent., etc., R. Co. v. Miller*, 202 U. S. 584, 596, 50 L. Ed. 1155.

13. Presumption.—Pittsburgh, etc., *R. Co. v. Backus*, 154 U. S. 421, 428, 31 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

"It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property the language expressing such intention must be clear." *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 428, 31 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040. See, also, *Central Pac. R. Co. v. California*, 162 U. S. 91, 113, 40 L. Ed. 903.

houses and effects, and property belonging to or in the use of the government of the United States.¹⁴

(3) *Unit Rule*.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 349, et seq.; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 458, et seq. See, also, post, "Valuation," VI, B.

b. *Situs as Determining Taxability*—(1) *Of Real Estate*.—It is clearly beyond the power of a state to tax real estate within a foreign jurisdiction, although a resident owner may receive an income therefrom.¹⁵

(2) *Of Personal Property*—(a) *In General*.—It may be taken as a general rule of the law of taxation of personal property that such property can only be taxed at the residence of the owner, or at such place as it has acquired a situs, which will subject it to the taxing power of the state where found. In its application to tangible property, there is little difficulty in applying this principle. The difficulty arises in determining whether a credit or chose in action has acquired a local situs in contemplation of law at a place other than the domicile of the owner in such sense as will permit the state to tax it in the place of its localization.¹⁶

14. Nonresidency of owner does not prevent taxation.—Coe v. Errol, 116 U. S. 517, 524, 29 L. Ed. 715.

15. Situs of real estate.—Union, etc., Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. Ed. 150.

Mortgages and mortgaged property.—It was stated in Savings, etc., Society v. Multnomah County, 169 U. S. 421, 42 L. Ed. 803, that "The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest therein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed like other choses in action, to the creditor at his domicile; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property at its situs." Buck v. Beach, 206 U. S. 392, 405, 51 L. Ed. 1106. See, also, Kirtland v. Hotchkiss, 100 U. S. 491, 498, 25 L. Ed. 558.

In Savings, etc., Society v. Multnomah County, 169 U. S. 421, 42 L. Ed. 803, it was held by this court that the fact that the mortgage was owned by a citizen of another state, and in possession outside of the state of Oregon, where the real estate was situated, did not violate the fourteenth amendment. Buck v. Beach, 206 U. S. 392, 405, 51 L. Ed. 1106. See, also, Bristol v. Washington County, 177 U. S. 133, 144, 44 L. Ed. 701. See the titles CONSTITUTIONAL LAW, vol. 4, p. 348; DUE PROCESS OF LAW, vol. 5, p. 543.

The holding that a mortgage being a mere chose in action, has no locality independent of the party in whom the right to enforce it resides, and though it may undoubtedly be taxed by the state when held by a resident therein, when held by

a nonresident it is as much beyond the jurisdiction of the state as the person of the owner (State Tax on Foreign-Held Bonds, 15 Wall. 300, 323, 21 L. Ed. 179), was overruled in Savings, etc., Society v. Multnomah County, 169 U. S. 421, 42 L. Ed. 803.

16. Of personal property generally.—State Board v. Comptoir National, 191 U. S. 388, 402, 48 L. Ed. 232; Delaware, etc., R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 499, 22 L. Ed. 189; Bristol v. Washington County, 177 U. S. 133, 144, 44 L. Ed. 701; New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174.

"In matters of taxation, however, and of subjecting the personal property of nonresidents to the claims of local creditors of the owner, serious encroachments have been made upon the ancient maxim *mobilia sequuntur personam*, and a rule has grown up in modern times that legislatures may deal with the personal as well as with the real property of nonresidents within their jurisdiction; and that such property, while enjoying the protection and benefits of the local law, may be taxed for the expenses of the local government. These doctrines have found expression in a large number of cases in this court. Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; S. C., 7 Wall. 139, 19 L. Ed. 109; Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Walworth v. Harris, 129 U. S. 355, 32 L. Ed. 712; Security Trust Co. v. Dodd, etc., Co., 173 U. S. 624, 43 L. Ed. 835, and cases there cited." Eidman v. Martinez, 184 U. S. 578, 581, 46 L. Ed. 697. See, also, Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 35 L. Ed. 613, followed in Pullman's Palace Car Co. v. Hayward, 141 U. S. 36, 35 L. Ed. 621; Mager v. Grima, 8 How. 490, 12 L. Ed. 1168; Lane County v. Oregon, 7 Wall. 71, 77, 19 L. Ed. 101; St. Louis v. Ferry Co., 11 Wall. 423, 430, 20 L. Ed. 192; State

Although the State of Residence Taxes the Same Property.—Although another state in which he resides taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also.¹⁷

(b) *Of Tangible Personal Property*—aa. *In General.*—The tendency has been in recent years to treat tangible personalty as having a situs of its own for the purpose of taxation, and correlatively to exempt it at the domicile of its owner. The cases in the state reports upon this subject usually turn upon the construction of local statutes granting or withholding the right to tax extraterritorial property, and do not involve the due process clause of the fourteenth amendment.¹⁸

Tax on Foreign-Held Bonds, 15 Wall. 300, 323, 324, 328, 21 L. Ed. 179; Railroad Co. v. Peniston, 18 Wall. 5, 29, 21 L. Ed. 787; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257.

"Recent cases in this court have affirmed very broadly the right of the legislature to tax the local property of non-residents, and particularly of corporations who are permitted by comity to do business within the state. The Delaware R. Tax, 18 Wall. 206, 21 L. Ed. 888; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790; Marye v. Baltimore, etc., R. Co., 127 U. S. 117, 32 L. Ed. 94; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, followed in Pullman's Palace Car Co. v. Hayward, 141 U. S. 36, 35 L. Ed. 621; Adams Express Co. v. Ohio, 166 U. S. 185, 41 L. Ed. 965. The same principle has been applied not only to tangible property but to credits and effects. Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189; Savings, etc., Society v. Multnomah County, 169 U. S. 421, 42 L. Ed. 803; New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174; Bristol v. Washington County, 177 U. S. 133, 44 L. Ed. 701." Eidman v. Martinez, 184 U. S. 578, 582, 46 L. Ed. 697. See, also, State Railroad Tax Cases, 92 U. S. 575, 607, 23 L. Ed. 663; Coe v. Errol, 116 U. S. 517, 524, 29 L. Ed. 715.

17. **Although the state of residence taxes the same property.**—Coe v. Errol, 116 U. S. 517, 524, 29 L. Ed. 715; Blackstone v. Miller, 188 U. S. 189, 47 L. Ed. 439; State Board v. Comptoir National, 191 U. S. 388, 403, 48 L. Ed. 232.

18. **Of tangible personal property.**—Union, etc., Transit Co. v. Kentucky, 199 U. S. 194, 207, 50 L. Ed. 150; St. Louis v. Ferry Co., 11 Wall. 423, 430, 20 L. Ed. 192; State Tax on Foreign-Held Bonds, 15 Wall. 300, 323, 21 L. Ed. 179. See Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217, 29 L. Ed. 158; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, followed in Pullman's Palace Car Co. v. Hayward, 141 U. S. 36, 35 L. Ed. 621; Carstairs v. Cochran, 193 U. S. 10, 48 L. Ed. 596; Old Dominion Steamship Co. v. Virginia, 198 U. S. 299,

305, 49 L. Ed. 1059; Delaware, etc., R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077. See, also, Cleveland, etc., R. Co. v. Backus, 154 U. S. 439, 445, 38 L. Ed. 1041; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715; Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 31 L. Ed. 790; Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899; Pittsburgh, etc., Coal Co. v. Bates, 156 U. S. 577, 39 L. Ed. 538; Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. Ed. 189; Fargo v. Hart, 193 U. S. 490, 499, 48 L. Ed. 761; Buck v. Beach, 206 U. S. 392, 400, 51 L. Ed. 1106.

"Statutes sometimes provide that tangible personal property shall be assessed wherever in the state it may be, either to the owner himself or to the agent or other person having it in charge; and there is no doubt of the right to do this, whether the owner is resident in the state or not." 1 Cooley on Taxation, 3d ed., p. 653. See, also, Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715; Marye v. Baltimore, etc., R. Co., 127 U. S. 117, 123, 32 L. Ed. 94; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613; Ficklen v. Shelby County Taxing District, 145 U. S. 1, 22, 36 L. Ed. 601; Savings, etc., Society v. Multnomah County, 169 U. S. 421, 427, 42 L. Ed. 803; New Orleans v. Stempel, 175 U. S. 309, 44 L. Ed. 174; State Board v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. Ed. 232; National Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 701; Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236." Carstairs v. Cochran, 193 U. S. 10, 16, 48 L. Ed. 596.

Although a resident owner may receive an income from tangible personal property beyond the jurisdiction. Union, etc., Transit Co. v. Kentucky, 199 U. S. 194, 204, 50 L. Ed. 150. See the titles CONSTITUTIONAL LAW, vol. 4, p. 347, et seq.; DUE PROCESS OF LAW, vol. 5, p. 541, et seq. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 456, et seq.

The maxim mobilia sequuntur personam may only be resorted to when conven-

bb. *Moving Property*.—It is competent for the legislature to give moving property a definite situs as of some day. Nor is that power impugned by the principle that protection is the consideration of taxation. There is protection during the transit through the municipalities of the state and at its termination in the state—protection accommodated to the kind of property and as efficient as links are to the continuity of a chain.¹⁹ But the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts.²⁰

cc. *Railroad Property*.—So as to railroad property.²¹

ience and justice so require. *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 208, 50 L. Ed. 150. See *St. Louis v. Ferry Co.*, 11 Wall. 423, 430, 20 L. Ed. 192; *Eidman v. Martinez*, 184 U. S. 578, 46 L. Ed. 697; *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. Ed. 439; *State Board v. Comptoir National D'Escompte*, 191 U. S. 388, 404, 48 L. Ed. 232; *Buck v. Beach*, 206 U. S. 392, 400, 51 L. Ed. 1106. See the title *CONFLICT OF LAWS*, vol. 3, p. 1038.

Property of resident.—The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. Whether the personal property of a resident of one state situate in another can be taxed in the former, is not decided. *St. Louis v. Ferry Co.*, 11 Wall. 423, 430, 20 L. Ed. 192.

Refrigerator cars permanently in other states.—*Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 201, 50 L. Ed. 150. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 541, et seq.

Personal property engaged in interstate commerce.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 453, et seq.

Spirits in bonded warehouse.—See the title *REVENUE LAWS*, vol. 10, p. 863.

Unit rule.—See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 349, et seq.; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 458, et seq. See, also, post, "Assessment," VI.

Money and deposits.—See post, "Money and Deposits in Bank," IV, I.

19. **Moving property.**—*Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 90, 47 L. Ed. 394.

Where the purpose of the statute of Michigan was to assess the forest products of the state—things which are a part of the general property of the state, it could declare that those "in transit" are assessable according to their destination. If that be "some place within the state," the property is to be "assessed in such place;" if that be "some place without the state," the property is to be assessed at the place in the state "nearest the last boom or sorting gap of the same in or bordering on this state in which said property will naturally be the last floated during the transit thereof." *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 91, 47 L. Ed. 394. See the title *INTER-*

STATE AND FOREIGN COMMERCE, vol. 7, p. 467.

20. **Occasional absences insufficient to affect domicile.**—*New York Cent., etc., R. Co. v. Miller*, 202 U. S. 584, 597, 50 L. Ed. 1155; *Ayer, etc., Tie Co. v. Kentucky*, May 21, 1906, 202 U. S. 409, 50 L. Ed. 1082. See, also, *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 208, 209, 50 L. Ed. 150.

21. **Railroad property.**—A state has rightful power to levy and collect a tax upon railroad personal property habitually used and employed within its territorial limits, and there found, if and whenever it may choose, by apt legislation, to exert its authority over the subject, although the situs of the railroad company is in another state and that, also, upon general principles, is the situs of all its personal property; but for purposes of taxation, as well as for other purposes, that situs may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117, 123, 32 L. Ed. 94.

"And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found." *Marye v. Baltimore, etc., R. Co.*, 127 U. S. 117, 123, 32 L. Ed. 94, where it was held, however, that the statute of the state (Virginia) was intended to apply only to domestic corporations, and not to the *Baltimore & Ohio R. R. Co.*, a Maryland corporation.

Local situs.—The rolling stock, capital stock, and franchise, are personal property, and this, with all other personal property, has a local situs at the principal place of business of the corporation, and can be taxed by no other county, city, or town, but the one where it is so situated. But, after all, the rule is merely the law of the state which recognizes it; and when it is called into operation as to property located in one state, and owned by a resident of another, it is a rule of

dd. *Ships and Shipping*.—The power of taxation of vessels depends either upon the actual domicil of the owner or the permanent situs of the property within the taxing jurisdiction, wholly irrespective of the place of enrollment.²²

Ferry Boats.—See the titles *FERRIES*, vol. 6, p. 281; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 367, et seq.

ee. *Bank Bills and State or Municipal Bonds*.—"It is well settled that bank bills and municipal bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicil of the owner."²³

ff. *Property Liable to Execution*.—If property can have such a situs within the state as to be subject to seizure and sale on execution, it would seem to follow that the state has power to establish a like situs within the state for purposes of taxation.²⁴

(c) *Of Intangible Personal Property*—aa. *In General—Debts and Credits*.—The rule *mobilia sequuntur personam* applies to intangible property. Generally speaking, intangible property in the nature of a debt may be regarded, for the purposes of taxation, as situated at the domicil of the creditor and within the jurisdiction of the state where he has such domicil. It is property within that state,²⁵ which the state may tax at its discretion.²⁶

Debts Due Residents Secured on Property in Another State.—A state may tax her resident citizens for debts held by them against nonresidents, and secured by mortgage on property in another state.²⁷

comity in the former state rather than an absolute principle in all cases. *State Railroad Tax Cases*, 92 U. S. 575, 607, 23 L. Ed. 663; *Green v. Van Buskirk*, 5 Wall. 307, 312, 18 L. Ed. 599.

22. Ships and shipping.—*Ayer, etc., Tie Co. v. Kentucky*, 202 U. S. 409, 421, 423, 50 L. Ed. 1082; *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 15 L. Ed. 254; *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192; *Morgan v. Parham*, 16 Wall. 471, 21 L. Ed. 303; *Transportation Co. v. Wheeling*, 99 U. S. 273, 25 L. Ed. 412; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 91, 47 L. Ed. 394; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 373, 27 L. Ed. 419.

Remaining in a state no longer than necessary to land passengers and freight, and prepare for the next voyage, does not make vessels liable to assessment and taxation under the laws of that state, or any city thereof. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 15 L. Ed. 254.

Nor does merely touching and being enrolled at a place in the state, the owner's domicil and permanent situs being elsewhere. *Ayer, etc., Tie Co. v. Kentucky*, 202 U. S. 409, 418, 50 L. Ed. 1082. See, to same effect, *St. Louis v. Ferry Co.*, 11 Wall. 423, 20 L. Ed. 192.

Section 21, of the act of 1884, does not essentially change the prior general law respecting enrollment in this respect. *Ayer, etc., Tie Co. v. Kentucky*, 202 U. S. 409, 425, 50 L. Ed. 1082. See the titles *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 369, 453, et seq.; *SHIPS AND SHIPPING*, vol. 10, p. 1155, et seq.

23. Bank bills and state or municipal bonds.—*New Orleans v. Stempel*, 75 U. S. 309, 322, 44 L. Ed. 74; *State Tax on For-*

oreign-Held Bonds, 15 Wall. 300, 323, 21 L. Ed. 179; where the same is said to be true of state bonds.

24. Property liable to execution.—*New Orleans v. Stempel*, 75 U. S. 309, 322, 44 L. Ed. 174. See the title *EXECUTIONS*, vol. 6, p. 89.

25. Of intangible personal property.—*Buck v. Beach*, 206 U. S. 392, 401, 51 L. Ed. 1106; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558. See *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 323, 21 L. Ed. 179, overruled in *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803, on another point. See, also, *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Bona parte v. Tax Court*, 104 U. S. 592, 26 L. Ed. 845; *Sturges v. Carter*, 114 U. S. 511, 29 L. Ed. 240; *Kidd v. Alabama*, 188 U. S. 730, 47 L. Ed. 669; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439; *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 201, 205, 50 L. Ed. 150.

26. "It is, consequently, for the state to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the federal constitution." *Kirtland v. Hotchkiss*, 100 U. S. 491, 499, 25 L. Ed. 558.

Notes and bills.—*State Board v. Comptoir National D'Escompte*, 191 U. S. 388, 403, 48 L. Ed. 232. See, also, *Bristol v. Washington County*, 177 U. S. 133, 144, 44 L. Ed. 701.

27. Debts due residents secured on property in another state.—*Nevada Bank*

Credits Held within the State for Nonresident Owner.—But there is no inhibition in the federal constitution against the right of the state to tax property in the shape of credits where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the nonresident owner for the purpose of collection or renewal, with a view to new loans and carrying on such transactions as a permanent business.²⁸ And neither the fiction that personal property follows the domicil of the owner, nor the doctrine that credits evidenced by notes have the situs of the latter, can be allowed to obscure the truth; and intangible personal property, such as notes or credits, may be taxed at its permanent abiding place, although the domicil of the owner is elsewhere, and they are kept out of the state except when needed there for collection.²⁹

bb. *Stock of Domestic Corporation.*—That it is within the power of the state to fix, for the purposes of taxation, the situs of stock in a domestic corporation, whether held by residents or nonresidents, is so conclusively settled by the prior adjudication of the federal supreme court that the subject is not open for discussion.³⁰

cc. *Corporate Bonds Held Out of the State.*—But a state cannot lay a tax on bonds of a domestic corporation owned by nonresidents, and cannot require the corporation to pay such tax.³¹

v. Sedgwick, 104 U. S. 111, 26 L. Ed. 703; *Kirtland v. Hetchkiss*, 100 U. S. 491, 25 L. Ed. 558; *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 201, 205, 50 L. Ed. 150; *Buck v. Beach*, 206 U. S. 392, 401, 51 L. Ed. 1106.

28. **Credits held within the state.**—*State Board v. Comptoir National D'Escompte*, 191 U. S. 388, 403, 48 L. Ed. 232; *New Orleans v. Stempel*, 175 U. S. 309, 317, 44 L. Ed. 174; *Bristol v. Washington County*, 177 U. S. 133, 144, 44 L. Ed. 701.

29. *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 402, 51 L. Ed. 853; *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439. See *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, distinguished in *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. Ed. 439; *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803; *New Orleans v. Stempel*, 175 U. S. 309, 319, 320, 44 L. Ed. 174.

In the case of *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. Ed. 853, the question was in relation to the validity of certain taxes assessed in the city of New Orleans against the Metropolitan Life Insurance Company by reason of the company doing business in lending money to the holders of its policies in New Orleans. The domicil of the company was in the city of New York, and the evidences of the credits, in the form of notes, were kept most of the time in New York, being sent to New Orleans when due. They were held taxable as credits arising out of the business done in the state by the nonresident corporation at its business domicil in the state. *Buck v. Beach*, 206 U. S. 392, 403, 51 L. Ed. 1106.

In *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174, there was a tax on credits, evidenced by notes (secured by mortgages on real estate in New Orleans)

which the owner a nonresident, who had inherited them, left in Louisiana in the possession of an agent, who collected the principal and interest as they became due. The capital of the owner was thus invested in the state, and was thereby subject to taxation there, and the notes did not alter the nature of the debt, but were merely evidence of it. Approved in *Buck v. Beach*, 206 U. S. 392, 404, 51 L. Ed. 1106, and *Bristol v. Washington County*, 177 U. S. 133, 144, 44 L. Ed. 701. See, also, *Metropolitan Life Ins. Co. v. New Orleans*, 205 U. S. 395, 400, 51 L. Ed. 853; *State Board v. Comptoir National*, 191 U. S. 388, 400, 401, 48 L. Ed. 232.

The maxim, *mobilia sequuntur personam*, does not prevent. *State Board v. Comptoir National*, 191 U. S. 388, 404, 48 L. Ed. 232.

Securities in state for safe-keeping.—See post, "Mortgage Notes in State for Safe-Keeping," IV, A, 2, b, (2), (c), ee.

30. **Stock of domestic corporation.**—*Corry v. Baltimore*, 196 U. S. 166, 474, 49 L. Ed. 566; *The Delaware R. Tax*, 18 Wall. 206, 230, 21 L. Ed. 888. See, also, *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Bristol v. Washington County*, 177 U. S. 133, 144, 44 L. Ed. 701.

Compelling payment by corporation of tax on shares held by nonresident.—See the title DUE PROCESS OF LAW, vol. 5, p. 542.

General law a part of corporate charter.—*Corry v. Baltimore*, 196 U. S. 466, 477, 49 L. Ed. 566. See the title CORPORATIONS, vol. 4, p. 676.

31. **Corporate bonds owned by nonresidents.**—*State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, overruled in *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803, on another point. See post, "Corporate Bonds and Securities," IV, C, 2, e.

Municipal Bonds Held by Nonresident Not Taxable by City.—See post, "State and Municipal Securities," IV, D, 2.

dd. *Securities Deposited with Insurance Commissioners.*—See the title INSURANCE, vol. 7, p. 83.

ee. *Mortgage Notes in State for Safe-Keeping.*—The mere presence of mortgage notes in a state in which the owner neither resides nor is domiciled, did not constitute the debts, of which the notes were the written evidence, property within the jurisdiction of that state, so that such debts could be therein taxed while there for safe-keeping, they being secured on property in another state, and payable and paid there.³²

ff. *National Bank Stock.*—See post, "Situs," IV, C, 3, a, (1), (c), bb, (ee).

(d) *Property Outside of Boundaries of Municipal Corporations.*—Cases, wherein the power of municipal organizations to tax property outside of their boundaries has been denied, are not applicable when the power is conferred by a general law, enacted by a legislature having jurisdiction over the subject.³³

3. CLASSIFICATION AND EXEMPTIONS.—See ante, "Classification of Property for Taxing Purposes," III, A, 2, b, (3), (c); post, "Exemptions from Taxation," V.³⁴

4. SELECTION OF SUBJECTS.—The right of congress to tax within its delegated power being unrestrained, except as limited by the constitution, it is within the authority conferred on congress to select the objects upon which an excise should be laid.³⁵

5. APPLICATION OF DOCTRINE OF RES JUDICATA.—Res judicata applies to tax cases if the cause of action relied on is the "thing" which was "adjudged" in a prior suit.³⁶ But a suit for taxes for one year is no bar to a suit for taxes

32. Mortgage notes in state for safe-keeping.—*Buck v. Beach*, 206 U. S. 392, 400, 51 L. Ed. 1106.

"Although public securities, consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions, have sometimes been treated as property in the place where they were found, though removed from the domicile of the owner, State Tax on Foreign-Held Bonds, 15 Wall. 300, 324, 21 L. Ed. 179, it has not been held in this court that simple contract debts, though evidenced by promissory notes, can under the facts herein stated be treated as property and taxed in the state where the notes may be found." *Buck v. Beach*, 206 U. S. 392, 407, 51 L. Ed. 1106.

"Although the language of the opinion in the case of State Tax on Foreign-Held Bonds, 15 Wall. 300, 324, 21 L. Ed. 179, has been somewhat restricted so far as regards the character of the interest of the mortgagee in the land mortgaged (Savings, etc., *Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803), the principle upon which the case itself was decided has not been otherwise shaken by the later cases. *New Orleans v. Stempel*, 175 U. S. 309, 319, 320, 44 L. Ed. 174; *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. Ed. 439. In the *Stempel* case, supra, the notes, as we have said, represented the capital of the owner invested in the state, and the capital was taxed, although the owner was a nonresident." *Buck v. Beach*, 206 U. S. 392, 408, 51 L. Ed. 1106. See ante, "In General—Debts and Credits," IV, A, 2, b, (2), (c), aa.

Deposit with trust company for safe-keeping.—*Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439. See *State Board v. Comptoir National*, 191 U. S. 388, 403, 48 L. Ed. 232.

33. Property outside of boundaries of municipal corporation.—*Wagoner v. Evans*, 170 U. S. 588, 592, 42 L. Ed. 1154. See ante, "Of Counties," III, E, 3.

34. Taxation of exempt property violates due process clause.—The collection of a tax upon exempt property would amount to the taking of property without due process of law, and a citizen is protected from such taking by the fourteenth amendment. *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077. See *Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. Ed. 513. See the title DUE PROCESS OF LAW, vol. 5, pp. 541, et seq., 586.

35. Selection by congress.—*McCray v. United States*, 195 U. S. 27, 61, 49 L. Ed. 78.

36. Doctrine of res judicata.—*Lander v. Mercantile Bank*, 186 U. S. 458, 476, 46 L. Ed. 1247; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 50 L. Ed. 477.

"A judgment for taxes does not differ from any other in respect to its conclusiveness." *New Orleans v. Warner*, 175 U. S. 120, 141, 44 L. Ed. 96; *United States v. New Orleans*, 98 U. S. 381, 25 L. Ed. 225.

Where an intervening petition to enforce a lien for taxes claimed by a territory upon the property in the hands of a

for another year, where the two suits are for distinct and separate causes of action.³⁷

Decree in Suit to Enjoin Taxes.—A decree, in a bill by a guardian to restrain the collection of taxes on his ward's estate, adjudging the estate to be liable thereto and settling the right of the state to compel a payment by the estate of the ward of taxes levied thereon for the years 1893 and 1894, is res adjudicata in a subsequent action to recover from the guardian's bondsmen the said taxes for those years and an ensuing year.³⁸ And the principle that a de-

receiver, was dismissed as not being sufficient to entitle petitioner to the relief asked, but the decree of dismissal was reversed by the United States supreme court, such reversal is an adjudication that upon the face of the petition a valid claim was presented, and is conclusive of such prima facie validity, not merely against objections which were in fact made but also against those which might have been made. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 540, 46 L. Ed. 315; *Cromwell v. Sac County*, 94 U. S. 351, 352, 24 L. Ed. 195; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 618, 36 L. Ed. 562.

And so as to the defense set up of an adequate remedy at law, when that question was foreclosed by the decree in the former suit. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 293, 50 L. Ed. 477.

But where a corporation enjoying an exemption from taxation over a certain amount changed its business under an act which necessitated the surrender of this exemption, the plea of res judicata cannot be upheld, where the former judgment sustaining this exemption was entered in an action commenced long prior to the act of 1887 to recover taxes alleged to have become due while the corporation plaintiff in error was engaged in its original business of an insurance company, and the judgment was upon the right of its shareholders to be exempt from any further taxation than that provided for in the charter while the company was doing business as such insurance company. The judgment could, therefore, not be an estoppel or operate in any manner as a bar to the maintenance of this action, based upon facts of a totally different nature, and arising long after the judgment was obtained in the former action. *Memphis City Bank v. Tennessee*, 161 U. S. 186, 192, 40 L. Ed. 664. See, also, *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202 and *Third Nat. Bank v. Stone*, 174 U. S. 432, 43 L. Ed. 1035, both holding that the plea of res judicata did not hold where the charter exemption had expired.

Agreement of attorney for commissioners of city sinking fund as creating res adjudicata.—See the title MUNICIPAL CORPORATIONS, vol. 8, p. 578.

Default judgments not conclusive.—In *Gage v. Pumpelly*, 115 U. S. 454, 29 L.

Ed. 449, the court cites a number of Illinois cases to the effect that a judgment by default in a tax sale proceeding was not conclusive upon the taxpayer, but could be impeached collaterally—distinguishing that class of cases from those where sales are made to satisfy special assessments in respect of which it was held that if the property owner fails to make his objections in the proper place, and the assessment is confirmed, then he may well not be permitted to go behind the confirmation when steps are taken to enforce payment. See post, "As Prima Facie Evidence of Title under Statutes," VIII, I, 9, c.

As to right to deduct debts.—See post, "Deduction of Indebtedness," IV, C, 3, a, (1), (c), bb, (bb), fff, (bbb).

37. *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 314, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457.

"If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. * * * The same principle was reaffirmed in *Nesbit v. Riverside Independent District*, 144 U. S. 610, 36 L. Ed. 562, and *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 302, 36 L. Ed. 972." *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 314, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457.

38. *Baldwin v. Maryland*, 179 U. S. 220, 45 L. Ed. 160.

The matter having become res judicata between the estate and the state, and there being no pretense that the taxes of additional years stand in any other condition as to matter of fact than the taxes of the years which were in terms included within the litigation settled by the decision referred to, the ruling therefore, as to the taxes for that year, comes within the force of that decision, and is determined by the conclusion in respect to the taxes of the other years. *Baldwin v.*

cree enjoining the collection of a tax for one year can never be the thing adjudged as to the right to collect taxes of a subsequent year, does not apply where the decree enjoining the collection of the taxes in controversy in the former case, was rested upon the ground that there was a contract protected from impairment by the constitution of the United States, which was as controlling on future taxes as it was upon the particular taxes to which that suit related.³⁹

Exemptions.—See post, "Conclusiveness of Adjudication to Establish," V, I.

B. Commerce, and Property Engaged Therein.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269.

Taxes on Foreign Commerce.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 332, 344. Taxes may be laid on foreign commerce as regulations of revenue; these regulations are the ordinary ones to which the constitution refers. Congress has no power to lay any but uniform taxes when regulating foreign commerce to the end of revenue—taxes equal and alike at all the ports of entry, giving no one a preference over another.⁴⁰

C. Corporations and Corporate Stock—1. **TAXABILITY GENERALLY**—a. *By States.*—Unless exempted in terms which amount to a contract not to tax, the property, privileges, and franchises of a corporation are as much the legitimate subjects of taxation as any other property of the citizens which is within the sovereign power of the state. Repeated decisions of the federal supreme court have held, in respect to such corporations, that the taxing power of the state is never presumed to be relinquished, and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous terms.⁴¹ And

Maryland, 179 U. S. 220, 222, 45 L. Ed. 160, citing *Johnson Co. v. Wharton*, 152 U. S. 252, 38 L. Ed. 429; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. Ed. 859; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202.

39. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 291, 50 L. Ed. 477; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. Ed. 276.

40. **Foreign commerce.**—Passenger Cases, 7 How. 283, 446, 12 L. Ed. 702. See, generally, the title REVENUE LAWS, vol. 10, p. 838.

Ships and boats engaged in commerce.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 453, et seq.

When commerce clause attaches and ceases to apply.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 295, et seq.; 297, et seq.

41. **By states.**—North Missouri R. Co. v. Maguire, 20 Wall. 46, 61, 22 L. Ed. 287, citing *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. Ed. 939; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 393, 13 L. Ed. 461; *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 897. See, also, *Osborn v. United States Bank*, 9 Wheat. 738, 859, 6 L. Ed. 204; *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 320, 21 L. Ed. 179; *State Freight Tax Case*, 15 Wall.

232, 21 L. Ed. 146; *State Tax on R. Gross Receipts*, 15 Wall. 284, 21 L. Ed. 164; *State Railroad Tax Cases*, 92 U. S. 575, 603, 23 L. Ed. 663; *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. Ed. 558; *Tennessee v. Whitworth*, 117 U. S. 139, 136, 29 L. Ed. 833; *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. Ed. 411; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 345, 30 L. Ed. 1200; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 294, 36 L. Ed. 972; *Central Pac. R. Co. v. California*, 162 U. S. 91, 126, 40 L. Ed. 903; *Adams Express Co. v. Kentucky*, 166 U. S. 171, 180, 41 L. Ed. 960; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 40, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

"In *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830, the chief justice delivering the opinion of the court, said: 'In corporations four elements of taxable value are sometimes found: 1, franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and, 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is no doubt within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all, and if property is taxed once in one way, it

a state may lay a tax upon the corporation itself as an entity existing under its laws, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock, as well as upon the capital stock or its separate corporate property. Its discretion as to manner and rate of assessment is large.⁴²

Corporations Created by or Acting as Agency of Federal Government.

—See the title CONSTITUTIONAL LAW, vol. 4, pp. 193, 205. The casual circumstance of a private corporation being employed by the government in the transaction of its fiscal affairs, would not exempt its private business from state taxation.⁴³

Property of Corporations Holding Federal Franchises.—And it has often been laid down that the property of corporations holding their franchises from the government of the United States is not exempt from taxation by the states of its situs.⁴⁴

b. *Classification.*—When under a statute of a state, all corporations, joint stock companies and associations of the same kind are subjected to the same tax, and there is the same rule applicable to all under the same conditions in determining the rate of taxation, there is no discrimination in favor of one against another of the same class.⁴⁵

would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition." *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. Ed. 411, quoted in *Bank v. Tennessee*, 161 U. S. 134, 147, 40 L. Ed. 645. See, also, *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. Ed. 558.

So of moneyed corporations.—*Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939.

42. Legislative discretion.—The Delaware R. Tax, 18 Wall. 206, 21 L. Ed. 888.

When the legislature afterwards taxes the property of corporations, in common with other property of like kind in the state in a way they were not taxed when the charters were issued, it is under an implied stipulation to that effect, and violates no part of the contract contained in the charter. *Planters' Bank v. Sharp*, 6 How. 301, 331, 12 L. Ed. 447, citing *Armstrong v. Treasurer*, 16 Pet. 281, 10 L. Ed. 965. See *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420, 567, 9 L. Ed. 773; *Dartmouth College v. Woodward*, 4 Wheat. 518, 699, 4 L. Ed. 629.

Although it may be so exercised as to destroy the object for which the charter is given. *Providence Bank v. Billings*, 4 Pet. 514, 562, 7 L. Ed. 939.

A rule which ascertains the value of the capital stock and franchise by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment, and deducting the value of the tangible property taxed, is probably as fair as any other. *State Railroad Tax Cases*, 92 U. S. 575, 27 L. Ed. 663. See *Metropolitan St. R. Co. v.*

New York State Board, 199 U. S. 1, 40, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

43. Osborn v. United States Bank, 9 Wheat. 738, 859, 6 L. Ed. 204.

44. Property of corporations holding federal franchises.—*Ficklen v. Shelby County Taxing District*, 145 U. S. 1, 22, 36 L. Ed. 601; *California v. Central Pac. R. Co.*, 127 U. S. 1, 40, 32 L. Ed. 150. See the titles CONSTITUTIONAL LAW, vol. 4, p. 202, et seq.; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 451, et seq.

A corporation (a railroad company) incorporated under the laws of the United States is, as to business done wholly within a state, subject to its control in all matters of taxation. *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 417, 38 L. Ed. 1028. See the title CONSTITUTIONAL LAW, vol. 4, p. 202.

45. Classification of corporations generally.—*Home Ins. Co. v. New York*, 134 U. S. 594, 607, 33 L. Ed. 1025. See *Barbier v. Connolly*, 113 U. S. 27, 29, 32, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 709, 28 L. Ed. 1145; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. Ed. 107; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 32, 32 L. Ed. 585; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 394, 35 L. Ed. 1051.

There is nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. *Kidd v. Alabama*, 188 U. S. 730, 732, 47 L. Ed. 669.

2. BASIS OF TAXATION—*a. Income or Franchise.*—A tax upon a corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed, where there is no discrimination against rights held in other states.⁴⁶

Gross Receipts of Foreign Corporation.—A state has the right to impose a tax upon the gross receipts of a corporation created by another state and having a portion of its road in that state.⁴⁷

Corporate Franchise.—See post, "Corporate Franchise," IV. E, 3.

b. Surplus, Profits and Dividends.—The accumulated earnings, profits and dividends of a corporation are liable to taxation.⁴⁸

c. Real Estate.—Real estate belonging to a corporation and necessary for its business, is liable to taxation.⁴⁹

d. Corporate Stock.—(1) *In General.*—Corporate stock is subject to taxation.⁵⁰ And a tax on the capital stock paid in clearly refers to the property of the corporation and not the individual property of the shareholders. The tax is on the corporate property, not the shares of stock held by the shareholders.⁵¹ There may be a tax upon the shares of a corporation, which are property distinct from that owned by the corporation and with a different owner, without an allowance of the exemption due to the property of the corporation itself, while, if the tax is upon the corporation's property, all exemptions due it must be allowed.⁵² And where the tax is made a corporate

46. *Income or franchise.*—The Delaware R. Tax, 18 Wall. 206, 208, 21 L. Ed. 888; Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326, 345, 30 L. Ed. 1200.

47. *Gross receipts.*—Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595, following State Tax on R. Gross Receipts, 15 Wall. 284, 21 L. Ed. 164. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 461. See, also, post, "Railroad and Canal Companies," IV. C, 3, h.

48. *Surplus, profits and dividends.*—Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558; Wilmington Railroad v. Reid, 13 Wall. 264, 20 L. Ed. 568; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 681, 43 L. Ed. 850; State Railroad Tax Cases, 92 U. S. 575, 595, 603, 23 L. Ed. 663; Central Pac. R. Co. v. California, 162 U. S. 91, 126, 40 L. Ed. 903.

Tax on dividends, surplus, profits and interest paid.—See ante, "Former Taxes on Incomes, Gains, etc., as Duties and Excises," III. C, 3, b, (2).

49. *Real estate.*—Wilmington Railroad v. Reid, 13 Wall. 264, 20 L. Ed. 568; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 663; Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 681, 43 L. Ed. 850.

50. *Corporate stock.*—Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. Ed. 558; State Freight Tax, 15 Wall. 232, 21 L. Ed. 146; State Tax on R. Gross Receipts, 15 Wall. 284, 21 L. Ed. 164; State Railroad Tax Cases, 92 U. S. 575, 603, 23 L. Ed. 663; Central Pac. R. Co. v. California, 162 U. S. 91, 126, 40 L. Ed. 903. See, also, Van Allen v. The Assessors, 3 Wall. 573, 18 L. Ed. 229; Bank v. Ten-

nessee, 161 U. S. 134, 145, 40 L. Ed. 645; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 681, 43 L. Ed. 850; Delaware, etc., R. Co. v. Pennsylvania, 198 U. S. 341, 354, 49 L. Ed. 1077; Tennessee v. Whitworth, 117 U. S. 129, 136, 29 L. Ed. 830; New Orleans v. Houston, 119 U. S. 265, 277, 30 L. Ed. 411.

51. Powers v. Detroit, etc., R. Co., 201 U. S. 543, 561, 50 L. Ed. 860.

"Capital stock," within the meaning of the Illinois taxing statute, does not mean shares of stock, but "the aggregate capital of the company;" which includes "the value of the right to use this tangible property in a special manner, for purposes of gain." So held in State Railroad Tax Cases (92 U. S. 575, 23 L. Ed. 663), where the provisions of this revenue statute were critically examined. Railroad Co. v. Vance, 96 U. S. 450, 455, 24 L. Ed. 752, followed in Indianapolis, etc., R. Co. v. Vance, 154 U. S. 638, 24 L. Ed. 757.

Inclusion of property beyond jurisdiction in assessment.—Delaware, etc., R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077. See the title DUE PROCESS OF LAW, vol. 5, pp. 542, 586. See, also, ante, "Jurisdiction and Situs," IV. A, 2.

52. *Allowance of exemptions.*—Home Sav. Bank v. Des Moines, 205 U. S. 503, 510, 51 L. Ed. 901. See, also, Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 681, 43 L. Ed. 850.

See post, CORPORATIONS, V. G, 4.

Investment of assets in exempt securities.—The fact that the corporate assets are invested in exempt property such as United States securities, does not prevent a state from taxing the shares of its stock in the hands of its stockholders, if the tax is really on them and not on the corporation. If in reality on the cor-

obligation irrespective of the stockholders, it is a tax on the corporation.⁵³

Construction of Exemptions.—See post, "Exemptions from Taxation," V.

(2) *Shares of Stockholders.*—See ante, "Taxability Generally," IV, C, 1; post, "Banks and Bank Stock," IV, C, 3, a.

Not Double Taxation.—See ante, "Double Taxation," III, A, 2, b, (5).

Payment by Corporation for Shareholders.—It, however, is not an uncommon and is an entirely legitimate method of collecting taxes to require a corporation, as the agent of its shareholders, to pay in the first instance the taxes upon shares, as the property of their owners, and look to the shareholders for reimbursement. In this very law we have an example of this method.⁵⁴

Investment of Assets in Exempt Securities.—See ante, "In General," IV, C, 2, d, (1).

Stock in Foreign Corporation.—See post, "Foreign Corporations," IV, C, 3, j.

e. *Corporate Bonds and Securities.*—**Requirement of Payment of Tax by Corporation.**—Where the corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the commonwealth out of this fund the proper tax due on the security, the tax is on the bondholder, not on the corporation, and does not infringe the constitution of the United States by making one party pay the debts and support the just burdens of another party.⁵⁵ Nor does it violate the obligation of the contract with the bondholders,⁵⁶ except as applied to nonresident bondholders.⁵⁷ And even as to resident bondholders, a foreign corporation can-

poration it is illegal. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 51 L. Ed. 901; *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229.

Bank stock and shares.—See post, "Investment of Capital in National Securities," IV, C, 3, a, (1), (c), bb, (dd).

53. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 501, 51 L. Ed. 901.

An assessment not made upon a corporation's capital stock, but upon the shares of shareholders appearing upon its books, where, nevertheless, the tax so assessed is to be paid by the company, although it is entitled to collect the amount so paid from the shareholder on whose account it is payable, but this payment by the company to be made irrespective of any dividends or profits payable to the shareholder out of which it might be repaid, is substantially a tax upon the corporation itself, and an infringement of its exemption from all other taxes on payment of a commutation tax for its license. *New Orleans v. Houston*, 119 U. S. 265, 278, 30 L. Ed. 411, distinguishing *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597, and *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701. See ante, "Payments of Interest from Income of Corporation," III, C, 3, b, (2). (g).

54. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 511, 51 L. Ed. 901; *United States v. Railroad Co.*, 17 Wall. 322, 21 L. Ed. 597; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701.

But it must not be really a tax on the corporation. *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411; *Holmes Sav. v. Des Moines*, 205 U. S. 503, 511, 51

L. Ed. 901. See the preceding section of this title.

55. **Requirement of payment of tax by corporation.**—*Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. Ed. 692; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117.

56. **Obligation of contract unimpaired.**—*State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, distinguished in *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 647, 38 L. Ed. 846.

57. A state law requiring a corporation to retain for the nonpayment of taxes a certain portion of the interest due on the bonds made and payable out of the state to nonresidents, impairs the obligation of the contract evidenced by the bonds. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 21 L. Ed. 179, distinguished from *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 647, 38 L. Ed. 846, and approved in *Murray v. Charleston*, 96 U. S. 432, 448, 24 L. Ed. 760, overruled in *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803, but on another point.

Although, if authorized by the charter, and if the liability of the loan to such tax had been stated in the bonds or certificates of loan, the tax would have been in the nature of a license tax for negotiating the loan, and could have been upheld on that ground, and for the further reason the contract would, in such case, have been made with reference to the existing law, and therefore the law could not have operated to impair its obliga-

not be required to deduct taxes from interest paid outside the state, without impairing the obligation of the bondholders' contracts and that arising from the acceptance of the terms of admission.⁵⁸

3. PARTICULAR KINDS OF CORPORATIONS—*a. Banks and Bank Stock*—(1) *Power to Tax*—(a) *Power of State Generally*.—See, also, post, "Mode of Taxation," IV, C, 3, a, (2). Where there is no exemption from taxation in the charter, a bank may be taxed by the state without impairing any contract.⁵⁹ It does so by its own inherent taxing power, subject to the federal constitution and valid federal laws.⁶⁰

(b) *State Taxation of United States Bank and Its Property*.—See the title CONSTITUTIONAL LAW, vol. 4, p. 195, et seq.

(c) *State Taxation of National Banks*—*aa. In General*.—The respective states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of congress. This is embodied in § 5219, Rev. Stat., which confines the right to tax to the shares of stock in the names of the holders, and the real estate of the bank, and any other tax is void.⁶¹

Method of Taxation May Be Different.—No conflict necessarily arises between the act of congress and the state law, solely because the latter provides one method for taxation of state banks and other moneyed corporations and another method for national banks.⁶² But if one method taxes elements of value which the other does not, it is illegal.⁶³

tion. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 322, 21 L. Ed. 179.

Interest on railroad bonds held by non-resident.—A state has no power to tax the interest of bonds (secured in this case by mortgage) given by a railroad corporation, held by a nonresident and binding every part of the road, when the road lies partially in another state—one road incorporated by the two states. *Railroad Co. v. Jackson*, 7 Wall. 262, 19 L. Ed. 88. Quære as to how these two cases would be held now to be affected by the fact that the bonds were secured in whole or in part by mortgage on property within the state's jurisdiction, since the decision in *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803, that this fact does give the state a right to tax the mortgage.

Deduction of tax on dividends and interest payments.—See ante, "Tax on Dividends," III, C, 3, b, (2), (f); "Payments of Interest from Income of Corporation," III, C, 3, b, (2), (g).

58. *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 642, 645, 38 L. Ed. 846, reaffirmed in *Delaware, etc., Canal Co. v. Pennsylvania*, 156 U. S. 200, 39 L. Ed. 396. See the titles CONSTITUTIONAL LAW, vol. 4, p. 347, et seq.; FOREIGN CORPORATIONS, vol. 6, p. 313, et seq., 326. See, also, generally, ante, "Of Intangible Personal Property," IV, A, 2, b, (2), (c).

59. **Power of state to tax.**—*Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. Ed. 939; *State Bank v. Knoop*, 16 How. 369, 387, 14 L. Ed. 977; *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840, followed in *Farmers', etc., Bank*

v. Owensboro, 173 U. S. 663, 43 L. Ed. 850. See, also, *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204.

60. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 509, 51 L. Ed. 901.

Investments in exempt securities.—See post, "Capital Stock," IV, C, 3, a, (2), (b), bb; "Investment of Capital in National Securities," IV, C, 3, a, (1), (c), bb, (dd). See, also, ante, "Corporate Stock," IV, C, 2, d.

Exemption by contract.—See post, "Capital Stock," IV, C, 3, a, (2), (b), bb; "Exemptions from Taxation," V.

61. **Section 5219, Rev. Stat.**—*Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 669, 43 L. Ed. 850. See, also, *Talbott v. Silver Bow County*, 139 U. S. 438, 443, 35 L. Ed. 210; *Third Nat. Bank v. Stone*, 174 U. S. 432, 434, 43 L. Ed. 1035; *People v. Weaver*, 100 U. S. 539, 543, 25 L. Ed. 705. See, also, the title CONSTITUTIONAL LAW, vol. 4, pp. 198, 199.

62. **Method of taxation may be different.**—*San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 78, 49 L. Ed. 669; *National Bank v. Commonwealth*, 9 Wall. 353, 363, 19 L. Ed. 701.

63. So where "in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations

Consistency with State Constitution.—See the title *COURTS*, vol. 4, p. 1117.

bb. *National Bank Shares*—(aa) *In General*.—**Right to Tax.**—A state may tax the shares of stockholders in national banking associations within its limits.⁶⁴ But this is only by the authority given by § 5219, Rev. Stat.⁶⁵

Shares Owned by Another National Bank.—The manifest intention of the law is to permit the state in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is, that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership, on the same footing with all other shares.⁶⁶

Uniformity and Equal Protection of Laws.—See post, "Privilege Offered to All Banks," IV, C, 3, a, (1), (c), bb, (bb), eee.

(bb) *Discrimination Forbidden, and What Constitutes*—aaa. *Provisions of Statute.*—Section 5219 of the Revised Statutes of the United States permits the states to assess and tax the shares of shareholders in national banks, with the limitations only "that the taxation shall not be at any greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state;" and that the shares of nonresidents "shall be taxed in the city or town where the bank is located, and not elsewhere." This was the act of February 10, 1868, 15 Stat. 34, ch. 7, and modified the act of 1864 so that the validity of such state taxation was thereafter to be determined by the inquiry, whether it was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and not necessarily by a comparison with the particular rate imposed upon shares in state banks.⁶⁷

forbidden by the act of congress." *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 81, 49 L. Ed. 669. See post, "Corporate Property," IV, C, 3, a, (2), (d).

64. **Right to tax.**—*Van Slyke v. Wisconsin*, 154 U. S. 581, 20 L. Ed. 240, following *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Van Allen v. The Assessors*, 3 Wall. 573, 583, 18 L. Ed. 229; *Lionberger v. Rouse*, 9 Wall. 468, 469, 19 L. Ed. 721; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Farrington v. Tennessee*, 95 U. S. 679, 688, 24 L. Ed. 558; *Rosenblatt v. Johnston*, 104 U. S. 462, 463, 26 L. Ed. 832; *Commercial Bank v. Chambers*, 182 U. S. 556, 561, 45 L. Ed. 1227.

Taxation of shares of stock in national banks is the universal rule. *Peoples' Nat. Bank v. Marye*, 191 U. S. 272, 279, 48 L. Ed. 180.

The shares of stock of a national bank in New York should be assessed for taxation at their actual value. *People v. Commissioners*, 94 U. S. 415, 24 L. Ed. 164.

65. *Talbott v. Silver Bow County*, 139 U. S. 438, 440, 35 L. Ed. 210.

That the provision in § 5219, Rev. Stat., was necessary to authorize the states to impose any tax whatever on these bank shares, is abundantly established by the cases of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Weston v. Charleston*, 2 Pet. 449, 7 L. Ed. 481; *People v. Weaver*, 100 U. S. 539, 543, 25 L. Ed. 705. See, also, post, "Capital

Stock," IV, C, 3, a, (2), (b), bb.

66. **Shares owned by another national bank.**—*Bank v. Boston*, 125 U. S. 60, 70, 31 L. Ed. 689.

67. **Section 5219, Rev. Stat.**—*Cleveland Trust Co. v. Lander*, 184 U. S. 111, 113, 46 L. Ed. 456; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 465, 42 L. Ed. 236; *Stanley v. Supervisors*, 121 U. S. 535, 542, 30 L. Ed. 1000; *Boyer v. Boyer*, 113 U. S. 689, 691, 28 L. Ed. 1089; *Lionberger v. Rouse*, 9 Wall. 468, 474, 19 L. Ed. 721; *Hepburn v. School Directors*, 23 Wall. 480, 23 L. Ed. 112. See post, "Between National Banks, and between State and National Banks," IV, C, 3, a, (1), (c), bb, (bb), ccc. See, also, ante, "In General," IV, C, 3, a, (1), (c), aa.

For comparison of provisions of acts of 1863, 1864 and 1868, see *Van Allen v. The Assessors*, 3 Wall. 573, 582, 18 L. Ed. 229; *Lionberger v. Rouse*, 9 Wall. 468, 473, 19 L. Ed. 721. See, also, *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Boyer v. Boyer*, 113 U. S. 689, 691, 28 L. Ed. 1089; *Mercantile Bank v. New York*, 121 U. S. 138, 148, 30 L. Ed. 895; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850.

"In *Lionberger v. Rouse*, 9 Wall. 468, 19 L. Ed. 721, it was held that the proviso originally contained in the act of 1864, and omitted from the act of 1868, expressly referring to state banks, was limited to state banks of issue." *Mercantile Bank v. New York*, 121 U. S. 138, 150, 30 L. Ed. 895.

bbb. Purpose of Statute.—The purpose of this statute is to prevent any discrimination between national bank capital and other moneyed capital carrying on a similar business and operations of a like character.⁶⁸ But this in terms only applies to moneyed capital in the hands of individuals, and excludes it when in the hands of corporations.⁶⁹

ccc. Between National Banks and between State and National Banks.—Between National Banks.—Section 5219, Rev. Stat., does not forbid discrimination between national banks, but only as between such banks and state banks, or other moneyed capital in the hands of private individuals. Where the legislation treats state banks and national banks alike; gives to each the same privileges; there is no discrimination against national banks as such.⁷⁰

Between State and National Banks.—If the state and national banks were treated equally, the latter were not assessed at a greater rate than the former; national bank shareholders were not, in such event, illegally assessed, unless there were a clear discrimination in favor of moneyed capital other than that employed in either state or national banks.⁷¹

ddd. "Moneyed Capital" Means Competing Capital.—The term "moneyed capital," as employed in § 5219 of the Revised Statutes, forbidding greater tax-

68. Purpose.—*Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 465, 42 L. Ed. 236; *National Bank v. Commonwealth*, 9 Wall. 353, 383, 19 L. Ed. 701; *Lionberger v. Rouse*, 9 Wall. 468, 475, 19 L. Ed. 721; *Boyer v. Boyer*, 113 U. S. 689, 691, 28 L. Ed. 1089; *Mercantile Bank v. New York*, 121 U. S. 138, 155, 30 L. Ed. 895; *Davenport Bank v. Davenport Board*, 123 U. S. 83, 85, 31 L. Ed. 94; *First Nat. Bank v. Ayers*, 160 U. S. 660, 666, 40 L. Ed. 573; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069. See, also, *First Nat. Bank v. Chapman*, 173 U. S. 205, 213, 43 L. Ed. 669; *Jenkins v. Neff*, 186 U. S. 230, 46 L. Ed. 1140; *Stanley v. Supervisors*, 121 U. S. 535, 549, 30 L. Ed. 1000.

If the rate of taxation by the state on such shares is the same as, or not greater than, upon the moneyed capital of the individual citizen which is subject or liable to taxation; that is to say, if no greater proportion or percentage of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of its citizens, the shares are taxed in conformity with that proviso of the forty-first section, which says that they may be assessed, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344. See, also, *Mercantile Bank v. New York*, 121 U. S. 138, 159, 30 L. Ed. 895. See ante, "In General," IV, C, 3, a, (1), (c), aa.

69. The words "moneyed capital" do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands,

as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but the shares of stock in such companies held by individuals are not moneyed capital. *Mercantile Bank v. New York*, 121 U. S. 138, 156, 30 L. Ed. 895.

70. Only between national banks and other moneyed capital.—*Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 465, 42 L. Ed. 236.

71. Between state and national banks.—*First Nat. Bank v. Chapman*, 173 U. S. 205, 216, 43 L. Ed. 669; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 465, 42 L. Ed. 236; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. Ed. 721, construing act of 1864; *First Nat. Bank v. Chapman*, 173 U. S. 205, 213, 43 L. Ed. 669, construing Rev. Stat. Ohio, § 2762.

Omission to tax state banks.—Under the national banking act of 1864, 13 Stat. 111, in the case of *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229, the taxing law of New York, which was in question, was held to be invalid, because it levied no taxes upon shares in state banks at all, the tax being assessed upon the capital of the banks after deducting that portion which was invested in securities of the United States; and it was held that this tax on the capital was not a tax on the shares of the stockholders equivalent to that on the shares in national banks. *Mercantile Bank v. New York*, 121 U. S. 138, 148, 30 L. Ed. 895. See, also, *People v. Commissioners*, 94 U. S. 415, 24 L. Ed. 164; *S. C.*, 4 Wall. 244, 18 L. Ed. 344; *Bradley v. People*, 4 Wall. 459, 18 L. Ed. 433. See ante, "Provisions of Statute," IV, C, 3, a, (1), (c), bb, (bb), aaa.

ation of shareholders of national banks than is imposed on other moneyed capital (in the hands of individual citizens of such state), does not include capital which does not come into competition with the business of national banks, and it must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated.⁷² The limitation applies solely to a parallel with the individual or corporation whose capital in money is used with a view to compensation for the use of the money.⁷³ Shares of stock held in insurance companies and other business, trading, manufacturing and miscellaneous corporations, whose business and operations are unlike those of banking institutions, are not moneyed capital in the sense of the statute.⁷⁴ And institutions or individuals carrying on a similar business and

72. "Moneyed capital" means competing capital.—First Nat. Bank v. Chapman, 173 U. S. 205, 219, 43 L. Ed. 669, and cases cited; Talbott v. Silver Bow County, 139 U. S. 438, 448, 35 L. Ed. 210; Commercial Bank v. Chambers, 182 U. S. 556, 560, 45 L. Ed. 1227; Jenkins v. Neff, 186 U. S. 230, 235, 46 L. Ed. 1140; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 41 L. Ed. 1069.

73. Talbott v. Silver Bow County, 139 U. S. 438, 448, 35 L. Ed. 210.

"The significance of this expression has been defined by this court in the case of Mercantile Bank v. New York, 121 U. S. 138, 30 L. Ed. 895, cited in Palmer v. McMahon, 133 U. S. 660, 667, 33 L. Ed. 772, as follows: "The term "moneyed capital," as used in Rev. Stat., § 5219, respecting state taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money." Talbott v. Silver Bow County, 139 U. S. 438, 447, 35 L. Ed. 210. See, also, People v. Commissioners, 4 Wall. 244, 18 L. Ed. 344.

74. Mercantile Bank v. New York, 121 U. S. 138, 153, 30 L. Ed. 895.

It does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property which, in the hands of individuals, none would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. First Nat. Bank v. Chapman, 173 U. S. 205, 213, 43 L. Ed. 669; Aberdeen Bank v. Chehalis County, 166 U. S. 440, 457, 41 L. Ed. 1069, reaffirmed in Bank v. Seattle, 166 U. S. 463, 41 L. Ed. 1079; Mercantile Bank v. New York, 121 U. S. 138, 155, 30 L. Ed. 895; First Nat. Bank v. Ayers, 160

U. S. 660, 40 L. Ed. 573; Talbott v. Silver Bow County, 139 U. S. 438, 447, 35 L. Ed. 210, where such corporate capital is said not to be necessarily "moneyed capital" even though its shares are such capital in the hands of individuals, or though it invests its capital in securities payable in money.

"The terms of the act of congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested." Mercantile Bank v. New York, 121 U. S. 138, 157, 30 L. Ed. 895.

It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment, thus coming into competition with the national banks in the banking business. Mercantile Bank v. New York, 121 U. S. 138, 157, 30 L. Ed. 895.

But money at interest is not the only moneyed capital included in that term as here used by congress. The words are "other moneyed capital." That certainly makes stock in national banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term. Hepburn v. School Directors, 23 Wall. 480, 484, 23 L. Ed. 112.

Stock in mining corporations.—The fact that there are a large number of mining corporations in Montana whose entire capital stock is invested in assessable property, and whose stock is not taxed for that reason, and that part of said property consists in mining claims, does not disturb the limitation of § 5219. Talbott v. Silver Bow County, 139 U. S. 438, 447, 448, 35 L. Ed. 210.

Manufacturing or transportation company.—The tax upon a corporation whose capital is invested in manufacturing or

transportation cannot, under this section, be placed in comparison with the tax upon an institution whose business is profit on money as money. So, whatever may be the rule in Montana in respect to the taxation of mines and mining claims, or of corporations whose investments are wholly or partially in that direction, it does not challenge or disturb the rule of taxation of money as money, or of purely moneyed corporations, upon that basis. *Talbott v. Silver Bow County*, 139 U. S. 438, 448, 35 L. Ed. 210; *Mercantile Bank v. New York*, 121 U. S. 138, 153, 30 L. Ed. 895.

Credits as moneyed capital.—"It cannot be contended that all credits, as defined in the statute of Ohio, are moneyed capital within the meaning of the act of congress. The term 'credits' includes among other things, as stated in the statute, 'all legal claims and demands * * * for labor or service due or to become due to the person liable to pay taxes thereon.' These claims are not in any sense of the statute moneyed capital. They include all claims for professional or clerical services, as well as for what may be termed manual labor." *First Nat. Bank v. Chapman*, 173 U. S. 205, 213, 218, 43 L. Ed. 669. See, also, *First Nat. Bank v. Ayers*, 160 U. S. 660, 665, 40 L. Ed. 573.

Savings banks and deposits therein.—"No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States." *Mercantile Bank v. New York*, 121 U. S. 138, 161, 30 L. Ed. 895. See, also, *Bank v. Boston*, 125 U. S. 60, 70, 31 L. Ed. 689.

And while deposits in savings banks constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase, it is clear that they are not within the meaning of the act of congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. *Mercantile Bank v. New York*, 121 U. S. 138, 160, 30 L. Ed. 895; *Davenport Bank v. Davenport Board*, 123 U. S. 83, 86, 31 L. Ed. 94; *Bank v. Boston*, 125 U. S. 60, 70, 31 L. Ed. 689.

Personal property not always moneyed capital.—"The act of congress does not make the tax on personal property the measure of the tax on bank shares in the state, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at

interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way." *Evansville Bank v. Britton*, 105 U. S. 322, 324, 26 L. Ed. 1053, quoted in *Mercantile Bank v. New York*, 121 U. S. 138, 157, 30 L. Ed. 895.

Shares of foreign corporations.—Clearly the property to be taxed under the rule prescribed for the taxation of national bank shares must be property which, according to the law of the state, is the subject of taxation within its jurisdiction, and does not include shares of stock of corporations created by other states and owned by citizens of New York. *Mercantile Bank v. New York*, 121 U. S. 138, 162, 30 L. Ed. 895.

Shares of stock in noncompeting moneyed corporations of New York.—

The shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, but which do not come into competition with the banks, are not moneyed capital in the hands of the individual citizen within the meaning of the act of congress. The true test is in the nature of the business in which the corporation is engaged. *Mercantile Bank v. New York*, 121 U. S. 138, 147, 157, 30 L. Ed. 895; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 461, 41 L. Ed. 1069, reaffirmed in *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079.

Shares in insurance and trust companies.—Within the definition of that phrase, established in the case of the *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, the interest of individuals in insurance and trust companies, the American Bell Telephone Company, and the Massachusetts Hospital Life Insurance Company is not moneyed capital. The investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the state. *Bank v. Boston*, 125 U. S. 60, 68, 31 L. Ed. 689; *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344.

See *Mercantile Bank v. New York*, 121 U. S. 138, 159, 30 L. Ed. 895, where shares in trust companies under the laws of New York are said to be moneyed capital in hands of individuals, although in that case there was no discrimination, and *Talbott v. Silver Bow County*, 139 U. S. 438, 447, 35 L. Ed. 210, reaffirmed as to insurance companies in *Mercantile Bank v. New York*, 121 U. S. 138, 154, 30 L. Ed. 895.

Such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks. *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 461, 41 L. Ed. 1069. See post, "Discrimination in Mode of Assessment," IV. C. 3, a, (1), (c), bb, (bb), fff.

operations and investments of a like character are not to be favored.⁷⁵

eee. *Privilege Offered to All Banks*.—Where a tax law treats state banks and national banks alike, and gives to each the same privileges, there is no discrimination against national banks as such.⁷⁶

fff. *Discrimination in Mode of Assessment*—(aaa) *In General*.—Any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate within the meaning of the act of congress.⁷⁷ It has reference to the entire process of assessment, whether the discrimination be by the valuation or by the rate of assessment on such valuation.⁷⁸

Par or Actual Value.—Presumptively the nominal value is the true value, any increase in profits going, in the natural course of things, in dividends to the stockholders, and this method, as applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation, and cannot be considered as discriminating against either.⁷⁹ But the valuation may be at the actual value, even if over par, if the rate of taxation is the same,⁸⁰ and may include the added value arising from the franchises of the bank, although no such added value obtains in the case of unincorporated banks subject to taxation.⁸¹

Entire Equality Not Required.—The act of congress does not require a

75. Similar business and operations.—First Nat. Bank *v.* Chapman, 173 U. S. 205, 213, 43 L. Ed. 669; Jenkins *v.* Neff, 186 U. S. 230, 231, 46 L. Ed. 1140; Stanley *v.* Supervisors, 121 U. S. 535, 549, 30 L. Ed. 1000; Mercantile Bank *v.* New York, 121 U. S. 138, 155, 30 L. Ed. 895.

76. Law allowing equal privileges to all banks.—Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461, 465, 42 L. Ed. 236.

Where a state statute allows any bank to collect from its shareholders an annual tax of eight mills on the par value of the stock, in lieu of any other tax except on the real estate, there is no discrimination, because as to those state banks that do not elect to pay the eight mills the auditor general is required to look to the stockholders directly for the regular four mills tax, whereas as to national banks he reaches the stockholders through the bank itself, and hence it is said that some shareholders in state banks may escape taxation. But this is a mere matter of procedure. It is no objection to the law that it makes the national bank the agent to collect and does not compel the state bank to do the same. Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461, 466, 42 L. Ed. 236.

Uniformity and equal protection of laws.—The fact that it is possible, under the operation of this law that one bank may pay at a less rate upon the actual value of its banking property than another, but the banks which do not make this election, whether state or national, pay no more than the regular tax, does not invalidate it. The result of the election under the circumstances is simply that those electing pay less. This lack of uniformity in the result furnishes no ground of complaint under the federal

constitution. Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461, 463, 42 L. Ed. 236. See, also, post, "Assessment to Bank Direct as Agent for Stockholders," IV, C, 3, a, (1), (c), bb, (cc).

77. Discriminating system of assessment.—Pelton *v.* National Bank, 101 U. S. 143, 146, 25 L. Ed. 901.

78. Valuation or rate of assessment.—People *v.* Weaver, 100 U. S. 539, 25 L. Ed. 705; Stanley *v.* Supervisors, 121 U. S. 535, 542, 30 L. Ed. 1000; Whitbeck *v.* Mercantile Nat. Bank, 127 U. S. 193, 32 L. Ed. 118; Boyer *v.* Boyer, 113 U. S. 689, 694, 28 L. Ed. 1089, citing besides the above cases, Pelton *v.* National Bank, 101 U. S. 143, 25 L. Ed. 901; Cummings *v.* National Bank, 101 U. S. 153, 25 L. Ed. 903; Supervisors *v.* Stanley, 105 U. S. 305, 26 L. Ed. 1044; Evansville Bank *v.* Britton, 105 U. S. 322, 323, 26 L. Ed. 1053, and deducing the above rule therefrom. See, also, Hills *v.* Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052; Mercantile Bank *v.* New York, 121 U. S. 138, 152, 30 L. Ed. 895.

79. Assessment at par value.—Stanley *v.* Supervisors, 121 U. S. 535, 549, 30 L. Ed. 1000, reaffirming Supervisors *v.* Stanley, 105 U. S. 305, 26 L. Ed. 1044. See, also, Williams *v.* Supervisors, 122 U. S. 154, 163, 30 L. Ed. 1088.

80. Hepburn *v.* School Directors, 23 Wall. 480, 23 L. Ed. 112; Mercantile Bank *v.* New York, 121 U. S. 138, 150, 30 L. Ed. 895. See, also, People *v.* Commissioners, 94 U. S. 415, 417, 24 L. Ed. 164; Palmer *v.* McMahon, 133 U. S. 660, 666, 33 L. Ed. 772.

81. Added value of banking franchises.—First Nat. Bank *v.* Chapman, 173 U. S. 205, 216, 43 L. Ed. 669.

perfect equality of taxation between state and national banks, but only that the shares of the national banks shall not be taxed at a higher rate than other moneyed capital in the hands of individuals.⁸²

System of Taxation Need Not Be Uniform if Results Are.—The provision of § 5219 of the Revised Statutes, authorizing the taxation of shares of stock in national banks, but exacting that the tax when levied should be at no greater rate than that imposed on other moneyed capital, did not require the states, in taxing their own corporations, "to conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners." If there is no unfavorable discrimination against national bank stockholders, the manner of assessing and collecting all taxes by the states is uncontrolled by the act of congress.⁸³

Tax Laws Discriminatory in Operation but Not Terms.—The prohibition in the act of congress of a higher rate of taxation of shares of stock in national banks than on other moneyed capital operated to avoid any method of assessment of taxation, the usual or probable effect of which would be to discriminate in favor of state banks and against national banks, and even where no such discrimination seemingly arose on the face of the statute, nevertheless, if from the record it appeared that the system created by the state in its practical execution produced an actual and material discrimination against national banks, it would be the duty of the court to hold the state statute to be in conflict with the act of congress, and therefore void.⁸⁴ But if neither the necessary,

82. Entire equality not required.—*Davenport Bank v. Davenport Board*, 123 U. S. 83, 85, 31 L. Ed. 94; *Bank v. Boston*, 125 U. S. 60, 67, 31 L. Ed. 689; *First Nat. Bank v. Chapman*, 173 U. S. 205, 216, 43 L. Ed. 669.

Where, considering the nature of the property, and the frequent fluctuations in value to which it is subject, the method applied to all banks, state and national, came, as nearly as practicable to securing between them equality and uniformity of taxation, all the banks, state and national, being thus placed, as respects taxation, upon the same footing, the method could not be considered as adopted in hostility to any of them. If it sometimes led to undervaluation of the shares of national banks, the holders could not complain. If it sometimes led to overvaluation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction, unless, as asserted, this course was not, in the years mentioned, available to the plaintiff and the stockholders, whose interests were assigned to him, because their names were not placed on the assessment roll until the time provided by law for revising and correcting the assessment had passed. If that course was thus cut off, they could have resorted to a court of equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they admitted to be a just valuation. *Williams v. Supervisors*, 122 U. S. 154, 163, 30 L. Ed. 1088. See, also, *Stanley v. Supervisors*, 121 U. S. 535, 549, 30 L. Ed. 1000, reaffirming *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed.

1044; *First Nat. Bank v. Chapman*, 173 U. S. 205, 216, 43 L. Ed. 669.

83. System of taxation need not be uniform if results are.—*Davenport Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 78, 49 L. Ed. 669; *First Nat. Bank v. Chapman*, 173 U. S. 205, 215, 43 L. Ed. 669. See next section.

And because a state statute does not provide for the taxation of shares in corporations other than banks, it does not follow that the tax on moneyed capital invested in bank shares is at a greater rate than that on the moneyed capital of individual citizens invested in other corporations, nor are the shareholders in national banks discriminated against, because the taxation of such other corporations is arrived at under a separate system. *Palmer v. McMahon*, 133 U. S. 660, 667, 33 L. Ed. 772; *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895.

Trust companies in New York.—And so as to the system of taxing trust companies in New York, there being no evident intent disclosed to discriminate in their favor as against banks, including national banks. *Mercantile Bank v. New York*, 121 U. S. 138, 158, 160, 30 L. Ed. 895, followed in *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904.

84. Tax laws discriminatory in operation but not terms.—*Davenport Bank v. Davenport Board*, 123 U. S. 83, 86, 31 L. Ed. 94; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 78, 49 L. Ed. 669; *Supervisors v. Stanley*, 105 U. S. 305, 318, 26 L. Ed. 1044, reaffirmed in *Stanley v. Supervisors*, 121 U. S. 535, 548, 30 L. Ed.

usual or probable effect of the system of assessment discriminates against the national banks upon the face of the statute, nor any evidence is given of the intention of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, it is not a case for the federal supreme court to hold the statute unconstitutional.⁸⁵

Individual Instances of Omission or Undervaluation.—Individual instances of omission or undervaluation are insufficient to invalidate an assessment.⁸⁶

1000. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053.

As where the discretion is lodged in the assessor in valuing the franchise of state banks or other moneyed corporations, but not as to the valuation of shares of national banks. The wide difference between the discretion on the one hand and the duty on the other will be additionally demonstrated by a consideration of the discrimination against national banks which has arisen in the practical execution of the statutes. *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 85, 49 L. Ed. 669.

And where the assessment of a state bank, taken by the agreed statement of facts as illustrative of the other assessments against state banks, showed a striking undervaluation as compared with the assessments of national banks, as admitted, it cannot be claimed with any force in argument that this statement shows but an isolated case of undervaluation and does not establish a general practice. *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 86, 49 L. Ed. 669.

So where, although for purposes of taxation the statutes of a state provide for the valuation of all moneyed capital, including shares of the national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while those shares are assessed at their full value, is a violation of the act of congress which prescribes the rule by which they shall be taxed by state authority. *Pelton v. National Bank*, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. See preceding section.

85. Same—Savings banks.—*Davenport Bank v. Davenport Board*, 123 U. S. 83, 86, 31 L. Ed. 94; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *First Nat. Bank v. Chapman*, 173 U. S. 205, 219, 43 L. Ed. 669; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 88, 49 L. Ed. 669; *Mercantile Bank v. New York*, 121 U. S. 138, 157, 159, 30 L. Ed. 895, where it was held that the mode of taxation adopted by the state of New York in reference to its corporations did not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

Statutes of New York taxing trust companies.—Where it was contended that the statutes of New York, in reference to the taxation of trust companies, were essentially different from those applicable to national banks; that these trust companies were practically carrying on a banking business; that an enormous amount of moneyed capital was invested in them, and that as a result not merely a theoretical but a practical and burdensome discrimination was made against the moneyed capital invested in national banks, it was held that the state would take the proper steps to keep them within their statutory limits, and a neglect for a limited time to do so could not be considered as an assent by the state to such an improper assumption of power. It is not to be assumed that the state is acting in bad faith; that it has so legislated that upon the face of the statutes a uniform rate of taxation upon all moneyed capital is provided, while at the same time it has designedly placed the grants of some corporate franchises in such form as to permit the use of moneyed capital in certain ways with peculiar and less stringent rates of taxation. *Jenkins v. Neff*, 186 U. S. 230, 232, 235, 46 L. Ed. 1140, reaffirming *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895. See, also, *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904.

86. Individual instances of omission or undervaluation.—*Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044, reaffirmed in *Stanley v. Supervisors*, 121 U. S. 535, 548, 30 L. Ed. 1000. See, also, *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 86, 49 L. Ed. 669, where an agreed statement of facts that the assessment was illustrative of others, was held to prevent this rule from applying. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053; *Palmer v. McMahon*, 133 U. S. 660, 667, 33 L. Ed. 772.

Where to provide for a legal assessment is clearly the purpose of the laws, if, in attempting to effect that purpose some slip is made or some details are provided for therein which may render assessments under them irregular or even illegal, that fact does not detract from the equitable duty of the shareholders in national banks to fulfill the plain demands of the laws, and pay a tax on their shares in like proportion as is assessed upon other moneyed capital, before they can

Act Curing Irregular Assessment.—The fact that irregularities in the assessment for certain years, of national bank shares, in that no entry of any assessment of the shares of the plaintiff and of the stockholders whose claims were assigned to him was made on the assessment roll of those years until after the first of September, and after the time for revising and correcting the assessment had passed, and in the defect of the oath annexed in its averment as to the estimate of the value of real estate, were cured by validating act, was not in conflict with the act of congress respecting taxation of national bank shares.⁸⁷

(bbb) **Deduction of Indebtedness.**—**Discriminatory if Allowed as to Other Moneyed Capital and Not National Bank Shares.**—The taxation of bank shares by a state statute, without permitting the shareholder to deduct from their assessed value the amount of his bona fide indebtedness, as in the case of other investments of moneyed capital, is a discrimination forbidden by the act of congress.⁸⁸ So where such deduction is allowed from the valuation of personal property generally and other moneyed capital, but not from the valuation of national bank shares.⁸⁹ But the fact that the owner of what is termed "credits" in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation, does not in itself constitute an illegal discrimination against the holders of such shares, it not appearing what proportion of these credits were "moneyed capital." It does not appear affirmatively that there was enough to be a material discrimination, these credits not being necessarily moneyed capital.⁹⁰ And debts incurred in the

establish any claim for interference in their behalf by a court of equity. *People's Nat. Bank v. Marye*, 191 U. S. 272, 279, 48 L. Ed. 180.

Pleading.—A bill which alleges no statutory discrimination against shares of national bank stock, and no such agreement or common action of assessors, and no general rule of discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject, is bad on demurrer in a suit to restrain collection of tax on such shares. *National Bank v. Kimball*, 103 U. S. 732, 735, 26 L. Ed. 469.

And a bill averring that the shares of the bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of stock of the complaint, is demurrable. *National Bank v. Kimball*, 103 U. S. 732, 735, 26 L. Ed. 469. See post, "Injunction against Taxes," VI, H.

87. Act curing irregular assessment.—*Williams v. Supervisors*, 122 U. S. 154, 165, 166, 30 L. Ed. 1088.

88. Discriminatory if allowed as to other moneyed capital and not national bank shares.—*Evansville Bank v. Britton*, 105 U. S. 322, 324, 26 L. Ed. 1053. See, also, *People v. Weaver*, 100 U. S. 539, 546, 25 L. Ed. 705; *Supervisors v. Stanley*, 105 U. S. 305, 310, 311, 26 L.

Ed. 1044; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118; *First Nat. Bank v. Chapman*, 173 U. S. 205, 219, 43 L. Ed. 669; *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904.

89. Personal property generally.—*Supervisors v. Stanley*, 105 U. S. 305, 316, 26 L. Ed. 1044, reaffirmed in *Stanley v. Supervisors*, 121 U. S. 535, 546, 30 L. Ed. 1000; *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Boyer v. Boyer*, 113 U. S. 689, 694, 28 L. Ed. 1089. See, also, *Palmer v. McMahon*, 133 U. S. 660, 666, 33 L. Ed. 772.

The cases of *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville Bank v. Britton*, 105 U. S. 322, 26 L. Ed. 1053, and *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903, are applications of the same principles. *Mercantile Bank v. New York*, 121 U. S. 138, 152, 30 L. Ed. 895.

While personal property is not necessarily moneyed capital, the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which bona fide debts may be deducted, all mean moneyed capital invested in that way. *Evansville Bank v. Britton*, 105 U. S. 322, 324, 26 L. Ed. 1053.

Undistributed earnings of banks.—See ante, "Profits Carried to Account of Fund or Used in Construction," III, C, 3, b, (2), (h).

90. Credits.—*First Nat. Bank v. Chapman*, 173 U. S. 205, 217, 43 L. Ed. 669, following *First Nat. Bank v. Ayers*, 160

actual conduct of a business, whether incorporated or unincorporated, may be deducted, under the law providing therefor, in ascertaining the proper valuation to be put upon such business, without being a discrimination against national bank shares, although no such deduction is provided for as to them.⁹¹

Not Void, but Voidable as to National Bank Shareholders with Debts to Deduct.—But there is no reason why such a statute should not remain the law as to banks or banking associations organized under the laws of the state, or as to private bankers. Nor is it void as to a shareholder in a national bank, who owes no debts, which he can deduct from the assessed value of his shares, as the denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. And in cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void, but the shareholder must show the assessing officer what his debts are, and take the necessary steps to secure a correction.⁹² Unless it is clear that such steps would be unavailing, from the fixed

U. S. 660, 665, 40 L. Ed. 573; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 41 L. Ed. 1069; *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079, and distinguishing *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, on the ground that the attention of the court in that case was not directed to this question, but it was assumed that under the statute of Ohio owners of all moneyed capital other than shares in a national bank were permitted to deduct their bona fide debts, but not the owners of such bank shares. (See pp. 219, 220, of opinion.) See, however, also, *Boyer v. Boyer*, 113 U. S. 689, 695, 28 L. Ed. 1089.

Where the constitution of the state, as construed by its supreme court, distinguished between stock and credits and authorized only a deduction of debts from credits, shares of stock were not credits, and both resident and nonresident shareholders were not entitled to deduct bona fide indebtedness from the value of their shares of stock. This construction of the statute is binding on the federal supreme court. *Commercial Bank v. Chambers*, 182 U. S. 556, 560, 45 L. Ed. 1227, citing *First Nat. Bank v. Ayers*, 160 U. S. 660, 664, 40 L. Ed. 573; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444, 41 L. Ed. 1069.

The court could not take what counsel for plaintiff calls judicial notice of what is claimed to be a fact, viz.; that the amount of moneyed capital in the state from which debts may be deducted, i. e., credits, as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. *First Nat. Bank v. Ayers*, 160 U. S. 660, 667, 40 L. Ed. 573. See, also, *First Nat. Bank v. Chapman*, 173 U. S. 205, 217, 43 L. Ed. 669.

Under the Ohio law, as held in *First Nat. Bank v. Chapman*, 173 U. S. 205, 215, 43 L. Ed. 669, "the shares in national and also in state banks are what is termed stocks or investments in stocks, and are

not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers."

91. Debts incurred in actual conduct of business.—*First Nat. Bank v. Chapman*, 173 U. S. 205, 215, 43 L. Ed. 669.

So held as between the holders of shares in incorporated state banks and national banks on the one hand, and unincorporated banks or bankers on the other. This does not give the unincorporated bank or banker the right to deduct his general debts disconnected from the business of banking and not incurred therein from the remainder above mentioned. It cannot be doubted that under this section those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted so that the real value of the capital that is employed may be determined and the taxes assessed thereon. This system is, as nearly as may be, equivalent in its results to that employed in the case of incorporated state banks and of national banks. Under the sections of the Revised Statutes of Ohio which relate to the taxation of these latter classes of banks (§ 2762, et seq.) the shares are to be listed by the auditor at their true value in money, which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts. *First Nat. Bank v. Chapman*, 173 U. S. 205, 215, 43 L. Ed. 669.

92. Not void, but voidable as to national bank shareholders with debts to deduct.—*Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Stanley v. Supervisors*, 121 U. S. 535, 545, 550, 30 L. Ed. 1000. See, also, *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Evansville*

purpose of the assessors to make no such deductions⁹³ or where the law makes no provision for such deduction.⁹⁴

Former Judgments as Res Adjudicata.—A judgment that the tax therein sought to be enjoined was illegally assessed and entered upon the treasurer's duplicate for collection, because a deduction of the bona fide debts of the shareholders of a national bank from the valuation of the shares, was not made, as the law allowed to be done in the taxation of "credits" in the hands of individuals, and thereby an illegal discrimination was made against national banks, is not conclusive proof of the existence of discrimination as to assessments of such stock for other years.⁹⁵

(ccc) *Deduction of Real Estate Outside of State.*—The refusal to deduct from the value of shares of stock of the bank the assessed value of real estate owned by a Utah national bank, situated in other states than Utah, where there was no proof that such a deduction was authorized by the laws of Utah in valuing shares of stock of other than national banking associations, did not constitute an illegal discrimination against the shareholders, as the state of its domicile is entitled to tax the full value of such shares, of which value such real estate is an element, and although taxed at its situs also.⁹⁶

ggg. *Exemptions Not Prohibited.*—The National Banking Act of Congress, approved June 3, 1864 (13 Stat. 99), was not intended to curtail the power of the states on the subject of taxation, or prohibit the exemption of particular kinds of property, but to protect the corporations formed under its authority from unfriendly discrimination by the states in the exercise of their taxing power.⁹⁷ And where the amount of the exemption is comparatively small, look-

Bank v. Britton, 105 U. S. 322, 26 L. Ed. 1053; Palmer v. McMahon, 133 U. S. 660, 666, 33 L. Ed. 772; People v. Weaver, 100 U. S. 539, 25 L. Ed. 705.

93. Hills v. Exchange Bank, 105 U. S. 319, 321, 322, 26 L. Ed. 1052.

94. Under the decision in Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052, the bank was entitled to relief by injunction against the collection of the illegal tax on the bank shares, and the fact that they did not make a demand for the deduction of their indebtedness from the assessed value of the shares of their bank stock before the entire process of the appraisement and equalization of the value of said shares for taxation had been completed, and the tax duplicate for said year had been delivered in accordance with law to the treasurer of said county for the collection of said taxes, did not defeat their right to have it made by this bill in chancery, for the reason that the court expressly finds that "the laws of Ohio make no provision for the deduction of the bona fide indebtedness of any shareholder from the shares of his stock and provide no means by which said deduction can be secured." Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193, 199, 32 L. Ed. 118.

95. *Former judgments as res adjudicata.*—Lander v. Mercantile Bank, 186 U. S. 458, 470, 46 L. Ed. 1247.

That adjudication should not prevail as an estoppel in a subsequent case as to taxes for other years, where the statute has been subsequently construed not of itself to work such discrimination. Lander v. Mercantile Bank, 186 U. S. 458, 470,

46 L. Ed. 1247. See New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. Ed. 202.

"Those were conclusions from propositions not only of law but of fact, and granting that one of the propositions of law was the construction of the Ohio statute (a wrong construction, as has since been held), a necessary element of fact was that the discrimination complained of was effected through the practical operation of the statute in the years the assessments were made." Lander v. Mercantile Bank, 186 U. S. 458, 476, 46 L. Ed. 1247. See, also, First Nat. Bank v. Chapman, 173 U. S. 205, 219, 43 L. Ed. 669. See ante, "Application of Doctrine of Res Judicata," IV, A. 5. See, also, the title RES ADJUDICATA, vol. 10, pp. 763, et seq., 766.

96. *Deduction of real estate outside of state.*—Commercial Bank v. Chambers, 182 U. S. 556, 561, 45 L. Ed. 1227.

97. *Exemptions not forbidden.*—Adams v. Nashville, 95 U. S. 19, 24 L. Ed. 369, citing, People v. Commissioners, 4 Wall. 244, 18 L. Ed. 344; Hepburn v. School Directors, 23 Wall. 480, 23 L. Ed. 112; Davenport Bank v. Davenport Board, 123 U. S. 83, 86, 31 L. Ed. 94; Mercantile Bank v. New York, 121 U. S. 138, 161, 30 L. Ed. 895; Boyer v. Boyer, 113 U. S. 689, 694, 28 L. Ed. 1089; Talbott v. Silver Bow County, 139 U. S. 438, 35 L. Ed. 210, where an exemption of the stock of corporations whose entire capital was invested in assessable property in the territory, was held not an illegal discrimination under § 5219.

Exemptions of the shares of capital stock held by individuals in all private

ing at the whole amount of personal property and credits which are the subjects of taxation, not large enough to make a material difference in the rate assessed upon national bank shares, it will not be obnoxious to the prohibition of discrimination against national bank shares in state taxation. Exact equality is unnecessary.⁹⁸ But these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares. Substantial equality must be preserved, and it is sometimes difficult to determine when this rule is infringed.⁹⁹ And the exemptions in favor of other moneyed capital may be of such a substantial character in amount as to take the case out of the operation of the rule that it is not absolute equality that is contemplated by the act of congress; but as substantial equality is attainable, and is required by the supreme law of the land, in respect of state taxation of national bank shares, when the inequality is so palpable as to show that the discrimination against capital invested in such shares is serious, the courts have no discretion but to interfere.¹

corporations of the state, "except banking institutions, and except those which by virtue of any contract in their charters or other contracts with this state are expressly exempted from taxation, and except mutual life insurance companies specially taxed," and of the deposits in savings banks, create no illegal discrimination. *Newark Banking Co. v. Newark*, 121 U. S. 163, 164, 30 L. Ed. 904.

Exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by § 5219 of the Revised Statutes of the United States. *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 461, 41 L. Ed. 1069; *First Nat. Bank v. Chapman*, 173 U. S. 205, 214, 43 L. Ed. 669; *Mercantile Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895; *Jenkins v. Neff*, 186 U. S. 230, 237, 46 L. Ed. 1140; *Davenport Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94; *Bank v. Boston*, 125 U. S. 60, 67, 31 L. Ed. 689.

State or municipal securities.—Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by congress for the taxation of national bank shares. *Mercantile Bank v. New York*, 121 U. S. 138, 162, 30 L. Ed. 895. See, also, *Adams v. Nashville*, 95 U. S. 19, 24 L. Ed. 369; *Boyer v. Boyer*, 113 U. S. 689, 694, 28 L. Ed. 1089.

Exemption of investments in nontaxable securities.—See post, "Investment of Capital in National Securities," IV, C, 3, a, (1), (c), bb, (dd).

98. Substantial equality.—*Mercantile Bank v. New York*, 121 U. S. 138, 162, 30 L. Ed. 895; *Newark Banking Co. v. Newark*, 121 U. S. 163, 165, 30 L. Ed. 904; *Davenport Bank v. Davenport Board*, 123 U. S. 83, 31 L. Ed. 94; *Bank v. Boston*, 125 U. S. 60, 67, 31 L. Ed. 689. See, also, *Lionberger v. Rouse*, 9 Wall. 468,

19 L. Ed. 721; *Boyer v. Boyer*, 113 U. S. 689, 691, 28 L. Ed. 1089.

In *Hepburn v. School Directors*, 23 Wall. 480, 23 L. Ed. 112, it was decided that the exemption from taxation by statute of "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate" did not make the taxation of shares in national banks unequal and invalid. This was decided in the negative on the two grounds, 1st, that the exemption was founded upon the just reason of preventing a double burden by the taxation both of property and of the debts secured upon it; and, 2d, because it was partial only, not operating as a discrimination against investments in national bank shares. *Mercantile Bank v. New York*, 121 U. S. 138, 150, 30 L. Ed. 895.

99. Mercantile Bank v. New York, 121 U. S. 138, 161, 30 L. Ed. 895; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089.

1. Exemptions creating substantial inequality.—*Boyer v. Boyer*, 113 U. S. 689, 701, 28 L. Ed. 1089, distinguishing *Hepburn v. School Directors*, 23 Wall. 480, 23 L. Ed. 112. See, also, *Mercantile Bank v. New York*, 121 U. S. 138, 147, 30 L. Ed. 895.

Where a state exempts from county taxation, all bonds or certificates of loan issued by any railroad company incorporated by the state; shares of stock in the hands of stockholders of any institution or company of the state which, in its corporate capacity is liable to pay a tax into the state treasury under the act of 1859; mortgages, judgments, and recognizances of every kind; moneys due or owing upon articles of agreement for the sale of real estate; and all loans however made by corporations which are taxable for state purposes when such corporations pay into the state treasury the required tax on such indebtedness, which were admitted by the pleadings to be of any substantial amount, it constitutes an illegal discrimination in favor of other moneyed capital against capital invested in national bank shares such as is not

hhh. *Burden of Proof and Sufficiency of Averment*.—Where there is found in the record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens, and there is nothing upon the face of these statutes which shows such discrimination, therefore it would seem that there has not been made out a case for the intervention of the court. Discrimination must be affirmatively shown, as the presumption is against it.² And such illegal discrimination must at least be definitely and clearly charged, for any relief to be based thereon.³

(cc) *Assessment to Bank Direct as Agent for Stockholders*.—The statutory appointment of the bank to pay the whole tax as agent of the stockholders, is not inconsistent with the federal law pertaining to national banks.⁴ And the bank may be required to pay the tax out of its corporate funds, or be authorized to deduct the amount paid for each stockholder out of his dividends,⁵ or it may be made optional with the bank to pay a different and larger tax on the par value, or the regular rate on the actual value, both to be paid by the bank.⁶

(dd) *Investment of Capital in National Securities*.—The National Banking Act, rightly construed, subjects the shares of the banking associations authorized by it, and in the hands of shareholders, to taxation by the states under certain limitations, without regard to the fact that a part or the whole of the capital of such association is invested in national securities declared by the statutes authorizing them to be "exempt from taxation by or under the state authority," and the act thus construed is constitutional.⁷ And the states may

consistent with the legislation of congress on the subject. *Boyer v. Boyer*, 113 U. S. 689, 699, 28 L. Ed. 1089.

2. Burden of proof and sufficiency of averment.—First Nat. Bank *v.* Chapman, 173 U. S. 205, 219, 43 L. Ed. 669; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. Ed. 118, distinguished. See, also, *Mercantile Bank v. New York*, 121 U. S. 138, 159, 30 L. Ed. 895; *Jenkins v. Neff*, 186 U. S. 230, 232, 46 L. Ed. 1140; *Supervisors v. Stanley*, 105 U. S. 305, 308, 26 L. Ed. 1044; *Davenport Bank v. Davenport Board*, 123 U. S. 83, 86, 31 L. Ed. 94.

3. Aberdeen Bank v. Chehalis County, 166 U. S. 440, 462, 41 L. Ed. 1069; *Bank v. Seattle*, 166 U. S. 463, 41 L. Ed. 1079; *National Bank v. Kimball*, 103 U. S. 732, 735, 26 L. Ed. 469.

4. Assessment to bank direct as agent for stockholders.—*National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701, followed in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. Ed. 892; *Van Slyke v. Wisconsin*, 154 U. S. 581, 20 L. Ed. 240; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 446, 41 L. Ed. 1069; *Lionberger v. Rouse*, 9 Wall. 468, 19 L. Ed. 721. See, also, *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904.

And the construction of the state court of the state taxing statutes should be followed. *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 444, 41 L. Ed. 1069.

5. Farrington v. Tennessee, 95 U. S. 679, 687, 24 L. Ed. 558; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Central Nat. Bank v. United States*,

137 U. S. 355, 363, 34 L. Ed. 703; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 466, 42 L. Ed. 236. As to effect upon taxation of dividends, see ante, "Tax on Dividends," III, C, 3, b, (2), (f).

6. Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461, 463, 42 L. Ed. 236.

List of stockholders required of cashier.—And the cashier of each national bank within the state may be required to transmit, by a certain date, to the clerks of the several towns in the state in which any stock or shareholders of such bank shall reside, a true list of the names of such stock or shareholders on the books of such bank, together with the amount of money actually paid in on each share on the first day of that month. *Waite v. Dowley*, 94 U. S. 527, 24 L. Ed. 181. See the title *BANKS AND BANKING*, vol. 3, pp. 94, 128-9, as to lists kept by cashiers.

7. Investment of capital in national securities.—*Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *Bradley v. People*, 4 Wall. 459, 18 L. Ed. 433; *Provident Institution v. Massachusetts*, 6 Wall. 611, 630, 18 L. Ed. 907; *National Bank v. Commonwealth*, 9 Wall. 353, 359, 19 L. Ed. 701; *Lionberger v. Rouse*, 9 Wall. 468, 473, 19 L. Ed. 721; *Evansville Bank v. Britton*, 105 U. S. 322, 325, 26 L. Ed. 1053; *Mercantile Bank v. New York*, 121 U. S. 138, 148, 30 L. Ed. 895; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 114, 46 L. Ed. 456; *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 518, 51 L. Ed. 901. See, also, *Palmer v. McMahon*, 133 U. S. 660, 666, 33 L. Ed. 772;

lawfully exempt investments of other moneyed capital in such securities, without allowing a deduction on that account to national banks' shareholders.⁸ But not the property or capital of the bank itself. See ante, "Power of State Generally," IV, C, 3, a, (1); post, "Capital Stock," IV, C, 3, a, (2), (b), bb.

(ee) *Situs*.—Shares of stock in the national banks are personal property, and though they are a species of personal property which, in one sense, is intangible and incorporeal, the law which created them could separate them from the person of their owner for the purpose of taxation, and give them a situs of their own, as has been done by declaring them taxable where the bank is located and not elsewhere.⁹ Nor is it a violation of the constitutional rule of uniformity.¹⁰ And the act of congress of 1868, re-enacting the law, gave a legislative construction to the words "place where the bank is located, and not elsewhere," as used in § 41, and permitted the state to determine and direct the manner and place of taxing resident shareholders, but provided that nonresidents should be taxed only in the city or town where the bank was located.¹¹

cc. *Franchise or Intangible Property*.—The franchise or intangible property of a national bank cannot be taxed under the authority granted by congress.¹²

(d) *Federal Taxation of Banks*.—**State Banks and Situs of Property**.—A bank incorporated and organized under the laws of one of the states of the Union, with its principal place of business within the United States, is subject to the sovereign power of the United States, and a proper object of taxation. The investments abroad are still the property of the bank and part of its capital and taxable by the United States. In the absence of any averments to the contrary, it is presumable they were such as banks usually make in doing a banking business, and that their legal situs was at the home office of the corporation.¹³

Merchants', etc., *Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Snyder v. Bettman*, 190 U. S. 249, 254, 47 L. Ed. 1035. See, also, post, "In General," IV, C, 3, a, (2), (b), bb, (aa).

Shares and capital distinct.—*National Bank v. Commonwealth*, 9 Wall. 353, 358, 359, 19 L. Ed. 701; *Van Allen v. The Assessors*, 3 Wall. 573, 583, 18 L. Ed. 229; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 114, 46 L. Ed. 456; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850. See, also, ante, "Corporate Stock," IV, C, 2, d.

8. States may exempt such investments of other moneyed capital.—*People v. Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *Mercantile Bank v. New York*, 121 U. S. 138, 149, 30 L. Ed. 895, distinguishing *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229. See, also, *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 449, 41 L. Ed. 1069. And see ante, "Corporate Stock," IV, C, 2, d.

9. Situs.—*Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189, holding that this was done by the 41st section of the National Banking Act of 1864, providing in effect, that all shares in such banks might be included in the valuation of the personal property of the owner, in the assessment of taxes imposed under state authority, at the place where the bank was located and not elsewhere. See, also, *Bristol v. Washington County*, 177 U. S. 133, 144, 44 L. Ed. 701;

Supervisors v. Stanley, 105 U. S. 305, 313, 314, 26 L. Ed. 1044; *Austin v. Aldermen*, 7 Wall. 694, 19 L. Ed. 224.

Quære, whether the general assembly of a state could, under the provisions of the original act of congress, in relation to taxing the national bank shares, provide for the taxation of shareholders at any other place within the state than that in which the bank was located. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 505, 22 L. Ed. 189.

10. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 505, 22 L. Ed. 189.

Valid under Illinois constitution of 1848.

—*Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189.

11. Act of 1868.—*Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 499, 22 L. Ed. 189. See *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904.

12. Franchise or intangible property.—*Third Nat. Bank v. Stone*, 174 U. S. 432, 434, 43 L. Ed. 1035; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 682, 43 L. Ed. 850; *Louisville v. Third Nat. Bank*, 174 U. S. 435, 43 L. Ed. 1037; *Louisville v. Citizens' Nat. Bank*, 174 U. S. 436, 43 L. Ed. 1037; *First Nat. Bank v. Louisville*, 174 U. S. 438, 43 L. Ed. 1038. See, also, post, "Capital and Capital Stock," IV, C, 3, a, (2), (b).

13. Federal taxation of state banks.—*Nevada Bank v. Sedgwick*, 104 U. S. 111, 26 L. Ed. 703.

Quære, whether, if they had been made

State Bank Notes.—See post, "Taxation of Circulation," IV, C, 3, a, (2), (e).

National Banks.—See post, "Mode of Taxation," IV, C, 3, a, (2).

(e) *Territorial Taxation.*—The same power of taxation in respect to national banks exists in the territories that does in the states.¹⁴

(2) *Mode of Taxation*—(a) *In General.*—**Mode of Taxation of Banks Generally.**—Banks and bankers (other than national) were formerly taxed by the United States: 1. On their deposits. 2. On the capital employed in their business. 3. On their circulation. 4. On the notes of every person or state bank used and paid out for circulation. Rev. Stat. 673, et seq. (Rev. Stat. § 3408).¹⁵

State Banking Franchise Taxable by State.—A round sum or an annual charge, with or without reference to capital stock, may be asked by a legislature for a banking franchise. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. Otherwise the franchise is corporate property and taxable as such.¹⁶

Federal License Tax on Bankers.—"Bankers" who sell the federal securities no otherwise than for the United States and for themselves, and who, therefore, do not sell them for others or for a commission, were not liable to pay the duties imposed by the 99th section of the Internal Revenue Act, of June 30, 1864, imposed upon "brokers and bankers doing business as brokers."¹⁷

in fixed property subject exclusively to another jurisdiction, a different rule would apply. *Nevada Bank v. Sedgwick*, 104 U. S. 111, 112, 26 L. Ed. 703. See, also, post, "Mode of Taxation," IV, C, 3, a, (2).

14. **Territorial taxation.**—*Talbott v. Silver Bow County*, 139 U. S. 438, 446, 35 L. Ed. 210.

15. **Mode of taxation.**—*Farrington v. Tennessee*, 95 U. S. 679, 688, 24 L. Ed. 558.

But the act of March 3, 1883, repealed the tax on capital and deposits, and left the tax on circulation at one-twelfth of one per centum a month on average issue. See Fed. Stat. Anno., § 3408. See *Manhattan Co. v. Blake*, 148 U. S. 412, 423, 37 L. Ed. 504; *Twin City Bank v. Nebeker*, 167 U. S. 196, 203, 42 L. Ed. 134.

For review of the legislation on the general subject of taxation of circulating notes other than national bank notes, see *Hollister v. Zion's, etc., Institution*, 111 U. S. 62, 65, 28 L. Ed. 352, followed in *Willis v. Belleville Nail Co.*, 111 U. S. 65, 28 L. Ed. 354.

But in view of the prohibitive ten per centum tax on the circulation of banks other than national, and the use of such circulation by (any) banks, this is all obsolete legislation as to state banks. See §§ 19, 20, 21 of the Act of Feb. 8, 1875, ch. 36, given in the Federal Statutes, Annotated, under § 3413.

The ten per cent tax so laid on bank and municipal circulation is constitutional. *National Bank v. United States*, 101 U. S. 1, 25 L. Ed. 979; *Veazie Bank v. Fenno*, 8 Wall. 533, 19 L. Ed. 482. See, also, *Hollister v. Zion's, etc., Institution*, 111 U. S. 62, 28 L. Ed. 352. See the title

CONSTITUTIONAL LAW, vol. 4, pp. 212, 305.

For definition of bank or banker, see the title BANKS AND BANKING, vol. 3, p. 5, et seq.

Savings banks having no capital were not included in the clause. *Bank v. Collector*, 3 Wall. 495, 510, 511, 18 L. Ed. 207.

Only such notes as are in law negotiable, so as to carry title in their circulation from hand to hand, were the subjects of taxation under the statute (imposing the ten per centum tax). *Hollister v. Zion's, etc., Institution*, 111 U. S. 62, 65, 28 L. Ed. 352, following *United States v. Van Auken*, 96 U. S. 366, 24 L. Ed. 852.

16. **Banking franchise.**—*Gordon v. Appeal Tax Appeal Court*, 3 How. 133, 149, 11 L. Ed. 529; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897.

17. **License tax on bankers.**—*United States v. Fisk*, 3 Wall. 445, 18 L. Ed. 243.

Although, under the Internal Revenue Act of June 30, 1864, as amended by the act of March 3, 1865, the sales of stocks, bonds, and securities made by "brokers" for themselves were subject to the same duties as those made by them for others. *United States v. Cutting*, 3 Wall. 441, 18 L. Ed. 241.

In *Warren v. Shook*, 91 U. S. 704, 24 L. Ed. 421, it was held that congress intended to impose the duty prescribed by § 99 upon bankers doing business as brokers, although a person, firm or company, having a license as a banker, might be exempted by subdivision nine of § 79 of the act of 1864, as amended by the act

National Banks.—National banks are subject to a -duty of one-half of one per centum each half year (now one-fourth of one per centum when secured by two per centum bonds of the United States), upon the daily average amount of its notes in circulation. There was formerly a duty of one-quarter of one per centum each half year upon the average amount of its deposits; and a duty of one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds, but these last two modes of taxation were omitted from § 5214, as amended by act of May 30, 1908.¹⁸

(b) *Capital and Capital Stock*—aa. *Capital Employed in Banking.*—The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government.¹⁹ It was formerly taxed by the United States, but the law has been repealed.²⁰

bb. *Capital Stock*—(aa) *In General.*—**Liable to Taxation Like Other Property.**—The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations, and it is subject to taxation like other property, where there is no express exemption in the charter.²¹

of March 3, 1865, 13 Stat. 472, from paying the special tax imposed upon brokers. Nothing more is decided in that case. *Richmond v. Blake*, 132 U. S. 592, 596, 33 L. Ed. 481.

18. National banks.—*Van Allen v. The Assessors*, 3 Wall. 573, 583, 18 L. Ed. 229. See § 5214, Rev. Stat., as amended May 30, 1908, making this change and also making the tax much heavier where issue secured otherwise than by federal bonds. See post, "Taxation of Circulation," IV, C, 3, a. (2), (e).

National banking franchise.—See ante, "Franchise or Intangible Property," IV, C, 3, a. (1), (c), cc.

19. Capital employed in banking.—*Gordon v. Appeal Tax Court*, 3 How. 133, 149, 11 L. Ed. 529. See, also, *Canal, etc., Co. v. New Orleans*, 99 U. S. 97, 25 L. Ed. 409.

20. Taxation by United States.—See Act of March 3, 1883, ch. 121; Rev. Stat., § 3408.

"Banker" construed.—Where a man, employing a capital in his business, had a room or place, indicated by a sign over the door, where his mail matter was received, and where he was, or could be, met by his clients, and where the latter could deliver stocks to be sold by him, or under his supervision, and he bought and sold stocks for his customers, such stocks were "received" by him "for sale," and he was a banker within the meaning of the Revised Statutes, §§ 3407, 3408, subjecting the capital employed to a tax. *Richmond v. Blake*, 132 U. S. 592, 594, 33 L. Ed. 481.

This statute did not apply to a person or corporation selling its own property, not that received from other owners for sale. *Selden v. Equitable Trust Co.*, 94 U. S. 419, 24 L. Ed. 249, distinguished in *Richmond v. Blake*, 132 U. S. 592, 597, 33 L. Ed. 481.

See the titles **BANKS AND BANKING**, vol. 3, pp. 5, 6; **BROKERS**, vol. 3, p. 5631.

Act of 1866.—The term "capital," employed by a banker in the business of banking, in the one hundred and tenth section of the Revenue Act of July 13th, 1866, did not include moneys borrowed by him from time to time temporarily in the ordinary course of his business. It applied only to the property or moneys of the banker set apart from other uses and permanently invested in the business. *Bailey v. Clark*, 21 Wall. 284, 22 L. Ed. 651.

21. Capital stock.—*Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558; *Providence Bank v. Billings*, 4 Pet. 514, 560, 7 L. Ed. 939; *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 681, 43 L. Ed. 850. See, also, *National Bank v. Commonwealth*, 9 Wall. 353, 359, 19 L. Ed. 701; *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992; *Ohio Life Ins. Co. v. Debolt*, 16 How. 416, 434, 14 L. Ed. 997.

When a franchise for banking is bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price. But whether the bonus for the franchise is paid by an annual tax upon the capital stock, or in any other way, it is in the discretion of the legislature to tax the capital stock as an aggregate according to its actual value, or the stockholders on account of their separate ownership of it, or the dividends in the aggregate, or the stockholders on account of their portions of them. *Gordon v. Appeal Tax Court*, 3 How. 133, 146, 11 L. Ed. 529.

Nature of burden.—A tax on the nominal capital of a bank, without regard to

Exemption of Capital Invested in Exempt Securities.—The public securities of the United States, whether held by corporations or individuals, are exempt from taxation by the states for any purpose. Such immunity from state taxation not only exempts such securities from taxes levied directly on the holder of the same, but even where such securities form a part of the capital stock of a bank the rule is equally well established that a state cannot tax such capital stock without deducting such portion thereof as is made up of such public securities.²² But the burden of proof of showing such investment is on the bank.²³

(bb) *Shares of Stock.*—**Not Double Taxation.**—See ante, "Double Taxation," III, A, 2, b, (5).

Payment by Bank for Stockholders.—See ante, "Assessment to Bank Direct as Agent for Stockholders," IV, C, 3, a, (1), (c), bb, (cc).

Bank's Exemption Does Not Exempt Shares.—See note.²⁴

Investment of Assets in Exempt Securities.—The rule seems to be the same as in the case of corporations generally.²⁵

National Bank Shares.—See ante, "National Bank Shares," IV, C, 3, a, (1), (c), bb.

(cc) *Dividends.*—See ante, "Tax on Dividends," III, C, 3, b, (2), (f).

(c) *Deposits.*—**United States Tax.**—The United States Internal Revenue Law formerly laid a tax of one twenty-fourth of one per centum per month on the deposits with any person or corporation engaged in banking. But this was repealed by act of March 3, 1883, ch. 21, 22 Stat. L. 488.²⁶

the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself. *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451. See, however, *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793.

22. Exemption of capital invested in exempt securities.—*Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 793; *Provident Institution v. Massachusetts*, 6 Wall. 611, 629, 18 L. Ed. 907; *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451; *National Bank v. Commonwealth*, 9 Wall. 353, 359, 19 L. Ed. 701; *Palmer v. McMahon*, 133 U. S. 660, 666, 33 L. Ed. 772. See, also, ante, "Investment of Capital in National Securities," IV, C, 3, a, (1), (c), bb, (dd).

"That the tax upon the property of a bank in which United States securities are included is beyond the power of the state, and, what perhaps is of lesser moment, within the prohibition of the statutory law, hardly needs to be proved by authority." *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 514, 51 L. Ed. 901. See *New York v. Commissioners*, 2 Black 620, 17 L. Ed. 451.

23. Burden of proof.—*Canal, etc., Co. v. New Orleans*, 99 U. S. 97, 25 L. Ed. 409.

24. Bank's exemption does not exempt shares.—"And, in the case of *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202, although it was held that the capital of the bank was exempt from taxation by a charter contract, and that, owing to the peculiar provisions of the charter, it would violate the contract to compel the bank to pay a tax levied on

its shareholders, nevertheless the exemption did not preclude the levy of a tax upon the stock in the names of the stockholders, the court said (p. 402): 'The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned.'"
Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 682, 43 L. Ed. 850.

25. Investment of assets in exempt securities.—*Home Sav. Bank v. Des Moines*, 205 U. S. 503, 510, 51 L. Ed. 901. See ante, "Shares of Stockholders," IV, C, 2, d, (2).

But the shares of state banks may be taxed as the property of the shareholders, although a part of the bank's capital is invested in exempt securities, such as national securities, unless the tax is substantially on the bank. *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 516, 51 L. Ed. 901. See ante, "Corporate Stock," IV, C, 2, d; "Investment of Capital in National Securities," IV, C, 3, a, (1), (c), bb, (dd).

26. Deposits.—See, construing this tax law, *Savings Bank v. Archbold*, 104 U. S. 708, 26 L. Ed. 901; *Banks for Savings v. The Collector*, 3 Wall. 495, 514, 18 L. Ed. 207; *Oulton v. Savings Institution*, 17 Wall. 709, 22 L. Ed. 618.

State funds on deposit taxable by United States as deposits.—*Manhattan Co. v. Blake*, 148 U. S. 412, 424, 37 L. Ed. 504. See the title CONSTITUTIONAL LAW, vol. 4, p. 210.

Deposits in savings banks.—*Savings Bank v. Archbold*, 104 U. S. 708, 709, 26 L. Ed. 901; *Bank for Savings v. The Col-*

State Tax.—A state tax upon a state bank, on account of its depositors, of a percentage on the amount of its deposits, is a franchise tax, not a tax on property, and valid.²⁷ Accordingly, a savings institution having a portion of its deposits invested in federal securities declared by the act of congress authorizing their issue to be exempt from taxation under state authority, is liable under such a statute to a tax on account of such deposits as on account of others.²⁸

(d) *Corporate Property.*—The corporate property of a bank, being separable from the franchise, may be taxed, even though the franchise be exempt by contract or otherwise, unless there be a special agreement to the contrary.²⁹

National Bank.—But the personal assets and personal property of a national bank are exempt from taxation under state laws, even after passing into the hands of a receiver upon insolvency.³⁰

(e) *Taxation of Circulation.*—See the titles BANKS AND BANKING, vol. 3, pp. 68, 69; CONSTITUTIONAL LAW, vol. 4, p. 211. While currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation,³¹ the circulation of both state and national banks has been taxed by the United States. See ante, "In General," IV, C, 3, a, (2), (b), bb, (aa). And the national banking law now imposes a tax upon the circulation of national banks, varying with the nature of the securities on which it is based, while the ten per cent tax has driven all other forms of bank circulation out of existence and made these provisions (§ 3408) practically obsolete.³²

(f) *Tax on Earnings.*—See ante, "Profits Carried to Account of Fund or Used in Construction," III, C, 3, b, (2), (h).

b. *Bridge Company.*—See post, "Interstate Bridge and Bridge Company," IV, C, 3, f.

c. *Express, Telegraph and Telephone Companies.*—(1) *State Taxation.*—**Unit Rule.**—In estimating the value of the property of a telegraph company situate within a state, it may be regarded not abstractly or strictly locally, but as a

lector, 3 Wall. 495, 510, 18 L. Ed. 207; *Oulton v. Savings Institution*, 17 Wall. 109, 22 L. Ed. 618.

Entry in depositor's passbook.—*Oulton v. Savings Institution*, 17 Wall. 109, 22 L. Ed. 618.

Regulation limiting right to withdraw.—*Oulton v. Savings Institution*, 17 Wall. 109, 22 L. Ed. 618.

Dividends on deposits in savings banks.—See ante, "To Depositors in Savings Bank," III, C, 3, b, (2), (f), bb.

27. **State tax.**—*Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907, construing a Massachusetts statute so taxing savings institutions. *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897.

28. **Investment in exempt securities.**—*Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907. See, also, *Bank for Savings v. The Collector*, 3 Wall. 495, 514, 18 L. Ed. 207; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Snyder v. Bettman*, 190 U. S. 249, 254, 47 L. Ed. 1035.

29. **Corporate property.**—*Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *State Bank v. Knoop*, 16 How. 369, 386, 14 L. Ed. 977. See, also, *West River Bridge Co. v. Dix*, 6 How. 507, 542, 12 L. Ed. 535; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Weston v. Charleston*,

2 Pet. 449, 469, 7 L. Ed. 481; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 345, 30 L. Ed. 1200; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 681, 43 L. Ed. 850.

30. **Personal property of national bank—Receivership.**—*Rosenblatt v. Johnston*, 104 U. S. 462, 463, 26 L. Ed. 832. See, also, *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705. See ante, "Power of State Generally," IV, C, 3, a, (1), (a).

31. **Taxation of circulation.**—*Veazie Bank v. Fenno*, 8 Wall. 533, 538, 19 L. Ed. 482.

32. **Present law.**—See § 5214, Rev. Stat., as amended by Act of May, 30, 1908, 35 Stat. L. 550. See *Hollister v. Zion's, etc., Institution*, 111 U. S. 62, 28 L. Ed. 352, followed in *Willis v. Belleville Nail Co.*, 111 U. S. 65, 28 L. Ed. 354. See, also, §§ 3408, 3412 and 3413 as amended by Act of Feb. 8, 1875, 18 Stat. L. 311; 3417, declaring that chapter not to apply to national banks, with certain exceptions. See, also, ante, "In General," IV, C, 3, a, (2), (b), bb, (aa).

As tax to meet incident expenses and not a revenue bill.—But the law imposing such tax to meet the incident expenses is not a revenue bill. *Twin City Bank v. Nebeker*, 167 U. S. 196, 202, 42 L. Ed. 134. See the title STATUTES, ante, p. 62.

part of a system operated in other states, and the state is not precluded from taxing the property because the state has not created the company or conferred a franchise upon it, or because it derives rights or privileges under the act of July, 1866 (to aid in the construction of telegraph lines), or is engaged in interstate commerce.³³

Telegraph Companies Employed as Federal Agencies.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 200, 202, 203.

As Interstate Commerce.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 295, 334, 376, et seq.; 451, et seq.

(2) *Federal Taxation.*—An "express business," to be taxable as such under the Internal Revenue Law, must be regular as to route or time, or both.³⁴

d. *Gas Companies.*—See note.³⁵

e. *Insurance Companies.*—The rate and extent of taxation by the state creating an insurance corporation may be limited by its charter in the absence of a constitutional prohibition of such limitation.³⁶

Corporate Objects Changed.—But such corporation does not continue to enjoy such exemption after its corporate objects and business are changed by legislation enacted subsequent to the adoption of a constitution forbidding such limitation.³⁷

Under Interstate Commerce Clause.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 293, 374, et seq.

Foreign Insurance Companies.—See the titles INSURANCE, vol. 7, p. 83,

33. *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 424, 47 L. Ed. 1116. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 243, 349; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 456, 458, et seq.

34. **Express business defined as involving the idea of regularity.**—*Retzer v. Wood*, 109 U. S. 185, 187, 27 L. Ed. 900. See, also, EXPRESS, vol. 6, p. 211. And see the title EXPRESS COMPANIES, vol. 6, p. 212.

35. **Gas companies.**—Where an article (as illuminating gas) which, under the internal revenue acts, is taxable when made and "sold," but is not taxable when made by the party "for his own use," is made by trustees appointed by the party using it, a city under obligatory and fixed arrangements with such party's creditors, at an establishment of which the party using the article has apparently the ultimate ownership, but which, till certain debts due by him, and contracted in order to build and enlarge the establishment, are paid, is held and managed exclusively by the trustees, under an arrangement that the party using may have the article at a certain price, and that all clear profits shall be set aside as a sinking fund for the payment of the principal due the creditors,—such article, when furnished to the debtor at a price fixed, is "sold," and taxable; though apparently the sale is chiefly for the purpose of providing, in the manner agreed on, a sinking fund to pay the debts of the party using it. *Philadelphia v. Collector*, 5 Wall. 720, 18 L. Ed. 614, applying the Internal Revenue Act of July 1, 1862, and the supplement thereto of March 3, 1863.

36. **Insurance companies.**—*Planters' Ins.*

Co. v. Tennessee, 161 U. S. 193, 40 L. Ed. 667; *Phoenix Fire, etc., Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660; *Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. Ed. 664.

Companies organized subsequent to adoption of constitutional prohibition.—

An insurance company incorporated under an act containing a statutory limit of taxation passed prior to the adoption by the state of a constitution forbidding such limitation of taxation, where the organization of such company is made subsequently to the adoption of such constitution and its coming into force, is subject to the constitutional provision regarding taxation, and cannot claim the benefit of the limitation on the taxing power. *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 40 L. Ed. 667.

A grant of "all the rights and privileges" which had been granted by a prior act to another corporation, in a state statute incorporating an insurance company, does not exempt the new company from taxation beyond a statutory limit conferred upon such other company by the act incorporating it. *Phoenix Fire, etc., Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660.

So of the right to "organize with all the forms, officers, terms, powers, rights, reservations, restrictions, and liabilities given to and imposed upon" an older named company. *Home Ins., etc., Co. v. Tennessee*, 161 U. S. 198, 40 L. Ed. 669.

37. *Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. Ed. 664. As to plea of *res judicata*, see ante, "Application of Doctrine of *Res Judicata*," IV, A, 5. See, generally, post, "Exemptions from Taxation," V.

and references; INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 293, 374, et seq.

f. *Interstate Bridge and Bridge Company*—(1) *State Taxation*.—A state may tax an interstate bridge over a bounding river, belonging to a corporation created by itself, upon that part of its tangible property within its jurisdiction, and also the franchise granted by the state.³⁸

(2) *Municipal Taxation*.—See ante, "Taxation as Taking of Property," III, A, 1, h. See the titles DUE PROCESS OF LAW, vol. 5, p. 586; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 359. See, also, the title CONSTITUTIONAL LAW, vol. 4, p. 201. A bridge, or the part thereof within the corporate limits of a municipality, is subject to municipal taxation, when the right has never been waived or contracted away. A stipulation against any waiver by the grant to the bridge company reserved all the city's rights.³⁹

g. *Manufacturing Corporations*.—Manufacturing corporations are sometimes taxed in a peculiar and favorable manner.⁴⁰

h. *Railroad and Canal Companies*—(1) *State or Territorial Taxation*.—Railroad property is taxable like other property when within a state's jurisdiction.⁴¹

Classification.—The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the state in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it.⁴²

38. State taxation of interstate bridge and bridge company.—Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 622, 43 L. Ed. 823; Henderson Bridge Co. v. Henderson City, 173 U. S. 624, 43 L. Ed. 835; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 153, 41 L. Ed. 953. See the titles CONSTITUTIONAL LAW, vol. 4, p. 349; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 359, et seq. See, also, ante, "Taxation as Taking of Property," III, A, 1, h.

A state tax on the capital stock of a bridge company formed by the consolidation of two state corporations of different states, and maintaining a bridge over the Mississippi river under authority of an act of congress, was not a tax on franchises conferred by the federal government, but on those conferred by the state, and as such not open to objection. Keokuk, etc., Bridge Co. v. Illinois, 175 U. S. 626, 632, 44 L. Ed. 299; Central Pac. R. Co. v. California, 162 U. S. 91, 40 L. Ed. 903; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953. See the title CONSTITUTIONAL LAW, vol. 4, p. 194.

39. Municipal taxation.—Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 609, 43 L. Ed. 823; S. C., 173 U. S. 624, 43 L. Ed. 835.

The ordinance of a city giving a bridge company authority to construct a bridge across a navigable river to the low-water mark on the opposite side, where the limits of the city extend to the low-water mark on the opposite side and the city expressly reserved all rights of taxation, cannot be construed as an exemption from taxation on the part of the city as to the bridge between low-water mark on

the opposite sides of the river. No contract right was impaired. Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 617, 43 L. Ed. 823; S. C., 173 U. S. 624, 43 L. Ed. 835.

Exemption of agricultural lands from municipal taxation.—See the title CONSTITUTIONAL LAW, vol. 4, p. 398.

Railroad bridge as real estate.—See post, "State or Territorial Taxation," IV, C, 3, h, (1).

40. Horn Silver Min. Co. v. New York, 143 U. S. 305, 317, 36 L. Ed. 164.

Manufacturing corporations under laws of Massachusetts.—Under the laws of Massachusetts and the provisions of their charters, manufacturing corporations enjoy great privileges adapted to the purposes of private profit, and by the laws of the state they are exempt from all other taxation, municipal or state, except a property tax on their real estate and machinery, which is based on a valuation in the same manner as taxes are imposed on the property of individuals. Hamilton Co. v. Massachusetts, 6 Wall. 632, 638, 18 L. Ed. 904. See the title CORPORATIONS, vol. 4, p. 630. See, also, ante, "Manufactories," V, G, 5.

41. Taxable by state.—See the cases cited infra under this subdivision.

Under provisions of federal constitution.—See ante, "Under Guaranty of Equal Protection of the Laws in Fourteenth Amendment and Federal Constitutional and Laws Generally," III, A, 2, b, (1).

Railroad property in military reservation.—Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 29 L. Ed. 264. See ante, "Nature and Extent," III, D, 1, b.

42. Classification.—Kentucky Railroad

Percentage of Gross Earnings.—Other taxation is sometimes substituted by a tax upon the gross earnings, without conflicting with a constitutional requirement that no "discrimination be made in taxing different kinds of property," and taxation "shall be in proportion to the value of the property taxed,"⁴³ or the annual net income, with exemption from other taxes.⁴⁴ And after acceptance of the act taxing the gross earnings in lieu of other taxes, it being optional, the liability to pay the gross earnings tax for the current year was not affected by the subsequent repeal thereof; and if it were released, liability to taxation under the general tax laws would attach at once in its place, whether such assessment was made before or after such repeal;⁴⁵ but if it did not pay the gross earnings tax, its property became liable to assessment and taxation, as the property of individuals in the several counties.⁴⁶

Not an Exemption of Other Property—Lands Granted to Railroad Company.—Such a method does not exempt the other property, such as lands granted to it, but merely changes the mode of taxation.⁴⁷ Such commutation,

Tax Cases, 115 U. S. 321, 339, 29 L. Ed. 414; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 453, 41 L. Ed. 1069; *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 394, 35 L. Ed. 1051.

"So, the fact that the legislature has chosen to call a railroad, for purposes of taxation, real estate, does not identify it with farming lands and town lots, in such a sense as imperatively to require the employment of the same machinery and methods for all, in the process of valuation for purposes of taxation." *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. Ed. 414. See the title CONSTITUTIONAL LAW, vol. 4, p. 397. See, also, post, "Valuation," VI, B.

Under constitutional requirement of equality and uniformity.—*State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. See, generally, ante, "Classification of Property for Taxing Purposes," III, A, 2, b, (3), (c).

Tax to pay proportionate part of expense of supervision.—"The legislative and constitutional provision of the state, that taxation of property shall be equal and uniform and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the state to meet the special service required." *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386, 394, 35 L. Ed. 1051. See the title CONSTITUTIONAL LAW, vol. 4, p. 373.

43. *McHenry v. Alford*, 168 U. S. 651, 654, 664, 42 L. Ed. 614, followed in *Stearns v. Minnesota*, 179 U. S. 223, 236, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201; *Railroad Companies v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091; *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 38 L. Ed. 706; *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 556, 50 L. Ed. 860.

"While the language of the Dakota organic act is not the same as that of the Minnesota constitution, in that the Min-

nesota constitution by implication requires the taxation of all property except that by its terms specifically exempted, and this act makes no provision in respect to the matter of exemption; yet in respect to property subject to taxation, it, like the Minnesota constitution, requires taxation in proportion to the value of the property taxed. It is doubtless true that it has been held that forbidding an exemption from taxation and requiring taxation according to the 'true value in money' forbids taxation otherwise than in accordance with established general rules in respect to valuation and prevents a commutation on a different basis; yet there have been rulings of the Supreme Court of Minnesota to the effect that commutation is not the same as exemption, or forbidden by a constitutional provision which forbids exemption, and that it may sometimes be the surest way of reaching taxation according to the 'true value in money,' and is, therefore, not necessarily an infringement of a constitutional provision requiring such taxation." *Stearns v. Minnesota*, 179 U. S. 223, 236, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201. See ante, "Commutation of Taxes," III, A, 2, b, (3), (e). See the title CONSTITUTIONAL LAW, vol. 4, p. 402. See ante, "Distinctions," V, A, 2; "Power of State Legislature," V, B, 1; post, "Valuation," VI, B.

44. **Annual net income.**—*Savannah v. Jesup*, 106 U. S. 563, 27 L. Ed. 276.

45. *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 270, 38 L. Ed. 706.

46. *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 271, 38 L. Ed. 706.

47. *McHenry v. Alford*, 168 U. S. 651, 660, 42 L. Ed. 614, construing the Dakota Act of 1883.

"This court, in *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, at p. 271, 38 L. Ed. 706, in speaking of the act of 1889, which in this particular (that of substituting an assessment upon gross earnings) is similar in substance to the act of 1883.

however, amounts to a partial or limited exemption from taxation.⁴⁸ And a state's power to so tax is clear.⁴⁹ And the acceptance of the act may constitute a contract with the corporation not to be subsequently impaired by the state.⁵⁰ Except where the state constitution required that all property should be uniformly taxed.⁵¹

Repeal of Provision and Right of Municipality to Tax.—The repeal of the provision for such taxation does not necessarily restore the power of municipalities to tax the property as other property is taxed.⁵²

said that the act did not exempt the property of the railroad company from taxation, but that it merely substituted one method of taxation for another upon the terms and conditions specified." *McHenry v. Alford*, 168 U. S. 651, 661, 42 L. Ed. 614. See, also, *Stearns v. Minnesota*, 179 U. S. 223, 238, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201, where the percentage paid, though derived wholly from gross earnings, is said to be a commutation tax on both railroad and granted lands.

The objection made to the act of 1883, that it violates the fourteenth amendment, is untenable under the views above expressed. *McHenry v. Alford*, 168 U. S. 651, 673, 42 L. Ed. 614.

A specific annual tax of one per cent on the cost of the road, with the right to tax gross earnings, in lieu of all other taxes, merely referred to the railroad itself and did not exempt lands not used or necessary in working the road. *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805.

48. *Savannah v. Jessup*, 106 U. S. 563, 27 L. Ed. 276.

49. Where lands were donated by congress to the state not to be used by it for its own benefit and in its own way, but were conveyed to the state in trust with the understanding that, as trustee, it should use them in the best possible manner for accomplishing the purposes of the trust, if it could exempt from all taxation, as it might, it might with equal propriety say that it should be subjected to taxation in only a limited way, as by a commutation tax on the gross earnings. *Stearns v. Minnesota*, 179 U. S. 223, 240, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201. See, also, *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 556, 50 L. Ed. 860.

Bonus on earnings of railroad.—*Railroad Co. v. Maryland*, 21 Wall. 456, 22 L. Ed. 678. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 450.

Tax on corporation measured by percentage on value of stock.—A tax upon railroad and canal companies, upon the actual cash value of every share of its capital stock; with a proviso that when the line of the railroad or canal belonging to a company liable to the tax lay partly in the state and partly in an adjoining state or states, the company

should only be required to pay the tax on such number of the shares of its capital stock as would be in that proportion to the whole number of shares, which the length of the road or canal within the limits of the state should bear to the whole length of such road or canal, was not imposed upon the shares of the individual stockholders, or upon the property of the corporation, but was a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock,—a rule which, though an arbitrary one, was approximately just in this case. *The Delaware R. Tax*, 18 Wall. 206, 21 L. Ed. 888. See the title DUE PROCESS OF LAW, vol. 5, p. 542.

50. **As irrevocable contract.**—*New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352, where a contract between the state and a railroad company that the latter should be taxed one-half of one per cent per annum on the cost of the railroad, was held irrevocable under the impairment of obligation of contract clause. See, also, *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 43, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87. See the title CORPORATIONS, vol. 4, pp. 701, 702.

In *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 556, 50 L. Ed. 860, it was held that a statute providing that a corporation should pay "an annual tax of one per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation, or any other law of this state," was not a mere gratuity, but an irrevocable contract. See, also, *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645, following *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Stearns v. Minnesota*, 179 U. S. 223, 238, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201, where there was held to be an irrevocable contract with the state that a tax of three per cent on the gross earnings should be the only tax on the company.

51. *Railroad Companies v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091, construing the constitution of Tennessee of 1870.

52. Where a railroad corporation enjoyed an immunity from all taxation in

Unit Rule.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 349; DUE PROCESS OF LAW, vol. 5, p. 542; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 458, et seq. A state has a right to tax all the property in the state of an interstate railroad, or other corporation, and to tax it at its value as an organic portion of a larger whole.⁵³ And while allowance must be made for property permanently outside the state, particularly where of exceptional value,⁵⁴ yet, in laying a franchise tax, a state may tax all property which is merely temporarily out of its jurisdiction.⁵⁵

Assessment of Railroad Property within Jurisdiction as Unit by State or Territorial Authorities, and Apportionment of Value.—The state or territorial authorities may be empowered by law to assess the railroad property within the jurisdiction of the taxing power, or certain kinds of such property, as a whole, and then to apportion the valuation among the local taxing subdivisions.⁵⁶ And in that case the local authorities have no right to assess and value such property.⁵⁷ But such authority is limited to that conferred by ex-

cess of one-half of one per cent upon its annual net income, subject, however, to the right of the state to withdraw it altogether, and by a subsequent act this limited exemption was withdrawn (*Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185), it was held that a municipal corporation did not have the power thereafter, under the terms of the repealing act, to tax such of the property of the company, within such corporation, as was taxable under its charter, as the act repealing the partial exemption established a system of taxation by the state, for its benefit exclusively, of the property of railroad companies. *Savannah v. Jesup*, 106 U. S. 563, 567, 568, 27 L. Ed. 276, distinguishing *Bailey v. Maguire*, 22 Wall. 215, 22 L. Ed. 850.

53. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 598, 51 L. Ed. 636; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 47 L. Ed. 1116.

54. *Fargo v. Hart*, 193 U. S. 490, 48 L. Ed. 761; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077; *Union, etc., Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150; *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 592, 51 L. Ed. 636.

55. **Franchise tax.**—*New York Cent., etc., R. Co. v. Miller*, 202 U. S. 584, 593, 595, 50 L. Ed. 1155.

56. **Assessment of railroad property within jurisdiction as unit by state or territorial authorities.**—*California v. Central Pac. R. Co.*, 127 U. S. 1, 29, 32 L. Ed. 150; *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098. See, also, *Maricopa, etc., R. Co. v. Arizona*, 156 U. S. 347, 352, 39 L. Ed. 447.

Frequently railroads are separated from other property, assessed by a state board, and the taxes collected therefrom applied to the general purposes of the state. Sometimes, it is true, a portion of the taxes thus collected is distributed pro rata to the counties along the lines of the

roads, but the power of the state to apply the taxes from railroad property to only state purposes cannot be doubted, and is often exercised. And the state has equal power to say that the average rate of taxation shall be determined, not by the rates upon other property in the immediate localities in which the railroads are located, but by those upon all property wherever situated in the state. *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 299, 50 L. Ed. 744; *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 414, 30 L. Ed. 118; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 522, 28 L. Ed. 1098, the case of a territorial board. See ante, "Requirement of Equality and Uniformity," III, A, 2, b.

Local apportionment of unlocated personal property.—The state having the undoubted authority to fix the situs of unlocated personal property, and having lawfully distributed it proportionately between the several counties traversed by the road, it thereby became subject to the same rate of taxation as other property in the respective counties. This involved no inequality, and violated no provision of either the state or federal constitution. It certainly did not involve a failure to extend to the plaintiff in error the equal protection of the laws. *Columbus, etc., R. Co. v. Wright*, 151 U. S. 470, 483, 38 L. Ed. 238.

"Without reviewing authorities on this subject, the principle involved in the case under consideration is not distinguished from the principle involved in *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663, and in *Kentucky Railroad Tax Cases*, 115 U. S. 321, 339, 29 L. Ed. 414; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585, and in *Charlotte, etc., R. Co. v. Gibbs*, 142 U. S. 386, 35 L. Ed. 1051." *Columbus, etc., R. Co. v. Wright*, 151 U. S. 470, 482, 38 L. Ed. 238. See the title CONSTITUTIONAL LAW, vol. 4, p. 398.

57. *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098.

press enactment, and any assessment beyond that is illegal and void.⁵⁸

Improvements Assessed Locally.—And the "improvements" are sometimes required to be assessed locally.⁵⁹

Railroad Bridge.—A railroad bridge is liable to taxation as real estate.⁶⁰

Franchise Granted by Federal Government.—See the title CONSTITUTIONAL LAW, vol. 4, p. 193.

Foreign Railroad Companies.—See post, "Foreign Corporations," IV, C, 3, j. See, also, note.⁶¹

Taxation of Railroad in Indian Reservation.—See the title INDIANS, vol. 6, p. 957.

(2) *Municipal Taxation.*—Under a charter authorizing a municipal corporation to assess every kind of taxable property situated within its bounds, railroad

58. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 415, 30 L. Ed. 118.

But where it is plain that, in regard to a railroad, the state board has power to assess only five things, the franchise, roadway, roadbed, rails and rolling stock, and the county boards are authorized to assess all the rest of the property, if the state board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be pro tanto illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void, and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal. *California v. Central Pac. R. Co.*, 127 U. S. 1, 29, 32 L. Ed. 150, following *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118.

Steamers and ferry boats.—Where, by an act of the legislature the state board is required to include in their assessment steamers engaged in transporting passengers and freights across waters which divide a railroad, and this act was held by the state supreme court to be contrary to the constitution of California, and steamboats were held to be assessable by the county board, and not by the state board, the federal supreme court, following that decision, and that of *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118, holds that the assessment of the steamers of a railroad company by the state board is in violation of the constitution of California, and void; and, being inseparably blended with the other property assessed, it makes the whole assessment void. *California v. Central Pac. R. Co.*, 127 U. S. 1, 32 L. Ed. 150. And see post, "Apportionment of Valuation and Unit Rule," VI, B, 3. As to sites, see ante, "Railroad Property," IV, A, 2, b, (2), (b), cc.

Superstructures on right of way as realty.—*New Mexico v. United States Trust Co.*, 174 U. S. 545, 547, 551, 43 L. Ed. 1079. As to exemption of right of way, see post, "Exemptions from Taxation," V.

59. **Improvements.**—Under the constitution and laws of California it would seem that fences erected upon the roadway, even if owned by the railroad company, must be separately assessed, as "improvements," in the mode required in the case of depots, station grounds, shops, and buildings owned by the company; namely, by local officers in the county where they are situated. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 412, 30 L. Ed. 118, followed in *San Bernardino County v. Southern Pac. R. Co.*, 118 U. S. 417, 421, 30 L. Ed. 125.

Burden of separating legal from illegal.—And when unauthorized property, such as improvements, were included, it was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for, such amount, if any, as was justly due. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 415, 30 L. Ed. 118.

60. **Railroad bridge.**—A railroad bridge is a "building or structure," within the proper meaning of the words as used in the West Virginia Code. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 147, 17 L. Ed. 571, and is liable to taxation as real estate. *Pittsburgh, etc., Railway v. Board of Public Works*, 172 U. S. 32, 43, 43 L. Ed. 354.

Whether included in the value of the track, or as a separate structure. *Pittsburgh, etc., Railway v. Board of Public Works*, 172 U. S. 32, 43, 43 L. Ed. 354; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 429, 31 L. Ed. 1031. See ante, as to bridges generally, "Interstate Bridge and Bridge Company," IV, C, 3, f.

61. **After sale to foreign corporation.**—*Chicago, etc., Railroad v. Guffey*, 122 U. S. 561, 573, 30 L. Ed. 1135, where a statute authorizing such sale and repealing exemption, is construed. See post, "Transfer of Immunity from Taxation," V, F.

property may be assessed unless specially exempted; such exemption may be by implication.⁶²

Assessment of Railroad Property as Unit by State Authorities.—See ante, "State or Territorial Taxation," IV, C, 3, h, (1).

Effect of Repeal of Provision for Commutation Tax to State.—See ante, "State or Territorial Taxation," IV, C, 3, h, (1).

Improvements Assessable Locally.—See ante, "State or Territorial Taxation," IV, C, 3, h, (1).

(3) *Federal Taxation.*—A railroad may be taxed for federal purposes.⁶³

Tax on Income, Profits, Dividends and Interest Payments.—See ante, "Former Taxes on Incomes, Gains, etc., as Duties and Excises," III, C, 3, b, (2).

(4) *Street Railroads.*—See the title CONSTITUTIONAL LAW, vol. 4, p. 397.⁶⁴

i. *Trust Companies.*—In New York trust companies are taxable, for local purposes, upon the actual value of their capital stock and are subjected to a franchise tax, in the nature of an income tax, payable to the state for state purposes.⁶⁵

j. *Foreign Corporations.*—See, also, the titles CONSTITUTIONAL LAW, vol. 4, pp. 353, 468; FOREIGN CORPORATIONS, vol. 6, p. 317; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 374. Foreign corporations, whether organized under the laws of a state of the Union or a foreign government, may be taxed by another state, for the privilege of conducting their corporate business within the latter.⁶⁶

62. Municipal taxation.—Union Pac. R. Co. v. Cheyenne, 113 U. S. 516, 28 L. Ed. 1098. See, also, Central R., etc., Co. v. Wright, 164 U. S. 327, 41 L. Ed. 454, where, municipalities, under the provisions of the laws of Louisiana, the charter of the "Central Railroad and Canal Company," of Louisiana, as amended by act of Dec. 14, 1835, changing its name and providing further that "no municipal corporation or other corporation shall have power to tax the stock of the company, but may tax any property, real or personal, within the jurisdiction of said corporation in the ratio of taxation of like property," are held to have the power to tax exactly as authorized, i. e., to tax the real and personal property of the railroad in the jurisdiction in the ratio of taxation of like property, and are not confined to the tax of one-half per cent upon the net annual income, as the state is.

63. Federal taxation.—Barnes v. The Railroads, 17 Wall. 294, 306, 21 L. Ed. 544.

64. Street railroads.—Metropolitan St. R. Co. v. New York State Board, 199 U. S. 1, 47, 50 L. Ed. 65; Twenty-Third St. R. Co. v. New York State Board, 199 U. S. 53, 50 L. Ed. 87.

65. Trust companies.—Mercantile Bank v. New York, 121 U. S. 138, 160, 30 L. Ed. 895, followed in Newark Banking Co. v. Newark, 121 U. S. 163, 30 L. Ed. 904. As to discriminations against national bank shares, see ante, "Discrimination in Mode of Assessment," IV, C, 3, a, (1), (c), bb, (bb), fff.

66. Foreign corporations.—Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029; Paul v. Virginia, 8 Wall.

168, 19 L. Ed. 357; Ducat v. Chicago, 10 Wall. 410, 19 L. Ed. 972.

Ohio.—The supreme court of Ohio has expressly held that the section of the Code of Ohio, relating to the taxation of corporations generally (§ 2744), applies to foreign as well as domestic corporations. Scottish Union, etc., Ins. Co. v. Bowland, 196 U. S. 611, 625, 49 L. Ed. 614.

Illinois.—But in Railroad Co. v. Vance, 96 U. S. 450, 455, 24 L. Ed. 752, followed in Indianapolis, etc., R. Co. v. Vance, 154 U. S. 638, 24 L. Ed. 757, it was held that the state board of equalization was not authorized to assess the capital stock of companies or associations managing property or engaging in business in Illinois, unless they were created under the laws of that state, following the settled construction of that statute by the supreme court of Illinois.

Foreign manufacturing corporations.—Horn Silver Min. Co. v. New York, 143 U. S. 305, 316, 36 L. Ed. 164, where the corporation in question was held not to be a manufacturing corporation.

A foreign corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the state, is not denied the equal protection of the law when subjected to a tax from which are exempted other corporations, foreign and domestic, which wholly manufacture the same class of goods within the state; as such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state. New York State v. Roberts, 171 U. S. 658, 662, 43 L. Ed. 323.

And the tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property.⁶⁷

Shares of Stock Held within State.—As to Corporations formed and having their property and business elsewhere, the state must tax the stock held within the state if it is to tax anything, and assuming the right to tax stock in foreign corporations to be conceded, if it does tax that stock it may take into account that the property and franchise of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the state cannot look behind the present net values of different stocks.⁶⁸ A state statute taxing stock in railroads incorporated in other states is not unconstitutional under the fourteenth amendment, because no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in that state.⁶⁹

Extent Discretionary.—The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of the federal supreme court.⁷⁰

Assessment on Capital Stock and Franchises of Foreign Corporation for Leased Railroad.—The state can make the leased property of a domestic corporation liable to assessments for such leased property upon capital stock and franchise against the lessee, a foreign corporation, although the property is managed and operated by a corporation deriving its existence from, and holding its stock and maintaining its organization under, the laws of another state and not under the laws of the state laying the tax.⁷¹

"Doing Business" Defined.—See *DOING BUSINESS*, vol. 5, p. 471.

Under Interstate Commerce Clause.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 369, et seq.; 409.

D. Federal, State and Municipal Securities—1. **UNITED STATES SECURITIES.**—United States bonds are taxable by the United States,⁷² but of course not by the states.⁷³

2. **STATE AND MUNICIPAL SECURITIES.**—A state may tax its creditors upon its debts due to them.⁷⁴ But whatever may be the wise rule—looking at the

67. **Tax on capital a tax on property.**—*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25, 35 L. Ed. 613, followed in *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 35 L. Ed. 621; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 209, 29 L. Ed. 158; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 552, 31 L. Ed. 790.

68. **Shares of stock held within state.**—*Kidd v. Alabama*, 188 U. S. 730, 732, 47 L. Ed. 669. See *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. Ed. 102, *Sturges v. Carter*, 114 U. S. 511, 521, 29 L. Ed. 240, construing Ohio laws.

69. *Kidd v. Alabama*, 188 U. S. 730, 47 L. Ed. 669.

Stock in railroads outside the state held by a Georgia corporation is taxable in Georgia. *Wright v. Louisville, etc., R. Co.*, 195 U. S. 219, 220, 49 L. Ed. 167.

70. **Extent discretionary.**—*Horn Silver Min. Co. v. New York*, 143 U. S. 305, 317, 36 L. Ed. 164.

It may be estimated according to the amount of its business or capital without the state. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 317, 36 L. Ed. 164.

Or by the consideration only of the capital employed within the state, and, whichever is applied, it is not within the

power of the federal court to grant any relief however great the hardship upon it. Application must be made to the state legislature. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 317, 36 L. Ed. 164.

Securities deposited with insurance commissioner by foreign insurance company.—*Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 627, 49 L. Ed. 614. See the title *INSURANCE*, vol. 7, p. 83.

71. *Railroad Co. v. Vance*, 96 U. S. 450, 456, 24 L. Ed. 752, followed in *Indianapolis, etc., R. Co. v. Vance*, 154 U. S. 638, 24 L. Ed. 757.

72. **United States bonds.**—*Murdock v. Ward*, 178 U. S. 139, 148, 44 L. Ed. 1009. See acts of July 1, 1862, 12 Stat. 474; June 30, 1864, 13 Stat. 281, 479.

73. **Not taxable by states.**—See the title *CONSTITUTIONAL LAW*, vol. 4, p. 196, et seq. See, also, ante, "Nature and Extent," III, D. 1, b.

Investments of corporate assets therein.—See ante, "Corporate Stock," IV, C, 2, d; "Investment of Capital in National Securities," IV, C, 3, a, (1), (c), bb, (dd); post, "Corporate Franchise," IV, E, 3.

74. **State and municipal securities.**—"A state may undoubtedly tax any of its

necessity in a commercial country for its prosperity that its public credit should never be impaired—as to the taxability of public securities, it is settled that any tax levied upon them cannot be withheld from the interest payable thereon, without impairing the contract obligation.⁷⁵ And the same is true of municipalities, as political agencies of the state.⁷⁶

Not Taxable by United States.—See ante, “Infringement on Rights of States,” III, C, 1, b, (2).

Public Debt of Another State Taxable.—See note.⁷⁷

E. Franchises, Rights and Privileges—1. INTANGIBLE PROPERTY GENERALLY.—A state may tax at its real value all intangible property within its jurisdiction.⁷⁸

2. FRANCHISES GENERALLY.—There is no constitutional objection to the taxation of franchises by a state. The right to subject them to a share in the burden of supporting the government is conceded,⁷⁹ when granted by a state.⁸⁰

creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched.” *Murray v. Charleston*, 96 U. S. 432, 445, 24 L. Ed. 760. See *Hartman v. Greenhow*, 102 U. S. 672, 683, 26 L. Ed. 271, where the question is alluded to as one of doubt.

Although it is not the policy of the government issuing them to do so. *Mercantile Bank v. New York*, 121 U. S. 138, 162, 30 L. Ed. 895, followed in *Newark Banking Co. v. Newark*, 121 U. S. 163, 30 L. Ed. 904.

“A tax on income derived from contracts, if it does not prevent the receipt of the income, cannot be said to vary or lessen the debtor’s obligation imposed by the contracts.” *Murray v. Charleston*, 96 U. S. 432, 446, 24 L. Ed. 760. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 804.

75. Not deductible from interest.—*Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760, followed in *Hartman v. Greenhow*, 102 U. S. 672, 683, 26 L. Ed. 271.

Coupons detached from bonds fall within this rule.—*Hartman v. Greenhow*, 102 U. S. 672, 685, 26 L. Ed. 271; *McGahey v. Virginia*, 135 U. S. 662, 669, 34 L. Ed. 304.

76. Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760. See, also, *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. Ed. 825; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 31, 31 L. Ed. 607; *Hartman v. Greenhow*, 102 U. S. 672, 683, 26 L. Ed. 271; *Clark v. Iowa City*, 20 Wall. 583, 22 L. Ed. 427.

Debts are not property. A nonresident creditor of a city cannot be said to be, in virtue of a debt which it owes him, a holder of property within its limits. *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760.

77. Public debt of another state taxable.—*Bonaparte v. Tax Court*, 104 U. S. 592, 594, 26 L. Ed. 845. See *Pollock v. Farmer’s Loan, etc., Co.*, 157 U. S. 429,

585, 39 L. Ed. 759. See the title **CONSTITUTIONAL LAW**, vol. 4, pp. 345, 347.

The registered public debt of one state, although exempt from taxation by the debtor state, or actually taxed there, may nevertheless be taxed by another state when owned by a resident of the latter state. *Bonaparte v. Tax Court*, 104 U. S. 592, 594, 26 L. Ed. 845.

78. Intangible property generally.—In *Adams Express Co. v. Ohio*, 166 U. S. 185, 41 L. Ed. 965, it is said (pp. 218, 219): “In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the federal constitution which restrains a state from taxing at its real value such intangible property. * * * It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts or obligations.” *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 39, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87. See, also, *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960.

79. Franchises generally.—*Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 35, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

In order to tax a franchise or privilege, the privilege or facility must exist in fact, but it is not necessary that it should be created by the government. *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. Ed. 786.

80. Franchises granted by state.—*Veazie Bank v. Fenno*, 8 Wall. 533, 547, 19 L. Ed. 482.

Where the franchises granted were subject to taxation, the fact that upon equitable considerations the state has consented that a certain reduction shall, in some cases, be made on account of payments made and said to be “in the nature of a tax,” does not entitle every holder of a franchise to a like reduction. It is akin to an exemption, and there is noth-

Inclusion of Franchise in Valuation of Property.—Whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property, and which may properly be included in their valuation.⁸¹

Ferry Franchise.—See the titles *FERRIES*, vol. 6, p. 281; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 367.

3. CORPORATE FRANCHISE.—The rights and privileges conferred by a corporate franchise granted by a state have value and constitute taxable property.⁸² And may be taxed at the discretion of the state within which they are exercised, if not limited by the charter, at any valuation or without any,⁸³ and the

ing in the federal constitution to prevent a state from granting exemption from taxation. *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 47, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892.

But not a portion of the tolls which the grantees of her franchises may exact. *State Freight Tax*, 15 Wall. 232, 278, 21 L. Ed. 146.

81. Inclusion of franchise in valuation of property.—*Adams Express Co. v. Ohio*, 166 U. S. 185, 219, 41 L. Ed. 965; *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 422, 47 L. Ed. 1116.

"The capital stock of a corporation and the shares in a joint stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges and good will of the concern." *Adams Express Co. v. Ohio*, 166 U. S. 185, 221, 41 L. Ed. 965.

They are not privilege taxes.—*Adams Express Co. v. Ohio*, 166 U. S. 185, 218, 41 L. Ed. 965. See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 349; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 458.

Under Kentucky constitution.—Under the requirement of § 171, that taxation "shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the taxes," taxation which is based upon income, license or franchise may be classified by the legislature. *Adams Express Co. v. Kentucky*, 166 U. S. 171, 181, 41 L. Ed. 960.

82. Corporate franchise.—*Central Pac. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903; *Philadelphia, etc., Steamship Co. v. Pennsylvania*, 122 U. S. 326, 345, 30 L. Ed. 1200; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 61, 22 L. Ed. 287; *The Delaware R. Tax*, 18 Wall. 206, 231, 21 L. Ed. 888; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 313, 36 L. Ed. 164. See, also, *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, 696, 39 L. Ed. 311; *Ashley v. Ryan*, 153 U. S. 436, 38 L. Ed. 773, and cases cited; *Osborn v. United States*

Bank, 9 Wheat. 738, 862, 6 L. Ed. 204; *Hamilton County v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Society for Savings v. Coite*, 6 Wall. 594, 607, 18 L. Ed. 897; *State Freight Tax*, 15 Wall. 232, 277, 21 L. Ed. 146; *State Railroad Tax Cases*, 92 U. S. 575, 603, 23 L. Ed. 663; *Farrington v. Tennessee*, 95 U. S. 679, 687, 24 L. Ed. 558; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 681, 43 L. Ed. 850; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 40, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87. See, also, ante, "Corporations and Corporate Stock," IV, C.

The franchise to do is an independent franchise and taxable.—*Adams Express Co. v. Ohio*, 166 U. S. 185, 224, 41 L. Ed. 965.

In the Kentucky laws taxing corporate franchises (§§ 4078-9-80-81, compilation of 1894) it is evident that the word "franchise" was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the state, that their intangible property should be assessed on the basis of the mileage of their lines within and without the state. But from the valuation on the mileage basis the value of all tangible property is to be deducted before the taxation is applied. *Adams Express Co. v. Kentucky*, 166 U. S. 171, 179, 41 L. Ed. 960.

Definition.—See the title *CORPORATIONS*, vol. 4, p. 630.

83. Discretion unlimited.—*California v. Central Pac. R. Co.*, 127 U. S. 1, 41, 32 L. Ed. 150; *The Delaware R. Tax*, 18 Wall. 206, 231, 21 L. Ed. 888; *Horn*

right is not affected by the way the capital stock is invested.⁸⁴ Unless a right to a granted exemption be shown.⁸⁵

Under Reserved Right to Alter or Repeal Charter.—The right reserved

Silver Min. Co. v. New York, 143 U. S. 305, 313, 36 L. Ed. 164.

As the granting of the privilege rests entirely in the discretion of the state, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the state in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the state in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the state and the corporation taxed. *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 228, 35 L. Ed. 994. See, also, *Home Ins. Co. v. New York*, 134 U. S. 594, 600, 33 L. Ed. 1025; *S. C.*, on previous hearings, 119 U. S. 129, 30 L. Ed. 350; *S. C.*, 122 U. S. appx., 636; *State Tax on R. Gross Receipts*, 15 Wall. 284, 293, 21 L. Ed. 164; *Provident Institution v. Massachusetts*, 6 Wall. 611, 631, 18 L. Ed. 907.

Under provisions of state constitution.—A tax upon the privileges of a corporation must be construed as subservient to the provision of the state constitution in force at the time, providing that "the property of all corporations for pecuniary profit shall be subject to taxation." *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 77, 46 L. Ed. 86.

Classification at different rate from other property.—See the title *CONSTITUTIONAL LAW*, vol. 4, pp. 394, 395.

May classify corporations and exempt some classes.—*New York State v. Roberts*, 171 U. S. 658, 660, 43 L. Ed. 323.

84. Not affected by way capital stock is invested.—Where a tax is imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles, from the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested. *New York State v. Roberts*, 171 U. S. 658, 664, 43 L. Ed. 323;

Society for Savings v. Coite, 6 Wall. 594, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907. *Pembina Consolidated Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025; *S. C.*, on previous hearings, 119 U. S. 129, 30 L. Ed. 350; *S. C.*, 122 U. S. 636. The principal case was followed in *Plummer v. Coler*, 178 U. S. 115, 132, 44 L. Ed. 998.

The fact that a portion of its capital stock is invested in United States securities is immaterial. *Home Ins. Co. v. New York*, 134 U. S. 594, 602, 33 L. Ed. 1025.

Franchise granted by another state to existing corporation not taxable.—*Louisville, etc., Ferry Co. v. Kentucky*, 188 U. S. 385, 398, 47 L. Ed. 513. See the titles *DUE PROCESS OF LAW*, vol. 5, p. 542; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 367.

85. Burden of showing exemption.—"Unless exempted in terms which amount to a contract, the privileges and franchises of a private corporation are as much the legitimate subject of taxation as any other property of the citizens which is within the sovereign power of the state." *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 897, followed in *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 393, 13 L. Ed. 461; *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 638, 18 L. Ed. 904; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 40, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87, distinguishing *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529, because there was in that case an express exemption from taxation. See, also, *State Bank v. Knoop*, 16 How. 369, 386, 401, 402, 14 L. Ed. 977; *People v. Commissioners*, 4 Wall. 244, 259, 18 L. Ed. 344; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *Farrington v. Tennessee*, 95 U. S. 679, 690, 694, 24 L. Ed. 558; *Railroad Commission Cases*, 116 U. S. 307, 328, 29 L. Ed. 636; *Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, 400, 27 L. Ed. 976.

Where a corporation returned its franchise for assessment, declined to resort to the remedy afforded by the state laws for the correction of the assessment as made if dissatisfied therewith, or to pay its tax and bring suit to recover back the whole or any part of the tax which is claimed to be illegal, its position is not one entitled to the favorable consideration of the court in a suit to recover such tax. *Central Pac. R. Co. v. California*, 162 U. S. 91, 127, 40 L. Ed. 903.

to the legislature to alter or repeal the charter of a corporation includes the right to tax a corporation upon its franchises as such instead of exacting license fees, as before prescribed.⁸⁶ The franchise tax may be in lieu of all other taxation, as in Massachusetts, where it is for state purposes only.⁸⁷

Corporations Engaged in Commerce.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 453, et seq.

Franchises Granted by Federal Government.—These are not taxable by the states.⁸⁸

Foreign Corporations.—See ante, "Foreign Corporations," IV, C, 3, j.

F. Imports and Exports.—As to definition, see ante, "Definitions," II, B. See, also, generally, EXPORTS AND IMPORTS, vol. 6, p. 210.

1. BY THE UNITED STATES—*a. Imports.*—See the title REVENUE LAWS, vol. 10, p. 838.

b. Exports.—**Prohibition in Federal Constitution.**—When the federal constitution says no tax or duty shall be laid on articles exported from any state, such articles cannot be taxed, directly or indirectly, and a tax on foreign bills of lading is void because it in effect is a tax on exports.⁸⁹ In other words the true construction of this constitutional provision "is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attaches to the export and not to the article before its exportation. Such has been the ruling of this court."⁹⁰

Remission of Tax on Articles Exported.—To remit on articles exported the tax which is cast upon other like articles consumed at home, while perhaps not technically a bounty on exportation, has some of the elements thereof. Congress may so remit taxes, but there is no compulsion upon it to do so.⁹¹

86. Under reserved right to alter or repeal charter.—*Schurz v. Cook*, 148 U. S. 397, 411, 37 L. Ed. 498. See post, "Exemptions from Taxation," V.

Right to reorganize not a contract.—See the title CORPORATIONS, vol. 4, p. 733, 734.

87. In lieu of all other taxes.—*Provident Institution v. Massachusetts*, 6 Wall. 611, 631, 18 L. Ed. 907.

A statute of Massachusetts which requires corporations having a capital stock divided into shares, to pay a tax of a certain percentage (one-sixth of one per cent) upon "the excess of the market value" of all such stock over the value of its real estate and machinery, is, under the settled course of decision in the state of Massachusetts on its constitution and laws, a statute which imposes a franchise tax, and is lawful, although not proportional, as required by the state constitution in respect to rates and taxes. *Hamilton Co. v. Massachusetts*, 6 Wall. 632, 18 L. Ed. 904; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907, affirmed.

88. Franchise granted by federal government.—*Central Pac. R. Co. v. California*, 162 U. S. 91, 112, 40 L. Ed. 903, citing *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118; *California v. Central Pac. R. Co.*, 127 U. S. 1, 32 L. Ed. 150. See the titles CONSTITUTIONAL LAW, vol. 4, p. 193; CORPORATIONS, vol. 4, p. 666; IN-

TERSTATE AND FOREIGN COMMERCE, vol. 7, p. 457. See, also, post, "Interstate Bridge and Bridge Company," IV, C, 3, f.

89. Tax cannot be laid directly or indirectly.—*Fairbank v. United States*, 181 U. S. 283, 289, 45 L. Ed. 862; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 356, 49 L. Ed. 1077.

90. Does not apply to article before exportation.—*Cornell v. Coyne*, 192 U. S. 418, 427, 48 L. Ed. 504, citing *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715; *Turpin v. Burgess*, 117 U. S. 504, 29 L. Ed. 988. See post, "Prohibition to States to Lay Duties on Exports," IV, F, 2, b, (5).

Articles manufactured for export.—"Subjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to prepare them for export." *Cornell v. Coyne*, 192 U. S. 418, 427, 48 L. Ed. 504. See the title REVENUE LAWS, vol. 10, p. 974. See, also, the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 330. See EXPORTS AND IMPORTS, vol. 6, p. 210.

91. Remission of tax on articles exported.—*Cornell v. Coyne*, 192 U. S. 418, 426, 48 L. Ed. 504. See the title BOUNTIES, vol. 3, p. 512.

Levying Duties at Intermediate Ports.—But it is too clear for argument that if vessels bound for a foreign country were compelled to stop at an intermediate port and pay into the treasury of the United States a duty upon their cargoes, such duty would be a tax upon an export and the place of its exaction would be of little significance.⁹²

Clause Refers to Foreign Commerce Alone.—But this clause, equally with the foregoing one prohibiting a state from laying duties on imports, refers only to commerce with foreign countries.⁹³

2. BY THE STATES—*a. Under the Commerce Clause of the Constitution.*—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 464-473.

b. Under Prohibition to States to Tax Imports and Exports.—(1) *The Constitutional Provision Stated.*—The constitution provides that no state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, with a view to raise a revenue for state purposes. And that the net produce of all duties and imposts, laid by any state on imports or exports shall be for the use of the treasury of the United States, and that all such laws shall be subject to the revision and control of congress.⁹⁴ Therefore, congress alone has the authority to levy duties.⁹⁵

Restriction on Taxing Power of States.—This prohibition is a restriction upon the power of the states to levy taxes, not upon the power to regulate commerce. The power given to congress to levy taxes could never be considered as abridging the right of the states on that subject, and they might consequently have exercised it, by levying duties on imports or exports, had the constitution contained no prohibition on the subject.⁹⁶

(2) *Meaning of Term "Imports and Exports."*—The words "imports" and "exports," as used in article 1, § 10, clause 2, of the United States constitution,

92. Levying duties at intermediate ports.—*Dooley v. United States*, 183 U. S. 151, 155, 46 L. Ed. 128.

93. Clause restricted to foreign commerce.—*Dooley v. United States*, 183 U. S. 151, 154, 46 L. Ed. 128. See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 330; REVENUE LAWS, vol. 10, p. 864, et seq.

94. Constitutional provision.—United States Constitution, art. 1, § 10, clause 2. *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 350, 43 L. Ed. 191; *Gibbons v. Ogden*, 9 Wheat. 1, 200, 201, 6 L. Ed. 23; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *New York City v. Miln*, 11 Pet. 102, 134, 9 L. Ed. 648; *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992; *Almy v. California*, 24 How. 169, 173, 16 L. Ed. 644; *Pervear v. Commonwealth*, 5 Wall. 475, 478, 18 L. Ed. 608; *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745; *Steamship Co. v. Portwardens*, 6 Wall. 31, 18 L. Ed. 749; *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101; *Waring v. The Mayor*, 8 Wall. 110, 121, 19 L. Ed. 342; *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 389; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L. Ed. 370; *Ward v. Maryland*, 12 Wall. 418, 426, 20 L. Ed. 449; *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517; *State Tax on R. Gross Receipts*, 15 Wall. 284, 296, 21 L. Ed. 164; *Railroad Co. v. Peniston*, 18 Wall. 5, 29, 21 L. Ed. 787; *Pace v. Bur-*

gess, 92 U. S. 372, 23 L. Ed. 657; *Cook v. Pennsylvania*, 97 U. S. 566, 572, 24 L. Ed. 1015; *Transportation Co. v. Wheeling*, 99 U. S. 273, 281, 25 L. Ed. 412; *Trade-Mark Cases*, 100 U. S. 82, 95, 25 L. Ed. 550; *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754; *People v. Commissioners*, 104 U. S. 466, 467, 26 L. Ed. 632; *Turner v. Maryland*, 107 U. S. 38, 27 L. Ed. 370, 372; *People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383, 384; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *Coe v. Errol*, 116 U. S. 517, 526, 29 L. Ed. 715; *Turpin v. Burgess*, 117 U. S. 504, 29 L. Ed. 988; *Brennan v. Titusville*, 153 U. S. 289, 302, 38 L. Ed. 719; *Emert v. Missouri*, 156 U. S. 296, 312, 39 L. Ed. 430; *Pittsburg, etc., Coal Co. v. Bates*, 156 U. S. 577, 39 L. Ed. 538; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590, 600, 39 L. Ed. 544; *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441, 449, 48 L. Ed. 254.

As to taxation of imports and exports by a state in the execution of its inspection laws, see the title INSPECTION LAWS, vol. 7, p. 22, et seq.

95. Congress alone may levy duties.—*Merritt v. Welsh*, 104 U. S. 694, 700, 26 L. Ed. 896; *Pervear v. Commonwealth*, 5 Wall. 475, 478, 18 L. Ed. 608; *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 283.

96. Restriction on taxing power of states.—*Gibbons v. Ogden*, 9 Wheat. 1, 201, 6 L. Ed. 23; *Transportation Co. v. Wheeling*, 99 U. S. 273, 282, 25 L. Ed. 412.

include only personal property.⁹⁷ They refer to that which may be the subject of commerce, such as goods and merchandise.⁹⁸

Persons.—Free human beings are not "imports" or "exports," within the meaning of this clause. They apply only to articles of property, not passengers voluntarily coming into the country.⁹⁹

(3) *Determination of Question*—(a) *In General*.—The fact that the duty is exacted upon the arrival of the goods certainly creates a presumption in favor of the theory that the tax is upon imports. At the same time it is possible that it may also be a duty upon an export. The mere fact that the duty is not laid at the port of departure is by no means decisive against its being such.¹ But in determining whether this clause of the constitution has been violated, the court will look to the substance rather than the form of the tax.²

(b) *Tax on Goods Passing from One State to Another*.—The words "duties, imposts and excises" were used in the constitution in their natural and obvious sense.³ Nor, in arriving at what those terms embrace, is there any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the constitution was framed and ratified.⁴ Therefore, it is held that while the words "import" and "export" are sometimes used to denote goods passing from one state to another, these words, in connection with the provision of the constitution that "no state shall levy any imposts or duties on imports or exports," apply only to articles imported from or exported to foreign countries into or from the United States; they do not refer to articles carried from one state to another.⁵

97. Meaning of terms imports and exports.—*People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383.

98. Terms "imports" and "exports" refer only to subjects of commerce.—*New York City v. Miln*, 11 Pet. 102, 135, 136, 9 L. Ed. 648.

Succession tax not within prohibition.—*Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168.

99. Persons are not imports or exports.—*People v. Compagnie Generale Transatlantique*, 107 U. S. 59, 62, 27 L. Ed. 383; *New York City v. Miln*, 11 Pet. 102, 135, 136, 9 L. Ed. 648; *Smith v. Turner*, 7 How. 283, 477, 12 L. Ed. 702; *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745.

Therefore a state statute imposing a tax upon every passenger for the privilege of leaving the state, or passing through it by the ordinary mode of passenger travel, is not in conflict with the constitutional prohibition, a citizen of the United States not being considered an export within the meaning of the provision. *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745. See, however, the title CONSTITUTIONAL LAW, vol. 4, p. 192.

1. Determination of character of tax.—*Dooley v. United States*, 183 U. S. 151, 155, 46 L. Ed. 128.

A duty laid by congress upon goods arriving at Porto Rico from New York would seem to be a duty upon an import to Porto Rico and not upon an export from New York. "The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement

that it shall not be covered into the general fund of the treasury, but be held as a separate fund for the government and benefit of Porto Rico." *Dooley v. United States*, 183 U. S. 151, 157, 46 L. Ed. 128.

2. Court regards substance rather than form.—*Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 39 L. Ed. 759, cited and approved in *Fairbank v. United States*, 181 U. S. 283, 296, 45 L. Ed. 862.

Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, 6 L. Ed. 678, it was held that the tax on the occupation of an importer was the same as a tax on imports, and therefore void. *Fairbank v. United States*, 181 U. S. 283, 296, 45 L. Ed. 862.

3. Words "duties and imposts" construed in obvious sense.—*Pollock v. Farmers' Loan, etc., Co.*, 158 U. S. 601, 619, 39 L. Ed. 1108.

4. Pollock v. Farmers' Loan, etc., Co., 158 U. S. 601, 619, 39 L. Ed. 1108.

5. Inapplicable to traffic between states but only with foreign countries.—*Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 389; *State Tax on R. Gross Receipts*, 15 Wall. 284, 296, 21 L. Ed. 164; *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754; *Brown v. Houston*, 114 U. S. 622, 628, 29 L. Ed. 257; *Coe v. Errol*, 116 U. S. 517, 526, 29 L. Ed. 715; *Turpin v. Burgess*, 117 U. S. 504, 507, 29 L. Ed. 988; *Pittsburg, etc., Coal Co. v. Bates*, 156 U. S. 577, 39 L. Ed. 538; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345, 350, 43 L. Ed. 191; *Dooley v. United States*, 183 U. S. 151, 153, 46 L. Ed. 128; *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538; *Pittsburg, etc., Coal Co. v. Louisiana*, 156

(c) *Tax on Corporate Franchise*.—This is not a tax on imported articles dealt in by the corporation, or on their sale.⁶

(4) *When State's Right to Tax Imports Accrues*.—(a) *In General*.—Goods imported from a foreign country, upon which the duties and charges at the custom house have been paid, are not subject to state taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whilst retaining their distinctive character, as an import, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the state, which is subjected to an ad valorem tax.⁷

(b) *Taxable after Character as Import Destroyed*.—But after the article ceases to be an import, it is a subject of taxation by the state at its discretion.⁸

U. S. 590, 600, 39 L. Ed. 544 (act providing for appointment of coal and coke boat gaugers and making it compulsory upon all persons selling coal or coke in barges to have same inspected, held constitutional); *McLean & Co. v. Denver*, etc., R. Co., 203 U. S. 38, 51 L. Ed. 73. See, also, *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Fairbank v. United States*, 181 U. S. 283, 294, 45 L. Ed. 862; *State Tax on R. Gross Receipts*, 15 Wall. 284, 297, 21 L. Ed. 164.

In *Woodruff v. Parham*, 8 Wall. 123, 137, 19 L. Ed. 382, the cases of *Almy v. California*, 24 How. 169, 16 L. Ed. 644, and *Brown v. Maryland*, 12 Wheat. 419, 449, 6 L. Ed. 678, were distinguished as not laying down a contrary doctrine; and *Woodruff v. Parham*, 8 Wall. 123, 19 L. Ed. 382, and *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, are reconciled with *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128, and *Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 150, in *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 520, 48 L. Ed. 538, et seq.

In *Almy v. California*, 24 How. 169, 16 L. Ed. 644, a statute of California imposing a stamp duty upon bills of lading for gold or silver transported from that state to any port or place out of the state was held to be a tax on exports, in violation of the provision of the constitution declaring that "no tax or duty shall be laid on articles exported from any state." But in *Woodruff v. Parham*, 8 Wall. 123, 138, 19 L. Ed. 382, the federal supreme court, referring to the *Almy* case, said it was well decided upon a ground not mentioned in the opinion of the court, namely, that, although the tax there in question was only on bills of lading, "such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745, and within the authority of congress to regulate commerce among the states." *Lottery Case*, 188 U. S. 321, 349, 47 L. Ed. 492.

Tax on sales of products of other states not tax on imports.—*Woodruff v. Par-*

ham, 8 Wall. 123, 19 L. Ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. Ed. 389; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 520, 48 L. Ed. 538, following *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 423, 467, 471, et seq.

6. Tax on corporate franchise.—*New York State v. Roberts*, 171 U. S. 658, 664, 43 L. Ed. 323. See ante, "Corporate Franchise," IV, E, 3.

7. Imports cannot be taxed in original packages unsold.—*Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517, following *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Coe v. Errol*, 116 U. S. 517, 526, 29 L. Ed. 715; *May v. New Orleans*, 178 U. S. 496, 504, 44 L. Ed. 1165; *Austin v. Tennessee*, 179 U. S. 343, 354, 45 L. Ed. 224; *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441, 449, 43 L. Ed. 254; *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 519, 48 L. Ed. 538. See, also, *Welton v. Missouri*, 91 U. S. 275, 281, 23 L. Ed. 347; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

Where in each box or case in which goods are imported there are contained separate parcels or bundles, the box, case or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer or packer is to be regarded as the original package, and upon the opening of such box, bale or case for the purpose of using or exposing to sale such separate parcels or bundles, each parcel or bundle loses its distinctive character as an import and becomes a part of the general mass of property in the state subject to local taxation, hence may be taxed by the state. *May v. New Orleans*, 178 U. S. 496, 502, 44 L. Ed. 1165, following *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, and followed in *Austin v. Tennessee*, 179 U. S. 343, 354, 45 L. Ed. 224.

8. Article subject to state taxation after it ceases to be import.—*Nathan v. Louisiana*, 8 How. 73, 81, 12 L. Ed. 992; *Low v. Austin*, 13 Wall. 29, 34, 20 L. Ed. 517; *May v. New Orleans*, 178 U. S. 496, 44 L. Ed. 1165; *Austin v. Tennessee*, 179 U. S. 343, 354, 45 L. Ed. 224.

If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale

And whenever the importer has so acted upon the thing imported, that it has become incorporated and mixed with the mass of property in the state, it must be considered as having lost its distinctive character as an import, and as having become subject to the taxing power of the state.⁹ The prohibition does not cease the instant the goods are brought into the country,¹⁰ for goods imported do not lose their character as imports, and become incorporated into the mass of property of the state so long as they remain the property of the importer in the form and condition in which they were imported. It is only when the importer has sold the imported articles in the original packages,¹¹ or has broken up such packages,¹² that they become mixed with the property of the state and subject to state taxation.¹³

(c) *Right to Sell Not Taxable*.—Moreover a state cannot, in the form of a license or otherwise, tax the right of the importer to sell in the form or package in which they were imported, as this is a tax on the imported article.¹⁴ But

by the importer, they become subject to state taxation, the extent and the character of the tax are mere matters of legislative discretion. *Low v. Austin*, 13 Wall. 29, 34, 20 L. Ed. 517.

9. When article ceases to be import—Statement of rule.—*Brown v. Maryland*, 12 Wheat. 419, 441, 6 L. Ed. 678; *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992; *Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342; *Hinson v. Lott*, 8 Wall. 148, 151, 19 L. Ed. 389; *Low v. Austin*, 13 Wall. 29, 33, 20 L. Ed. 517; *State Tax on R. Gross Receipts*, 15 Wall. 284, 295, 21 L. Ed. 164; *Welton v. Missouri*, 91 U. S. 275, 281, 23 L. Ed. 347; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015; *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754; *Coe v. Errol*, 116 U. S. 517, 526, 29 L. Ed. 715; *Leisy v. Hardin*, 135 U. S. 100, 110, 34 L. Ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 34 L. Ed. 150; *Emert v. Missouri*, 156 U. S. 296, 312, 39 L. Ed. 430; *May v. New Orleans*, 178 U. S. 496, 507, 44 L. Ed. 1165; *Austin v. Tennessee*, 179 U. S. 343, 354, 45 L. Ed. 224.

10. Prohibition does not cease instant goods enter country.—*Brown v. Maryland*, 12 Wheat. 419, 442, 444, 6 L. Ed. 678; *Low v. Austin*, 13 Wall. 29, 20 L. Ed. 517; *Leisy v. Hardin*, 135 U. S. 100, 110, 34 L. Ed. 128.

11. Sale in original package destroys character as import.—*Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Pervear v. Commonwealth*, 5 Wall. 475, 479, 18 L. Ed. 608; *Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342; *Low v. Austin*, 13 Wall. 29, 33, 20 L. Ed. 517; *Coe v. Errol*, 116 U. S. 517, 526, 527, 29 L. Ed. 715.

In accordance with this rule it is held that sales of goods imported, when made by the shippers or consignees, and where the purchaser is not the first vendor of the imported merchandise, may be constitutionally taxed by a state. *Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342, citing *Pervear v. Commonwealth*, 5 Wall. 475, 479, 18 L. Ed. 608.

Purchaser, without risk until delivery at port, not importer.—The bay of Mobile being included within the statutory def-

inition of the port of Mobile, contracts for the purchase of cargoes of foreign merchandise before or after the arrival of the vessel in the said bay, where the goods by the terms of the contract, are not to be at the risk of the purchaser until delivered to him in said bay, do not constitute the purchaser an "importer," and the goods so purchased and sold by him, though in the original packages, may be properly subjected to taxation by the state. *Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342, distinguishing *Brown v. Maryland*, 12 Wheat. 419, 443, 6 L. Ed. 678. See, also, *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754.

12. Character as import destroyed breaking up original package.—*Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342; *Pervear v. Commonwealth*, 5 Wall. 475, 479, 18 L. Ed. 608; *Low v. Austin*, 13 Wall. 29, 33, 20 L. Ed. 517; *May v. New Orleans*, 178 U. S. 496, 44 L. Ed. 1165; *Austin v. Tennessee*, 179 U. S. 343, 354, 45 L. Ed. 224.

13. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *May v. New Orleans*, 178 U. S. 496, 44 L. Ed. 1165.

14. Right to sell cannot be taxed.—*May v. New Orleans*, 178 U. S. 496, 44 L. Ed. 1165; *Hopkins v. United States*, 171 U. S. 578, 595, 43 L. Ed. 290; *Norfolk, etc., R. Co. v. Sims*, 191 U. S. 441, 449, 48 L. Ed. 254; *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 519, 48 L. Ed. 538.

"Thus in *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, it was held that an act of a state legislature requiring importers of foreign goods to take out a license was a violation of the constitution declaring that no state shall, without the consent of congress, lay an impost or duty on imports or exports." *Dooley v. United States*, 183 U. S. 151, 155, 46 L. Ed. 128; *Fairbank v. United States*, 181 U. S. 283, 294, 45 L. Ed. 862; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, is the leading case and is cited on this point and approved in *Pervear v. Commonwealth*, 5 Wall. 475, 478, 18 L. Ed. 608; *Waring v. The Mayor*, 8 Wall. 110, 122, 19 L. Ed. 342; *Low v. Austin*, 13 Wall. 29, 33, 20 L.

if there is no discrimination in favor of domestic articles, and the tax is on the use of the privilege of selling in a particular way, it may be valid.¹⁵

(5) *Prohibition to the States to Lay Duties on Exports*—(a) *In General*.—The prohibition that “no state shall, without the consent of congress, lay any imposts or duties on exports,” art. 1, § 10, par. 2, has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the constitution.¹⁶ But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition, though they should happen to be exported afterwards.¹⁷ And the manner in which and the place at which the tax is levied

Ed. 517; *New York City v. Miln*, 11 Pet. 102, 134, 9 L. Ed. 648; *Almy v. California*, 24 How. 169, 173, 16 L. Ed. 644; *Welton v. Missouri*, 91 U. S. 275, 281, 23 L. Ed. 347; *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754; *Coe v. Errol*, 116 U. S. 517, 526, 29 L. Ed. 715; *Leloup v. Port of Mobile*, 127 U. S. 640, 646, 32 L. Ed. 311; *Brennan v. Titusville*, 153 U. S. 289, 302, 38 L. Ed. 719; *Emert v. Missouri*, 156 U. S. 296, 312, 39 L. Ed. 430.

Right to import includes right to sell in original package.—*Brown v. Maryland*, 12 Wheat. 419, 442, 6 L. Ed. 678; *New York City v. Miln*, 11 Pet. 102, 135, 9 L. Ed. 648; *Almy v. California*, 24 How. 169, 173, 16 L. Ed. 644; *Waring v. The Mayor*, 8 Wall. 110, 122, 19 L. Ed. 342; *Low v. Austin*, 13 Wall. 29, 33, 20 L. Ed. 517; *Coe v. Errol*, 116 U. S. 517, 526, 29 L. Ed. 715; *Bowman v. Chicago*, etc., R. Co., 125 U. S. 465, 499, 31 L. Ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 111, 34 L. Ed. 128; *Hopkins v. United States*, 171 U. S. 578, 595, 43 L. Ed. 290; *May v. New Orleans*, 178 U. S. 496, 507, 44 L. Ed. 1165.

The importer has the right to sell not only personally, but he has the right to employ an agent to sell for him.—*Schollenberger v. Pennsylvania*, 171 U. S. 1, 24, 43 L. Ed. 49.

The tax on sales made by an auctioneer is a tax on the goods sold; and when applied to foreign goods sold in the original packages of the importer, before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports. Here there was a discrimination against foreign in favor of domestic goods. *Cook v. Pennsylvania*, 97 U. S. 566, 573, 24 L. Ed. 1015.

Stamp tax on bill of lading as duty on article represented.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 463.

15. Tax on privilege without discrimination.—“In *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678, Chief Justice Marshal, while maintaining the right of an importer to sell his article in the original package, free from any tax, recognized the distinction between the importer selling the article himself and employing an auc-

tioneer to do it for him, and he said that in the latter case the importer could not object to paying for such services as for any other, and that the right to sell might very well be annexed to importation without annexing to it also the privilege of using auctioneers, and thus to make the sale in a peculiar way. In such case a tax upon the auctioneer's license would be valid. The same view is enforced in *Emert v. Missouri*, 156 U. S. 296, 39 L. Ed. 430.” *Hopkins v. United States*, 171 U. S. 578, 595, 43 L. Ed. 290. See, also, the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 470, 473.

16. States are forbidden to tax exports.—*Turpin v. Burgess*, 117 U. S. 504, 507, 29 L. Ed. 988. See *Ward v. Maryland*, 12 Wall. 418, 419, 427, 20 L. Ed. 449; *Nathan v. Louisiana*, 8 How. 73, 81, 12 L. Ed. 992.

Compared to prohibition of federal tax on exports.—“Now the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a state.” *Turpin v. Burgess*, 117 U. S. 504, 506, 29 L. Ed. 988; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715. See ante, “Exports,” IV, F, 1, b.

17. General tax unobjectionable.—*Turpin v. Burgess*, 117 U. S. 504, 507, 29 L. Ed. 988; *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992; *Brown v. Houston*, 114 U. S. 622, 629, 29 L. Ed. 257.

When article becomes export.—An article intended for exportation to a foreign country does not cease to be a part of the general mass of the property of the state, and as such subject to its taxing power, until it has been actually started on its final movement for transportation to a foreign country, or has been delivered to a carrier for such transportation. Mere intention to export or preparation of the article for exportation, does not constitute it an export within the constitutional prohibition, but a state cannot tax an article intended for exportation, because or by reason of such intended exportation, i. e., it cannot be taxed differently from other goods in the state. *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715; *Turpin v. Burgess*, 116 U.

are of minor consequence.¹⁸

(b) *Taxation of Distilled Spirits Intended for Exportation*.—The execution of the exportation bond provided for by § 3330 of the Revised Statutes providing for the withdrawal of distilled spirits from bonded warehouses for exportation in the original casks without the payment of taxes, is not the commencement of the exportation so as to render applicable the constitutional inhibition of taxation of articles exported from the states.¹⁹

(c) *Stamp Tax and Other Fees and Charges*.—The proper fees accruing in the administration of the laws and regulations necessary for the protection of the government against imposition and frauds likely to be committed under the pretext of exportation, are, in no sense, a duty on exports. They are simply the compensation given for services properly rendered.²⁰

Stamp Duty on Foreign Bills of Lading.—But if it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported.²¹

(6) *Right of States to Pass Inspection Laws*.—Article 1, § 10, of the constitution forbidding a state to lay imposts or duties on imports or exports, expressly reserves the right of the states to pass inspection laws and lay duties to pay the expense thereof.²²

G. Incomes and Salaries.—1. IN GENERAL.—**Salaries of Public Officers**.—No diminution by taxation in the recompense of an officer is just and lawful,

S. 504, 517, 29 L. Ed. 988; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 295, et seq., under discussion of when protection of commerce clause attaches.

Mere carriage to depot insufficient.—The carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715; *Turpin v. Burgess*, 117 U. S. 504, 506, 29 L. Ed. 988.

A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation. *Nathan v. Louisiana*, 8 How. 73, 12 L. Ed. 992.

Money invested in products in course of exportation.—Quære, whether the products of the United States which have passed the customs department, and are on shipboard in the course of exportation to a foreign market, have become exports, and are no longer within the taxing power of the state, so that to tax money invested in such products is, in effect, laying an impost or duty on exports. *People v. Commissioners*, 104 U. S. 466, 467, 26 L. Ed. 632.

18. Manner and place of levying tax immaterial.—*Dooley v. United States*, 183 U. S. 151, 155, 46 L. Ed. 128.

19. Exportation bonds.—*Thompson v. United States*, 142 U. S. 471, 35 L. Ed. 1084. See, also, the title REVENUE LAWS, vol. 10, pp. 973, 974.

20. Fees accruing in administration of laws.—*Pace v. Burgess*, 92 U. S. 372, 23 L. Ed. 657. But they must not be discriminatory. *Fairbank v. United States*, 181 U. S. 283, 45 L. Ed. 862. See ante.

"Right to Sell Not Taxable," IV, F, 2, b, (4), (c); "In General," IV, F, 2, b, (5), (a).

Stamp tax on tobacco intended for exportation.—Hence, the law which requires an internal revenue stamp to be placed on packages of manufactured tobacco intended for exportation is not a tax or duty on exports within the meaning of the constitutional prohibition that no tax or duty shall be laid on articles exported from any state. Because the stamp thereby required is a means devised for the prevention of fraud by separating and identifying the tobacco intended for exportation; thus relieving it from the taxation to which other tobacco was subjected. *Pace v. Burgess*, 92 U. S. 372, 23 L. Ed. 657, distinguishing *Almy v. California*, 24 How. 169, 16 L. Ed. 644; *Turpin v. Burgess*, 117 U. S. 504, 29 L. Ed. 988. See, also, *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715.

21. Stamp duty on foreign bills of lading.—*Fairbank v. United States*, 181 U. S. 283, 293, 45 L. Ed. 862, where it was held that a discriminatory stamp tax on a bill of lading of goods carried to a foreign country, imposed by the act of June 13, 1898 was a tax on exports and therefore void. Cited in *United States v. New York, etc., Mail Steamship Co.*, 200 U. S. 488, 50 L. Ed. 569. See, also, *Dooley v. United States*, 183 U. S. 151, 155, 46 L. Ed. 128. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 463.

22. States may pass inspection laws.—*McLean & Co. v. Denver, etc., R. Co.*, 203 U. S. 38, 51 L. Ed. 78. See the title INSPECTION LAWS, vol. 7, p. 22, et seq.

unless it be prospective, or by way of taxation by the sovereignty which has a power to impose it; and which is intended to bear equally upon all according to their estate.²³

2. BY THE UNITED STATES.—**Taxation of Incomes.**—See ante, "Income Taxes," III, C, 3, b.

3. BY THE STATES.—The states have power to lay income taxes.²⁴

H. Lands and Interests therein—1. **LANDS IN GENERAL.**—Liability to taxation is an incident to all real estate. Exemption is an exception, and when claimed must be clearly made out.²⁵

2. **PUBLIC LANDS OF THE UNITED STATES**—a. *Control by Congress.*—Congress may pass all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.²⁶

b. *Public Lands Not Granted.*—Public lands belonging to the United States are exempted from taxation by the states.²⁷

c. *Public Lands after Entry or Grant but before Issue of Patent*—(1) *In General.*—The beneficial owner of public lands, that is one who has done everything to entitle him to a patent from the government, with the legal right to such patent although without the legal title, is taxable upon the same as its owner, as they are really private property then.²⁸ So where the purchaser of land has paid for it and received a final certificate,²⁹ but full equitable title

23. **Salaries of public officers.**—Dobbins v. Erie County, 16 Pet. 435, 449, 10 L. Ed. 1022. See the titles CONSTITUTIONAL LAW, vol. 4, pp. 194, 211; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 832.

24. **Income taxes by states.**—Pollock v. Farmers' Loan, etc., Co., 158 U. S. 601, 629, 39 L. Ed. 1108. See Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326, 344, 30 L. Ed. 1200.

A tax on the gross receipts of a steamship company derived from transportation tolls cannot properly be regarded as an income tax. Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326, 344, 30 L. Ed. 1200. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 461, 462.

25. **Lands in general.**—Tucker v. Ferguson, 22 Wall. 527, 573, 22 L. Ed. 805. See ante, "Of Real Estate," IV, A, 2, b, (1); "Real Estate," IV, C, 2, c.

Taxation of lands of nonresident of city.—See ante, "Of Cities, Towns, etc.," III, E, 2.

Public or governmental property.—See post, "Public or Governmental Property," IV, M.

26. **Control by congress.**—Pollard v. Hagan, 3 How. 212, 224, 11 L. Ed. 565. See the title PUBLIC LANDS, vol. 10, p. 53.

27. **Public lands not granted.**—Stearns v. Minnesota, 179 U. S. 223, 243, 45 L. Ed. 162; McGoon v. Scales, 9 Wall. 23, 19 L. Ed. 545; Tucker v. Ferguson, 22 Wall. 527, 572, 22 L. Ed. 805; Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. Ed. 845; Barden v. Northern Pac. R. Co., 154 U. S. 288, 347, 38 L. Ed. 992, per Brewer, Gray, Shiras, JJ., dissenting; Hussman v. Durham, 165 U. S. 144, 147, 41 L. Ed. 664. See, also, Stryker v. Goodnow, 123 U. S. 527, 537, 31 L. Ed. 194; Litchfield v.

County of Webster, 101 U. S. 773, 775, 25 L. Ed. 925; Litchfield v. County of Hamilton, 101 U. S. 781, 25 L. Ed. 928.

Wisconsin.—The doctrine affirmed in the Constitution of Wisconsin. Constitution of 1848, art. 2, § 2; Wisconsin, etc., R. Co. v. Price County, 133 U. S. 496, 504, 33 L. Ed. 687.

28. **Beneficial owner.**—Wisconsin, etc., R. Co. v. Price County, 133 U. S. 496, 33 L. Ed. 687; Central Pac. R. Co. v. Nevada, 162 U. S. 512, 40 L. Ed. 1057; Montana Catholic Missions v. Missoula County, 200 U. S. 118, 128, 50 L. Ed. 398; Frost v. Spitley, 121 U. S. 552, 556, 30 L. Ed. 1010; Clark v. Herington, 186 U. S. 206, 210, 46 L. Ed. 1128; Carroll v. Safford, 3 How. 441, 11 L. Ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339; Hussman v. Durham, 165 U. S. 144, 147, 41 L. Ed. 664; Northern Pac. R. Co. v. Patterson, 154 U. S. 130, 132, 38 L. Ed. 934; Railway Co. v. McShane, 22 Wall. 444, 22 L. Ed. 747; Northern Pac. R. Co. v. Traill County, 115 U. S. 600, 29 L. Ed. 477; Deffebach v. Hawke, 115 U. S. 392, 405, 29 L. Ed. 423; Northern Pac. R. Co. v. Myers, 172 U. S. 589, 598, 43 L. Ed. 564; Stryker v. Goodnow, 123 U. S. 527, 535, 31 L. Ed. 194; Winona, etc., Land Co. v. Minnesota, 159 U. S. 526, 530, 40 L. Ed. 247; Van Brocklin v. Tennessee, 117 U. S. 151, 169, 29 L. Ed. 845.

29. **After payment and final certificate.**—Carroll v. Safford, 3 How. 441, 11 L. Ed. 671, followed in Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339; Levi v. Thompson, 4 How. 17, 19, 11 L. Ed. 856; Wisconsin, etc., R. Co. v. Price County, 133 U. S. 496, 506, 33 L. Ed. 687; Stearns v. Minnesota, 179 U. S. 223, 251, 45 L. Ed. 162. See, also, Central Pac. R. Co. v. Nevada, 162 U. S. 512, 527, 40 L. Ed. 1057.

Taxation upon lands so held is not a

must have passed, and no liens or equitable rights of the United States be unextinguished, however trivial or small.³⁰ Nothing must remain to be done or paid in order to fully vest the equitable title.³¹

Necessity for Payment of Costs of Survey, etc.—And public lands are not taxable, no patent having been issued therefor, and the costs of surveying, selecting, and conveying the same not having been paid.³²

During Pendency of Proceedings before Land Department.—See note.³³

Year in Which Entry, Location or Purchase Made.—It has been held, under provisions of state law, that government land entered or located, or lands purchased from the state, could not be taxed for the year in which the entry, location or purchase was made.³⁴

Under Perfect Grant.—A party in possession of a tract of land under a

violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by congress," nor is it "a tax on the lands of the United States." The state of Michigan could rightfully impose the tax. *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671.

The right to tax attaches as well to donation entries as to cash entries, the particular land in either case, when the entry is made and certificate given, being segregated from the mass of public lands, and becoming private property. *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339.

30. *Stearns v. Minnesota*, 179 U. S. 223, 251, 45 L. Ed. 162, citing *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 29 L. Ed. 477; *Wisconsin, etc., R. Co. v. Price County*, 133 U. S. 496, 33 L. Ed. 687; *Clark v. Herington*, 186 U. S. 206, 210, 46 L. Ed. 1128.

"Yet until such equitable title has passed, and while the land is still subject to the control of the government, it is beyond the reach of the states' power to tax. *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Railway Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Yucker v. Ferguson*, 22 Wall. 527, 572, 22 L. Ed. 805; *Colorado Co. v. Commissioners*, 95 U. S. 259, 24 L. Ed. 495." *Hussman v. Durham*, 165 U. S. 144, 147, 41 L. Ed. 664.

Claims satisfied before tax year expired.—In the absence of any day or time fixed decisively by the statute or clearly deducible from it, and of any decision of any court of the state on the subject, or of any long and well-settled practice by the state authorities, it seems that when land is only exempt from taxation by reason of the claims upon it of the federal government, and those claims are satisfied before the final proceedings are concluded, it would be included in that assessment. In such case not half the current year for which the taxes are levied has expired. The general matter of assessment or valuation for taxation is still within the control of the proper officer, and if it is brought to their knowledge that the full ownership of the lands has passed from the United States to

individuals or corporations it would seem equitable that they should bear their share of the burden of taxation. *Hunnell v. Cass County*, 22 Wall. 464, 478, 22 L. Ed. 752.

31. *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373, overruled on other grounds in *Railway Co. v. McShane*, 22 Wall. 444, 460, 22 L. Ed. 747; *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 520, 40 L. Ed. 1057; *Hussman v. Durham*, 165 U. S. 144, 41 L. Ed. 664.

32. Costs of survey, etc., not paid.—*Lamborn v. County Comm'rs*, 97 U. S. 181, 182, 24 L. Ed. 926; *Van Brocklin v. Tennessee*, 117 U. S. 151, 169, 29 L. Ed. 845; *Railway Co. v. Prescott*, 16 Wall. 603, 608, 21 L. Ed. 373; *Railway Co. v. McShane*, 22 Wall. 444, 462, 22 L. Ed. 747; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 610, 29 L. Ed. 477. See, also, *Hunnell v. Cass County*, 22 Wall. 464, 22 L. Ed. 752.

Grants to railroads.—See post, "Railroad Grants," IV, H, 2, c, (3).

33. During pendency of proceedings before land department.—While holding that in the case of a homestead entry pending proceedings before the land department and before final disposition and patent issued, as between the United States and the settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, quære, whether, as between the settler and the state, it may not be deemed the property of the settler, and, therefore, subject to taxation. *Shiver v. United States*, 159 U. S. 491, 499, 40 L. Ed. 231.

34. Year in which entry, location or purchase made—Iowa.—*Litchfield v. County of Webster*, 101 U. S. 773, 775, 25 L. Ed. 925, followed in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928. See *Stryker v. Goodnow*, 123 U. S. 527, 535, 31 L. Ed. 194, reaffirming *Litchfield v. County of Webster*, 101 U. S. 773, 25 L. Ed. 925, but saying that the decision in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928, was erroneous in taking jurisdiction and reversing a judgment for the tax of 1861. See opinion.

perfect grant has a possessory and equitable right which is of value, and that is enough to sustain taxation.³⁵

(2) *Mineral Lands.—In General.*—The possibility that certain lands may turn out to be mineral lands surely cannot be a defense to a claim for taxes applicable to the entire grant, so long as the railroad company lays claim to the right to the possession of such lands.³⁶

Minerals Detached from Lands.—Although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim, or title of the United States, and becoming personal property, are, as such, subject to state taxation in like manner as other personal property.³⁷

(3) *Railroad Grants.—In General.*—Lands granted to a railroad company by congress, to aid in construction, are taxable by the state or territory in which the lands lie, although never certified or patented to the railroad company, or even identified as specific lands granted, or decided not to be mineral lands.³⁸

Grants to State to Be Sold to Aid Railroad.—Such grants, where there is no restriction in their terms, are taxable by the states at their discretion after they are sold,³⁹ but as acceptance of the grant created a trust, the state could not tax the lands while she held them as a trustee of the United States, but after transfer of her title to the company which it had perfected and acquired the right to sell, they were taxable.⁴⁰

Agreement of State Not to Tax for Term.—Where the state, in the act accepting the grant of public lands for a railroad, agreed, sua sponte, to forbear to tax for seven years, and there is no complaint that this stipulation has been violated, any obligation, legal or equitable, to do more in this way is wanting. There is a presumption that no further exemption was intended.⁴¹

35. Under perfect grant.—Maish v. Arizona, 164 U. S. 599, 609, 41 L. Ed. 567.

Unconfirmed but perfect Mexican grants.—Where lands are held by perfect grants under the laws of Mexico, and are in the possession of the claimants, and covered with valuable improvements, it must be held that the objection to their taxation cannot be sustained. Maish v. Arizona, 164 U. S. 599, 609, 41 L. Ed. 567.

But where the grant has been confirmed, but not to be effective until payment of survey and selection, it is not taxable until such survey and payment. Colorado Co. v. Commissioners, 95 U. S. 259, 24 L. Ed. 495.

36. In general.—Central Pac. R. Co. v. Nevada, 162 U. S. 512, 526, 40 L. Ed. 1057; Northern Pac. R. Co. v. Myers, 172 U. S. 589, 597, 602, 43 L. Ed. 564. See, also, Northern Pac. R. Co. v. Patterson, 154 U. S. 130, 132, 38 L. Ed. 934; Maish v. Arizona, 164 U. S. 599, 609, 41 L. Ed. 567. See the title MINES AND MINERALS, vol. 8, p. 404, et seq.

37. Minerals detached from public lands.—Forbes v. Gracey, 94 U. S. 762, 24 L. Ed. 313; Buford v. Houtz, 133 U. S. 320, 332, 33 L. Ed. 618. See the title MINES AND MINERALS, vol. 8, pp. 405, 407.

38. Railroad grants.—Northern Pac. R. Co. v. Clark, 153 U. S. 252, 255, 271, 38 L. Ed. 706.

Acceptance of authority unnecessary.—Central Pac. R. Co. v. Nevada, 162 U. S. 512, 523, 40 L. Ed. 1057.

39. Grants to state to be sold to aid railroad.—Tucker v. Ferguson, 22 Wall. 527, 572, 22 L. Ed. 805.

40. After termination of trust by sale.—Tucker v. Ferguson, 22 Wall. 527, 572, 22 L. Ed. 805.

The company, so far as the matter of right is concerned, was upon a footing with all other alienees of the United States. The imposition of taxes can in no just sense be said to be a diminution of the value of the lands. Tucker v. Ferguson, 22 Wall. 527, 573, 22 L. Ed. 805.

After mortgage by company.—And where the company mortgaged the lands to trustees, to secure its bonds, the lands were taxable by the state as "sold" within the meaning of the act of congress, although the bulk of them were yet unsold in the hands of the trustees. Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805.

41. Agreement of state not to tax for term.—Tucker v. Ferguson, 22 Wall. 527, 573, 22 L. Ed. 805.

Grant by state.—Where a contract of exemption under a legislative act exempting from taxation lands granted by the state to aid in building a railroad, was by the terms of the act to continue until the lands were "sold and conveyed," the exemption was continued only until the full

Selection by State Agents and Approval of Same.—But where no title could pass, not only until the selections were made by the agents of the state appointed by the governor, but until such selections were approved by the secretary of the interior, the approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected, and until then the lands were not subject to local taxation.⁴²

Evidence of Alienation by Company.—Where the taxability of lands depends upon whether the equitable title had passed from the railroad company in whose hands they were exempt, the fact that by conclusive decree of a competent court it is established that the full equitable title had passed to the plaintiff in error prior to the time at which the lands were adjudged taxable, is sufficient to establish their taxability.⁴³

Payment of Costs of Survey, etc.—In the absence of statute, as in the case of other public lands, if prepayment by the grantee of the costs of surveying, selecting and conveying lands granted to a railroad company, were required by the statute making the grant, before any of the lands should be conveyed, no title vested in the grantee and the state could not tax the land where the costs of survey had not been paid.⁴⁴ But this may be changed by statute, and congress did enact, by the act of July 10, 1886, 24 Stat. 143, that lands granted to railroad corporations by act of congress should be taxable by the states, territories and municipal corporations, whether the costs of surveying, selecting and conveying had been paid or not, or a patent had been issued therefore or not.⁴⁵ And no formal acceptance of such legislation by the state was necessary.⁴⁶

equitable title was transferred, and the railroad company could not thereafter, by neglecting to convey the legal title, postpone indefinitely the exemption. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 529, 40 L. Ed. 247. This case is cited and discussed in *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. Ed. 91.

42. Selection by state agents and approval of same.—*Wisconsin, etc., R. Co. v. Price County*, 133 U. S. 496, 511, 33 L. Ed. 687.

43. Evidence of alienation by company.—*Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 533, 40 L. Ed. 247.

44. Payment of costs of survey, etc.—*Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Hunnewell v. Cass County*, 22 Wall. 464, 22 L. Ed. 752, where it was said that where such dues were paid during the current year, the lands ought to be taxable by the state for that year.

"In this particular, this case (*Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373) was affirmed in *Railway Co. v. McShane*, 22 Wall. 444, 462, 22 L. Ed. 747, and *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 29 L. Ed. 477." *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 523, 40 L. Ed. 1057.

So of the grant to the Northern Pacific Railroad Company of July 2, 1864. *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 608, 29 L. Ed. 477, holding that the principal of the exemption of these lands from taxation until the costs of surveying them were paid applied to these lands.

Because the requirement to pay these costs was made in 1870, six years after

the original grant, it was not void as an unconstitutional exercise of power by congress. *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 609, 29 L. Ed. 477. See, also, *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373.

The fact that the road was built before this tax was levied and the company had earned the land did not make its equitable title complete, and, according to the decisions of the federal supreme court, subject to taxation. *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 609, 29 L. Ed. 477.

And the fact, that these lands have been mortgaged by the company, under sanction of the act of congress on that subject, does not put the legal title out of the United States, so that her rights can no longer be interposed to protect them from taxation. *Railway Co. v. McShane*, 22 Wall. 444, 463, 22 L. Ed. 747.

Injunction.—See post, "Allowed Only in Extreme Cases," VI, H, 1, c.

45. Rule changed by statute.—*Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 520, 40 L. Ed. 1057.

46. Formal acceptance by state unnecessary.—*Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 523, 40 L. Ed. 1057.

Nor, conceding that the general statutes of Nevada taxing public lands were inoperative to authorize the taxation of these lands prior to the act of congress of July, 1886, was any re-enactment of those statutes necessary, since the effect of this act was merely to remove the only obstacle to their enforcement. *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 523, 40 L. Ed. 1057.

Contingent Right of Pre-Emption in Lands Unsold.—It was once held that if the grant contain a proviso that any of the lands granted and not sold by the company within three years after the final completion of the road, shall be liable to be sold to actual settlers under the pre-emption laws, at a price named per acre, the money to be paid to the company—this exempted the lands from taxation.⁴⁷ But this was afterwards overruled.⁴⁸

Des Moines River Grant.—After congress by joint resolution relinquished all the title the United States then retained to the lands which had before that time been certified by the department of the interior as part of the Des Moines river grant, and which were held by bona fide purchasers under the state, no further conveyance was necessary to complete the transfer, and the description was sufficient to identify the property. The title thus relinquished inured at once to the benefit of the purchasers for whose use the relinquishment was made, and was subject to taxation.⁴⁹

Mineral Lands.—See ante, "Mineral Lands," IV, H, 2, c, (2).

(4) *Swamp and Overflowed Lands Granted to States.*—The swamp and overflowed lands donated by the United States to the state of Arkansas, under the state statute providing for their reclamation and sale, are exempt from taxation for ten years, if the lands are not sooner reclaimed, but if they are it ceases on reclamation.⁵⁰

d. *After Patent Issued.*—Where, however, the government has issued the patent, the lands are taxable, whether payment of those costs have been made to the United States or not.⁵¹

I. Money and Deposits in Bank.—There is no difference between a deposit in bank and the actual money in the pocket, so far as the right to tax it is concerned.⁵²

J. Occupations and Callings—1. IN GENERAL.—All trades and avocations by which the citizens acquire a livelihood may also be taxed by the state for the support of the state government.⁵³ As well when carried on by a corporation as by an individual.⁵⁴ And when the taxing statute affects all persons engaged in the business in the same way and degree, there is no arbitrary deprivation of property or denial of equal protection of the laws.⁵⁵

47. Contingent pre-emption right.—*Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373.

48. The *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373, modified and overruled so far as it asserts the contingent right of pre-emption in lands granted to the Pacific Railroad Company, to constitute an exemption of those lands from state taxation. *Railway Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747.

49. *Des Moines river grant.*—*Litchfield v. County of Webster*, 101 U. S. 773, 775, 25 L. Ed. 925, followed in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928. See the title PUBLIC LANDS, vol. 10, p. 212, et seq.

50. Swamp and overflowed lands granted to states.—*Railroad Co. v. Loftin*, 105 U. S. 258, 260, 26 L. Ed. 1042. See, also, *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 794.

51. After patent issue.—*Railway Co. v. McShane*, 22 Wall. 444, 22 L. Ed. 747.

52. Money and deposits in bank.—*Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439.

Deposit in bank or trust company.—In *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 439, it was held that a deposit by a citizen of Illinois in a trust company in New York was within the taxing power of the latter state, even though the depositor intended to withdraw the money for further investment, and although the deposit had been subjected to taxation in Illinois as a part of an estate to which it belonged. *State Board v. Comptoir National D'Escompte*, 191 U. S. 388, 403, 48 L. Ed. 232.

53. Occupations and callings.—*Hamilton Co. v. Massachusetts*, 6 Wall. 632, 638, 18 L. Ed. 904; *Society for Savings v. Coite*, 6 Wall. 594, 18 L. Ed. 897; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *State Railroad Tax Cases*, 92 U. S. 575, 603, 23 L. Ed. 663. See the title LICENSES, vol. 7, p. 873.

54. *Osborn v. United States Bank*, 9 Wheat. 738, 862, 6 L. Ed. 204. Unless expressly exempted from taxation. *Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, 27 L. Ed. 976.

55. *Giozza v. Tiernan*, 149 U. S. 657, 662, 37 L. Ed. 599; *Armour Packing Co. v. Lacy*, 200 U. S. 226, 50 L. Ed. 451. See the titles CONSTITUTIONAL LAW

Ferries and Ferry Companies.—See the titles *FERRIES*, vol. 6, p. 281; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 367, et seq.

Intoxicating Liquors.—See the title *INTOXICATING LIQUORS*, vol. 7, p. 519, et seq. See, also, the title *CONSTITUTIONAL LAW*, vol. 4, p. 377; also, pp. 369, 372, 476-7. See *TRAFFIC*.

2. **FEDERAL LICENSE TAX.—Federal License as Conferring Power to Carry on Business in State.**—Section 3243, Rev. Stat., expressly provides that the payment of a special internal revenue tax shall not authorize the carrying on of the specified business contrary to the laws of a state.⁵⁶

Right of Surviving Partner of Firm.—Where a firm consisting of two partners have paid the special tax, and one of the firm purchases the interest belonging to the other, the one who becomes the sole and exclusive owner of the trade or business may carry on the same trade or business at the same place for the balance of the term for which the tax is paid.⁵⁷

Conducting Business without License.—See the titles *INTOXICATING LIQUORS*, vol. 7, p. 518; *LICENSES*, vol. 7, p. 869; *REVENUE LAWS*, vol. 10, pp. 981, et seq., 985, 989, et seq. See note.⁵⁸

Indictment.—See note.⁵⁹

Brewers.—Brewers are included within the prohibition of the statute (14 Stat. 113; Rev. Stat., § 3232) that no person, firm, company, or corporation shall be engaged in or carry on any trade, business, or profession until he or they shall have paid the required special tax.⁶⁰

Sale of Lottery Tickets.—See note.⁶¹

vol. 4, pp. 369, 372; *LICENSES*, vol. 7, p. 873, et seq.

License as contract against further exactions.—See the title *LICENSES*, vol. 7, p. 883, et seq.

License fee payment as not relieving from property tax.—See the title *LICENSES*, vol. 7, p. 871.

Imposition by city.—See ante, "Of Cities, Towns, etc.," III, E, 2.

56. *Plumley v. Massachusetts*, 155 U. S. 461, 466, 39 L. Ed. 223; *Austin v. Tennessee*, 179 U. S. 343, 363, 45 L. Ed. 224; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18, 43 L. Ed. 49. See the titles *LICENSES*, vol. 7, p. 881, et seq.; *REVENUE LAWS*, vol. 10, p. 985.

Sale of oleomargarine.—In *Plumley v. Massachusetts*, 155 U. S. 461, 466, 39 L. Ed. 223, this principle was applied to the special tax on oleomargarine.

57. *United States v. Glab*, 99 U. S. 225, 25 L. Ed. 273.

58. **Single sale.**—"While it has been sometimes held that proof of selling to one person was, at least, *prima facie* evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental or made under such circumstances as to indicate that it was not the business of the vendor." *Ledbetter v. United States*, 170 U. S. 606, 610, 42 L. Ed. 1162.

59. **Indictment in language of statute.**—See the title *REVENUE LAWS*, vol. 10, p. 985.

Designation of place.—*Ledbetter v. United States*, 170 U. S. 606, 613, 42 L. Ed. 1162, set out fully in the title *IN-*

DICTMENTS, INFORMATION, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 997.

Designation of time.—*Ledbetter v. United States*, 170 U. S. 606, 612, 42 L. Ed. 1162, fully set out in the title *INDICTMENT, INFORMATION, PRESENTMENTS AND COMPLAINTS*, vol. 6, p. 996.

Section 3236 construed not to authorize unlawful carrying on of more than one business in same place.—Section 3236, Rev. Stat., requiring payment of special tax for every kind of business conducted, concerns only the obtaining of a tax for each of two occupations where they are lawfully carried on at one place. It does not grant authority to carry on two such occupations otherwise unlawful. *Ludloff v. United States*, 108 U. S. 176, 182, 27 L. Ed. 693. See the title *REVENUE LAWS*, vol. 10, p. 985.

60. **Brewers.**—*United States v. Glab*, 99 U. S. 225, 25 L. Ed. 273. As to right to refund, see post, "Refunding," IX, A.

Malt and spirituous liquors distinct.—Section 3244, Rev. Stat., taxing wholesale and retail liquor dealers, seems plainly by its provisions to distinguish "malt liquors," the product of fermentation, from "spirituous liquors," the result of distillation. *Sarlls v. United States*, 152 U. S. 570, 573, 38 L. Ed. 556.

61. It was held in *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497, that congress might impose a special tax upon a trade or business, such as selling lottery tickets, although such business was forbidden by state law. It did not confer a license to break the state law.

Sugar Refining.—See note.⁶²

Bankers, Brokers and Wholesale Dealers.—See ante, "In General," IV, C, 3, a, (2), (a). See, also, the title **BROKERS**, vol. 3, pp. 531, 532.

K. Passenger Taxes.—See post, "Tonnage Duties and Passenger Taxes," IV, N.

L. Poll Taxes.—States, generally, have the right to impose poll taxes, as well as those on property, though they should be proportionate and moderate in amount.⁶³

M. Public or Governmental Property.—See post, "Public Property," V, G, 2.

N. Tonnage Duties and Passenger Taxes—Tonnage Duties.—See the title **TONNAGE DUTIES**, and cross references therefrom.

Passenger Taxes.—See the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, pp. 332, 344, 373, 378, 463, et seq. See note.⁶⁴

O. Property Held in Trust.—See post, "Listing and Return by Owner," VI, E.

P. Ready Made Clothing.—As to tax on ready made clothing and exemption therefrom, see the title **REVENUE LAWS**, vol. 10, p. 966.

V. Exemptions from Taxation.⁶⁵

A. Definitions and Distinctions—1. **DEFINITIONS**—a. *Construction of Term "Privilege."*—As we shall see further on, the early rulings of the supreme court that an exemption from taxation was embraced in the term "privilege" in a grant,⁶⁶ have been departed from.⁶⁷ But exemption from taxation may

62. **Sugar refining.**—See *Pennington v. Cox*, 2 Cranch 33, 2 L. Ed. 199, construing the act of 1802, repealing the tax on refined sugar.

63. **Poll taxes.**—*Passenger Cases*, 7 How. 283, 531, 12 L. Ed. 702, Mr. Justice Woodbury's dissenting opinion.

64. **Passenger tax inconsistent with naturalization clause.**—The right of taxation upon foreign passengers claimed by the states of New York and Massachusetts is inconsistent with the naturalization clause in the constitution, and the laws of congress regulating it. If a state can, by taxation or otherwise, direct upon what terms foreigners may come into it, it may defeat the whole policy of the national government and of the constitution with respect to immigrants and the naturalization of foreigners. (*Opinion of Wayne, J.*) *Passenger Cases*, 7 How. 283, 426, 12 L. Ed. 702. See the titles **ALIENS**, vol. 1, p. 248; **NATURALIZATION**, vol. 8, p. 798.

65. **Of Indian lands.**—See the title **INDIANS**, vol. 6, p. 955.

Property in hands of bankrupt trustee not exempt.—See the title **BANKRUPTCY**, vol. 2, p. 896.

Exemption of federal property, agencies and instrumentalities.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 192, et seq. See, also, ante, "Nature and Extent," III, D, 1, b.

Exemption of state and municipal property, agencies and instrumentalities.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 209, et seq. See, also, ante, "Infringement on Rights of States," III, C, 1, b, (2).

Federal, state and municipal securities.—See ante, "Federal, State and Municipal Securities," IV, D; "Tax on Incomes from Municipal Securities," III, C, 3, b, (3).

Commerce and property engaged therein.—See the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 269.

Franchises.—See ante, "Franchises, Rights and Privileges," IV, E.

Incomes.—See ante, "Income Taxes," III, C, 3, b.

Imports and exports.—See ante, "Imports and Exports," IV, F.

Public lands.—See ante, "Public Lands of the United States," IV, H, 2.

Repeal of exemption as question ruled by state decision.—See the title **COURTS**, vol. 4, p. 1070.

66. See post, "Construction of Particular Words and Phrases in Grant," V, F, 4, b.

67. **Privilege held not to include exemption from taxation.**—*Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 26 L. Ed. 152; *Railroad Co. v. Commissioners*, 103 U. S. 1, 4, 26 L. Ed. 359; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 252, 27 L. Ed. 922. The prior decisions on this point are reviewed at length and discussed in *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. Ed. 784.

"If the exemption was granted only as

be construed as included in the word "privileges," if there are other provisions removing all doubt of the intention of the legislature in that respect.⁶⁸

b. *Construction of Term "Immunity."*—"The word 'immunity' expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words (rights or privileges). Exemption from taxation is more accurately described as an 'immunity' than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption."⁶⁹

2. *DISTINCTIONS.*—There is a marked distinction between a limitation of the power to tax beyond a certain rate, and an exemption from taxation.⁷⁰ But there is no distinction between an exemption or immunity, and a special and discriminating rule of taxation, as applied to charters.⁷¹

B. Power to Grant Exemptions.—I. POWER OF STATE LEGISLATURES—

a. *In General.*—It has been settled by repeated adjudications of the federal supreme court that, in the absence of constitutional prohibitions,⁷² a state may

a privilege it may be recalled at the pleasure of the legislature. *Cooley*, Const. Lim. (4th Ed.) 342; *Cooley*, Taxation, 146." *Railway Co. v. Philadelphia*, 101 U. S. 528, 532, 29 L. Ed. 912.

"In *Picard v. Tennessee*, etc., R. Co., 130 U. S. 637, 32 L. Ed. 1051, Mr. Justice Field, in delivering the opinion of the court, said: 'The later, and, we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term "privileges," it will not be so construed. It can have its full force by confining it to other grants to the corporation.'" *Rochester R. Co. v. Rochester*, 205 U. S. 236, 251, 51 L. Ed. 784. See, also, *Wilmington*, etc., R. Co. v. *Alsbrook*, 146 U. S. 279, 36 L. Ed. 972; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 182, 40 L. Ed. 660; *Railroad Cos. v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091.

68. *Picard v. Tennessee*, etc., R. Co., 130 U. S. 637, 642, 32 L. Ed. 1051; *Wilmington*, etc., R. Co. v. *Alsbrook*, 146 U. S. 279, 297, 36 L. Ed. 972.

69. *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 177, 40 L. Ed. 660.

70. *Exemption distinguished from limitation.*—The right of a foreign corporation, which has been admitted to do business in a state upon the payment of a certain license tax or fee, not to have same increased beyond that imposed on domestic corporations of similar character, held to be a contractual right and to be not an exemption from taxation, but simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. *American Smelting*, etc., Co. v. *Colorado*, 204 U. S. 103, 114, 51 L. Ed. 393. See the title *FOREIGN CORPORATIONS*, vol. 6, pp. 324, 325. See ante, "Commutation of Taxes," III, A, 2, b, (3), (e).

71. *No distinction between exemption and discrimination.*—*Mobile*, etc., R. Co. v. *Tennessee*, 153 U. S. 486, 38 L. Ed. 793. See, also, post, "General Encouragements and Bounties," V, D, 3, b, (2), ee.

72. *Constitutional inhibitions against exemptions.*—*Jefferson Branch Bank v. Skelly*, 1 Black 436, 448, 17 L. Ed. 173; *Yazoo*, etc., R. Co. v. *Adams*, 180 U. S. 1, 22, 45 L. Ed. 395, rehearing denied in S. C., 181 U. S. 580, 45 L. Ed. 1011; *Powers v. Detroit*, etc., R. Co., 201 U. S. 543, 556, 50 L. Ed. 860.

The constitutions of Missouri, *Home of the Friendless v. Rouse*, 8 Wall. 430, 438, 19 L. Ed. 495, followed in *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498; *Chicago*, etc., R. R. v. *Guffey*, 122 U. S. 561, 30 L. Ed. 1135; *Keokuk*, etc., R. Co. v. *Missouri*, 152 U. S. 301, 38 L. Ed. 450; *Arkansas*, *Memphis*, etc., R. Co. v. *Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *Florida*, *Louisville*, etc., R. Co. v. *Palmes*, 109 U. S. 244, 255, 27 L. Ed. 922; *Georgia*, *Savannah* v. *Jesup*, 106 U. S. 563, 570, 27 L. Ed. 276; and *Tennessee* all contain such prohibitions. *Railroad Cos. v. Gaines*, 97 U. S. 697, 709, 710, 24 L. Ed. 1091; *Mobile*, etc., R. Co. v. *Tennessee*, 153 U. S. 486, 500, 38 L. Ed. 793.

Under the Tennessee constitution of 1834, an exemption from taxation by charter could be granted. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *County of Tipton v. Locomotive Works*, 103 U. S. 523, 530, 26 L. Ed. 340; *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810; *Mobile*, etc., R. Co. v. *Tennessee*, 153 U. S. 486, 499, 38 L. Ed. 793.

But under the constitution of 1870, the legislature could not even by general law grant or preserve an immunity from taxation, not otherwise existing, total or partial, to the capital stock or shares of a corporation. *Memphis City Bank v. Tennessee*, 161 U. S. 186, 190, 40 L. Ed. 664.

Acceptance of charter after adoption of prohibition.—Where an act of incorporation was passed when the state constitution did not forbid special exemptions or limitations as to taxation, but was not organized until after a new constitution went into effect which did forbid them, it was held that it was not entitled to the

by contract based on a consideration, exempt the property of an individual or corporation, from taxation, either for a specified period or permanently,⁷³ so

exemption from taxation granted by that charter on payment of a commutation tax on its corporate stock. *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 196, 40 L. Ed. 667.

Inhibition prevents renewal of exemption, as well as original grant.—*Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 254, 27 L. Ed. 922; *Trask v. Maguire*, 18 Wall. 391, 409, 21 L. Ed. 938; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357.

Laws indirectly producing exemption are void.—*Huntington v. Worthen*, 120 U. S. 97, 101, 30 L. Ed. 588.

A law, therefore, omitting from assessment portions of any particular property, thus lessening the estimate of its value, has the effect of exempting it to that extent from taxation. That result cannot be accomplished, as well observed by the supreme court of the state, under the guise of regulating the duties of assessors. *Huntington v. Worthen*, 120 U. S. 97, 101, 30 L. Ed. 588.

Partial invalidity.—Where the statute declared that, in making its statement of the value of its property, the railroad company should omit certain items, that clause being held invalid, the rest remained unaffected, and could be fully carried out. An exemption, which was invalid, was alone taken from it. *Huntington v. Worthen*, 120 U. S. 97, 102, 30 L. Ed. 588.

Right to change mode of taxation.—It was held in *Savannah v. Jesup*, 106 U. S. 563, 27 L. Ed. 276, that the constitution of Georgia declaring that all laws exempting property from taxation shall be void, does not affect a statute which merely changes the mode of taxation. See ante, "Exemptions Not Prohibited," III, A, 2, b, (3), (h).

73. State legislatures may grant exemptions from taxation which are irrevocable. *New Jersey v. Wilson*, 7 Cranch 164, 166, 3 L. Ed. 303; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *State Bank v. Knoop*, 16 How. 369, 376, 384, 14 L. Ed. 977; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Mechanics', etc., Bank v. Debolt*, 18 How. 380, 15 L. Ed. 458; *Mechanics', etc., Bank v. Thomas*, 18 How. 384, 15 L. Ed. 460; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *Franklin Branch Bank v. Ohio*, 1 Black 474, 17 L. Ed. 180; *Gilman v. Sheboygan*, 2 Black 510, 513, 17 L. Ed. 305; *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Von Hoffman v. Quincy*, 4 Wall. 535, 554, 18 L. Ed. 403; *Home of the Friendless v. Rouse*, 8 Wall. 430, 438, 19 L. Ed. 495, followed in *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed.

498; *Wilmington Railroad v. Reid*, 13 Wall. 264, 266, 267, 20 L. Ed. 568; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 20 L. Ed. 570; *Salt Co. v. East Saginaw*, 13 Wall. 373, 376, 20 L. Ed. 611; *Tomlinson v. Jessup*, 15 Wall. 454, 24 L. Ed. 204; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Charleston v. Branch*, 15 Wall. 470, 21 L. Ed. 193; *Humphrey v. Pegues*, 16 Wall. 244, 248, 249, 21 L. Ed. 326; *The Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Rees v. Watertown*, 19 Wall. 107, 122, 22 L. Ed. 72; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. Ed. 282; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 498, 22 L. Ed. 595; *Bailey v. Maguire*, 22 Wall. 215, 226, 22 L. Ed. 850; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Farrington v. Tennessee*, 95 U. S. 679, 689, 24 L. Ed. 558; *Welch v. Cook*, 97 U. S. 541, 24 L. Ed. 1112; *University v. People*, 99 U. S. 309, 25 L. Ed. 387; *Hoge v. Railroad Co.*, 99 U. S. 348, 25 L. Ed. 303; *County of Tipton v. Locomotive Works*, 103 U. S. 523, 26 L. Ed. 340; *Asylum v. New Orleans*, 105 U. S. 362, 368, 26 L. Ed. 1128; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 665, 29 L. Ed. 516; *Williamson v. New Jersey*, 130 U. S. 189, 32 L. Ed. 915; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645; *Louisville Water Co. v. Kentucky*, 170 U. S. 127, 42 L. Ed. 975.

The assumption that a state, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the state. The question of exempting property from taxation is one of policy, and not of power. *State Bank v. Knoop*, 16 How. 369, 384, 14 L. Ed. 977.

The modification and removal of taxes, and the exemption of property therefrom, is an ordinary exercise of the power of state sovereignty. *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305.

But there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent exemption from taxation. *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 666, 41 L. Ed. 590; *Washington University v. Rouse*, 8 Wall. 439, 443, 19 L. Ed. 498.

Limitations upon right to bargain away power to tax.—But no government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is,

as to bind not only the legislature granting the exemption but its successors.⁷⁴ There is nothing in the Constitution of the United States to forbid it, nor any authority given to the supreme court to question the right of a state to bind itself by such contracts, whenever it may think proper to make them.⁷⁵ But it is not in the power of a municipal corporation, by any contract with a corporation, to deprive the legislature of the power of determining this question of exemptions, when the state has reserved such power to it; by an ordinance granting a franchise.⁷⁶

that for a consideration it may, in the exercise of a reasonable discretion, and for the public good surrender a part of its powers in this particular. *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. Ed. 1079. See ante, "Alienability by Legislature," III, A, 1, d, (6).

Exemption of corporations.—It has been often decided by the supreme court that the legislature of a state may, in the absence of special restrictions in its constitution, make a valid contract with a corporation to exempt it from taxation, and that such contract can be enforced against the state at the instance of the corporation. *New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *Achison v. Huddleson*, 12 How. 293, 13 L. Ed. 993; *State Bank v. Knopp*, 16 How. 369, 14 L. Ed. 977; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 498, 22 L. Ed. 595; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 463, 42 L. Ed. 236; *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 556, 50 L. Ed. 860.

Such a provision in a corporate charter constitutes a contract which the state may not substantially impair. *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Humphrey v. Pegues*, 16 Wall. 244, 249, 21 L. Ed. 326.

Banks.—*Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 429, 14 L. Ed. 997.

Duration.—The exemption may be either in perpetuity or for a limited period of time. *Bailey v. Maguire*, 22 Wall. 215, 22 L. Ed. 850.

Statute confirming charter exemption of foreign corporation.—*Mackell v. Chesapeake, etc., Canal Co.*, 94 U. S. 308, 24 L. Ed. 161. As to sale of exempt property for taxes, see post, "Purpose of Sale and Authority to Sell," VIII, A, 1.

74. Binding effect of exemption on succeeding legislatures.—*New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L.

Ed. 173; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Tomlinson v. Jessup*, 15 Wall. 454, 458, 24 L. Ed. 204; *Hoge v. Railroad Co.*, 99 U. S. 348, 25 L. Ed. 303; *Wolff v. New Orleans*, 103 U. S. 358, 368, 26 L. Ed. 395; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *State Bank v. Knopp*, 16 How. 369, 14 L. Ed. 977; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 14 L. Ed. 997; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Mechanics', etc., Bank v. Debolt*, 18 How. 380, 15 L. Ed. 458; *Mechanics', etc., Bank v. Thomas*, 18 How. 384, 15 L. Ed. 460; *Franklin Branch Bank v. Ohio*, 1 Black 474, 17 L. Ed. 180; *Wright v. Sill*, 2 Black 544, 17 L. Ed. 333; *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558.

Though the right of one legislature to bind its successors in the exercise of its power of taxation, which is an essential attribute of sovereignty, has met with frequent earnest dissent from a minority of the court. *Railroad Co. v. Maine*, 96 U. S. 499, 508, 24 L. Ed. 836.

Limitation upon power to bind future legislatures.—The legislature cannot by contract, deprive a future legislature of the power of imposing any tax it may deem necessary for the public service—or of exercising any other act of sovereignty confided to the legislative body, unless the power to make such a contract is conferred upon them by the constitution of the state. And in every controversy on this subject, the question must depend on the constitution of the state, and the extent of the power thereby conferred on the legislative body. In this case the power existed under the constitution in force. *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 431, 14 L. Ed. 997.

Statutes are not a limitation of the power of future legislatures in respect to the taxation of the property, where they are in no sense contracts and are not, therefore, irrepealable. *Railway Co. v. Loftin*, 98 U. S. 559, 564, 25 L. Ed. 222; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805.

75. *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 428, 14 L. Ed. 997; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 47, 50 L. Ed. 65.

76. Powers of municipal corporations.—*Railway Co. v. Philadelphia*, 101 U. S.

b. *Power to Contract for Commutation Taxes.*—There is no constitutional objection to the exercise of the power to make a binding contract by a state in laying a specific tax in lieu of all other taxes on a corporation, as a bank.⁷⁷

c. *Power to Annex Conditions and Contingencies.*—The constitutional power to grant exemptions, wholly or partially, and for fixed or indefinite periods, necessarily includes the power to exempt upon conditions or contingencies which are to happen in the future.⁷⁸

d. *Extraterritorial Power.*—"One state cannot exempt property from taxation in another. Each state is independent of all the others in this particular."⁷⁹

2. **POWER OF CONGRESS.**—And Congress, like any state legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation.⁸⁰

3. **POWER OF MUNICIPALITIES.**—A municipality enjoys no such inherent right to grant exemptions as we have seen is possessed by state legislatures. Attempts by cities to bargain away their taxing powers are generally regarded as *ultra vires*.⁸¹ And a grant of the power of taxation, by the legislature of a state to a township or other municipality, does not form such a contract between the state and the township under the contract clause as will thereafter preclude the state from granting exemptions to any such subjects of taxation by the township.⁸²

C. Rules of Construction—1. **STATUTES EXEMPTING PROPERTY**—a. *In General.*—The rule of construction in construing an act exempting property from taxation is so well established by this and other courts as scarcely to need the citation of authorities.⁸³ It is familiar law that statutes exempting property from taxation are to be strictly construed.⁸⁴ The intention of the legislature

528, 29 L. Ed. 912; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. Ed. 173; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 107, 34 L. Ed. 898; *The Delaware Railroad Tax*, 18 Wall. 206, 227, 21 L. Ed. 888; 2 Morawetz on Private Corporations, §§ 1061, 1062, 1066, 1085, 1095, 1097.

77. **Commutation taxes.**—*State Bank v. Kriop*, 16 How. 369, 389, 14 L. Ed. 977; *Stearns v. Minnesota*, 179 U. S. 223, 253, 45 L. Ed. 162. See ante, "Commutation of Taxes," III, A, 2, b, (3), (e).

78. **Legislature may annex conditions.**—*Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 501, 38 L. Ed. 793.

Such as that the property of the corporation should be only liable for one-half the current rate of taxation levied by the state during any year, or it could constitutionally provide by the charter that the corporate property should be assessed at only one-half of its value. *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 503, 38 L. Ed. 793; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 20 L. Ed. 570; *Farrington v. Tennessee*, 95 U. S. 679, 681, 24 L. Ed. 558.

79. *Bonaparte v. Tax Court*, 104 U. S. 592, 594, 26 L. Ed. 845. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 347.

80. **Congress may grant exemptions.**—*Gibbons v. District of Columbia*, 116 U. S. 404, 408, 29 L. Ed. 680.

81. **Power of municipalities to grant exemptions.**—*Savannah, etc., Railway v. Savannah*, 198 U. S. 392, 398, 49 L. Ed. 1097. See ante, cases under note 1.

82. **Power of city to tax may be withdrawn.**—*East Hartford v. Hartford Bridge Co.*, 10 How. 511, 534, 13 L. Ed. 518; *State Bank v. Knoop*, 16 How. 369, 380, 14 L. Ed. 977; *United States v. Railroad Co.*, 17 Wall. 322, 329, 21 L. Ed. 597; *Williamson v. New Jersey*, 130 U. S. 189, 199, 200, 32 L. Ed. 915. See ante, "Revocation and Subsequent Limitation," III, E, 1, d, (4); "In General," V, B, 1, a.

Power to tax to pay off municipal bonds.—Where a state legislature authorizes a city to borrow money, issue bonds and tax all the property in the city to pay it, this is not a contract with the bondholders, that the state shall not afterwards exercise her power to modify the taxation, or exempt portions of the property from taxation. And if it were, a property holder could not complain if the bondholders did not. *Gilman v. Sheboygan*, 2 Black 510, 17 L. Ed. 305.

83. **Rules of construction.**—*Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 672, 47 L. Ed. 641.

84. **Statutes exempting from taxation are strictly construed.**—*Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *Railway Co. v. Philadelphia*, 101 U. S. 528, 29 L. Ed. 912; *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810; *Railroad Co. v. Loftin*, 105 U. S. 258, 261, 26 L. Ed. 1042; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 29 L. Ed. 770; *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174, 33 L. Ed. 302; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 294, 36 L. Ed. 972; *Schurz v. Cook*, 148 U. S. 397, 37 L. Ed. 498; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S.

to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms,⁸⁵ the rule being that the right of taxation exists unless the exemption is expressed in clear and unambiguous terms,⁸⁶ and no claim of exemption can be sustained unless within

301, 306, 38 L. Ed. 450; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 529, 40 L. Ed. 247; *Covington, etc., Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. Ed. 560; *New Mexico v. United States Trust Co.*, 172 U. S. 171, 185, 43 L. Ed. 407.

Meaning of rule in text.—But the rule requiring a strict construction of statutes exempting property from taxation must not be misunderstood. It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised of the meaning of a statute, ambiguity occurs, which immediately and inevitably determines the interpretation of the statute. Its proper office is to help to solve ambiguities, not to compel an immediate surrender to them—to be an element in decision, and effective, maybe, when all other tests of meaning have been employed which experience has afforded, and which it is the duty of courts to consider when rights are claimed under a statute, to ascertain if doubt exists, and to solve it if possible. *Citizens' Bank v. Parker*, 192 U. S. 73, 85, 48 L. Ed. 346.

85. Intent to exempt must appear beyond reasonable doubt.—*Hoge v. Railroad Co.*, 99 U. S. 348, 354, 25 L. Ed. 303; *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *The Delaware Railroad Tax*, 18 Wall. 206, 225, 21 L. Ed. 888; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 23 L. Ed. 814; *Farrington v. Tennessee*, 95 U. S. 679, 686, 24 L. Ed. 558; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 668, 29 L. Ed. 770; *Given v. Wright*, 117 U. S. 648, 655, 29 L. Ed. 1021; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 641, 32 L. Ed. 1051; *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 192, 195, 36 L. Ed. 121; *Wilmington, etc., R. Co. v. Alsbrough*, 146 U. S. 279, 294, 36 L. Ed. 972; *Bank v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645.

"Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. * * * Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 22, 45 L. Ed. 395; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 26, 45 L. Ed. 408.

"That the legislature was, about the time in question, freely incorporating various companies and granting them ex-

emption from taxation with considerable liberality is not a sufficient reason to induce this court to depart from the universal and well established rule making a claim for exemption a matter to be proved beyond all doubt." *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 179, 40 L. Ed. 660.

The act of the legislature of Missouri of February 16th, 1865, to provide for the completion of the North Missouri Railroad, does not so show an intention of the state to give up its power to tax the property of the corporation owning that railroad. *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 L. Ed. 287.

86. Exemption must be expressed in clear, unambiguous terms.—*Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 393, 13 L. Ed. 461; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *Gilman v. Sheboygan*, 2 Black 510, 513, 17 L. Ed. 305; *Society for Savings v. Coite*, 6 Wall. 594, 606, 18 L. Ed. 987; *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907; *The Delaware Railroad Tax*, 18 Wall. 206, 225, 226, 21 L. Ed. 888; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 L. Ed. 287; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 498, 499, 22 L. Ed. 595; *Tucker v. Ferguson*, 22 Wall. 527, 575, 22 L. Ed. 805; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 597, 23 L. Ed. 814; *New Jersey v. Yard*, 95 U. S. 104, 116, 24 L. Ed. 352; *Hoge v. Railroad Co.*, 99 U. S. 348, 355, 25 L. Ed. 303; *Railway Co. v. Philadelphia*, 101 U. S. 528, 532, 29 L. Ed. 912; *Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, 400, 401, 27 L. Ed. 976; *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 27 L. Ed. 977; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 617, 618, 28 L. Ed. 837; *Sturges v. Carter*, 114 U. S. 511, 521, 29 L. Ed. 240; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 236, 29 L. Ed. 626; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 668, 29 L. Ed. 770; *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569, 30 L. Ed. 732; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 641, 32 L. Ed. 1051; *Wilmington, etc., R. Co. v. Alsbrough*, 146 U. S. 279, 294, 36 L. Ed. 972; *Schurg v. Cook*, 148 U. S. 397, 409, 37 L. Ed. 498.

This is the rule of construction in Illinois. *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 47 L. Ed. 641.

Contract exempting property from taxation must be clearly proved.—*Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Gilman v.*

Sheboygan, 2 Black 510, 17 L. Ed. 305, North Missouri R. Co. v. Maguire, 20 Wall. 46, 22 L. Ed. 287; Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; Tucker v. Ferguson, 22 Wall. 527, 573, 22 L. Ed. 805; New Jersey v. Yard, 95 U. S. 104, 116, 24 L. Ed. 352; Hoge v. Railroad Co., 99 U. S. 348, 25 L. Ed. 303; Bank v. Tennessee, 161 U. S. 134, 146, 40 L. Ed. 645, and cases cited; Wells v. Savannah, 181 U. S. 531, 539, 540, 45 L. Ed. 986.

"Claim for exemption must be clearly made out."—Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 23 L. Ed. 814; Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. Ed. 558; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770; New Orleans City, etc., R. Co. v. New Orleans, 143 U. S. 192, 195, 36 L. Ed. 121; Bank v. Tennessee, 161 U. S. 134, 146, 40 L. Ed. 645.

"Clear proof of a valid contract."—The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment. Wells v. Savannah, 181 U. S. 531, 539, 45 L. Ed. 986.

Surrender must be expressed in terms "too plain to be mistaken."—Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939; Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461; Ohio Life Ins., etc., Co. v. Debolt, 16 How. 416, 435, 14 L. Ed. 997; Jefferson Branch Bank v. Skelly, 1 Black 436, 446, 17 L. Ed. 173; Memphis Gas Light Co. v. Shelby County, 109 U. S. 398, 400, 27 L. Ed. 976; Memphis, etc., R. Co. v. Commissioners, 112 U. S. 609, 617, 28 L. Ed. 837; Southwestern R. Co. v. Wright, 116 U. S. 231, 236, 29 L. Ed. 626; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 667, 29 L. Ed. 770; Chicago, etc., R. Co. v. Guffey, 120 U. S. 569, 575, 30 L. Ed. 732; Wilmington, etc., R. Co. v. Alsbrook, 146 U. S. 279, 36 L. Ed. 972; Bank v. Tennessee, 161 U. S. 134, 146, 40 L. Ed. 645; Phoenix Ins. Co. v. Tennessee, 161 U. S. 174, 177, 40 L. Ed. 660.

It being settled law that the language by which a state surrenders its right of taxation, must be clear and unmistakable, a grant by one state to a corporation of another state to exercise a part of its franchise within the limits of the state making the grant, and laying a tax upon it at the time of the grant, does not, of itself, preclude a right of further taxation by the same state. Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595.

Claim for exemption for subsequently issued stock.—Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. Ed. 773; Ohio Life Ins., etc., Co. v. Debolt, 16 How. 416, 435, 14 L. Ed. 997; Phoenix Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. Ed. 660; Bank

v. Tennessee, 163 U. S. 416, 423, 41 L. Ed. 211.

A provision in a corporate charter will not be construed as a contract of exemption from taxation unless there be a clear expression of the legislative will to that effect. Pacific R. Co. v. Maguire, 20 Wall. 36, 42, 22 L. Ed. 282; Ohio Life Ins., etc., Co. v. Debolt, 16 How. 416, 435, 14 L. Ed. 997; Jefferson Branch Bank v. Skelly, 1 Black 436, 446, 17 L. Ed. 173; Memphis Gas Light Co. v. Shelby County, 109 U. S. 398, 400, 27 L. Ed. 976; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 371, 27 L. Ed. 419.

Street railroads.—Where a city, under valid New York laws, grants a railway company certain privileges and provides for a definite annual payment therefor, but uses no language from which a contract to exempt from taxation plainly and unmistakably appears, the state must be held to retain its general taxing powers, and a subsequent franchise tax will not impair the obligation of any contract. Metropolitan St. R. Co. v. New York State Board, 199 U. S. 1, 50 L. Ed. 65; Twenty-Third St. R. Co. v. New York State Board, 199 U. S. 53, 50 L. Ed. 87. See, also, Savannah, etc., Railway Co. v. Savannah, 198 U. S. 392, 49 L. Ed. 1097, construing a contract for extension of tracks to create no exemption, none being expressed, and New Orleans City, etc., R. Co. v. New Orleans, 143 U. S. 192, 36 L. Ed. 121, where a contract between a city and a street railroad company, whereby the city sold the right of way and franchise to operate a street railway on certain streets of the city for a term of years, the charter providing the railroad was to pay an annual tax on its realty and fixtures, was held not impaired by the subsequent passage of a city ordinance imposing a license tax, pursuant to an act of the legislature, upon such business, as exemption from taxation is never to be presumed. New Orleans City, etc., R. Co. v. New Orleans, 143 U. S. 192, 36 L. Ed. 121, distinguishing Gordon v. Appeal Tax Court, 3 How. 133, 11 L. Ed. 529, and following Memphis Gas Light Co. v. Shelby County, 109 U. S. 398, 27 L. Ed. 976. See, also, Wells v. Savannah, 181 U. S. 531, 539, 45 L. Ed. 986.

No exemption resulted from a clause preserving the easement of the said street railway company for its railway purposes over land conveyed to the city in certain streets, and the right to lay down, construct, maintain and operate said railway through said streets, subject to the control and regulation of the mayor and aldermen. Savannah, etc., Railway v. Savannah, 198 U. S. 392, 398, 49 L. Ed. 1097.

License tax at so much per car operated does not exempt from franchise tax. Brooklyn City R. Co. v. New York State Board, 199 U. S. 48, 50 L. Ed. 79.

Delaware railroad tax.—Accordingly, a

the express letter or the necessary scope of the exempting clause.⁸⁷ A well-founded doubt is fatal to the claim. It is only when the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.⁸⁸ The reason of the rule is that such exemptions are in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed strictissimi juris.⁸⁹ If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it, the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests.⁹⁰

provision in an act of the legislature of Delaware, under which the original Wilmington and Susquehanna Railroad Company was united with the Delaware and Maryland Railroad Company, requiring the new company to pay annually into the treasury of the state a tax of one-quarter of one per cent upon its capital stock of \$400,000, did not prevent a subsequent legislature from imposing a further or different tax upon the company. The amount designated was only a declaration of the tax payable annually until a different rate should be established. The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888.

Construction of Atlanta & Richmond Air Line Railroad Company's charter.—Hoge v. Railroad Co., 99 U. S. 348, 25 L. Ed. 303.

"A permanent exemption of land from taxation, or an exemption dependent upon the will of an individual, is something not to be adjudged unless the language creating such exemption clearly compels such construction." Winona, etc., Land Co. v. Minnesota, 159 U. S. 526, 531, 40 L. Ed. 247. See, also, Tucker v. Ferguson, 22 Wall. 527, 528, 22 L. Ed. 805.

The rule of exemption from taxation for the Indian the same.—Goudy v. Meath, 203 U. S. 146, 149, 51 L. Ed. 130.

87. Ford v. Delta, etc., Land Co., 164 U. S. 662, 666, 41 L. Ed. 590; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 668, 29 L. Ed. 770; Chicago, etc., R. Co. v. Guffey, 120 U. S. 569, 30 L. Ed. 732; Yazoo, etc., R. Co. v. Thomas, 132 U. S. 174, 33 L. Ed. 302; Yazoo, etc., R. Co. v. Delta Comm'rs, 132 U. S. 190, 33 L. Ed. 308; New Orleans City, etc., R. Co. v. New Orleans, 143 U. S. 192, 36 L. Ed. 121; Schurz v. Cook, 148 U. S. 397, 409, 37 L. Ed. 498; Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 306, 38 L. Ed. 450; Winona, etc., Land Co. v. Minnesota, 159 U. S. 526, 40 L. Ed. 247.

88. Erie R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 23 L. Ed. 814; Farrington v. Tennessee, 95 U. S. 679, 686, 24 L. Ed. 558; New Orleans City, etc., R. Co. v. New Orleans, 143 U. S. 192, 195, 36 L. Ed. 121; Wilmington, etc., R. Co. v. Alsbrook, 140

U. S. 279, 36 L. Ed. 972; Ford v. Delta, etc., Land Co., 164 U. S. 662, 41 L. Ed. 590; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 672, 47 L. Ed. 641; Metropolitan St. R. Co. v. New York State Board, 199 U. S. 1, 36, 50 L. Ed. 65; Twenty-Third St. R. Co. v. New York State Board, 199 U. S. 53, 50 L. Ed. 87. See, also, Louisville v. Bank, 174 U. S. 439, 444, 43 L. Ed. 1039; Hoge v. Railroad Co., 99 U. S. 348, 25 L. Ed. 303; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Bailey v. Maguire, 22 Wall. 215, 22 L. Ed. 850; Central R., etc., Co. v. Georgia, 92 U. S. 665, 674, 23 L. Ed. 757, followed in Southwestern R. Co. v. Georgia, 92 U. S. 676, 23 L. Ed. 762; Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939; Christ Church v. County of Philadelphia, 24 How. 300, 302, 16 L. Ed. 602; Gilman v. Sheboygan, 2 Black 510, 513, 17 L. Ed. 305; Wilmington Railroad v. Reid, 13 Wall. 264, 266, 20 L. Ed. 568; Bank v. Tennessee, 104 U. S. 493, 495, 26 L. Ed. 810.

Statute exempting property belonging to seminary.—Chicago Theological Seminary v. Illinois, 188 U. S. 662, 672, 47 L. Ed. 641.

Partial exemption favored.—Where a construction either way would not be clearly erroneous, or, at any rate, either construction would not be so obviously erroneous as to leave no doubt upon the question, in such cases the rule as to the construction of statutes of exemption from taxation should be applied, and as there may be room for reasonable doubt whether a total or partial exemption was meant, the partial exemption should alone be recognized. Chicago Theological Seminary v. Illinois, 188 U. S. 662, 674, 47 L. Ed. 641.

89. Norfolk, etc., R. Co. v. Pendleton, 156 U. S. 667, 673, 39 L. Ed. 574; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. Ed. 401; Memphis, etc., R. Co. v. Commissioners, 112 U. S. 609, 617, 28 L. Ed. 837; Chesapeake, etc., R. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121.

90. Wilmington Railroad v. Reid, 13 Wall. 264, 267, 20 L. Ed. 568; Pacific R. Co. v. Maguire, 20 Wall. 36, 43, 22 L. Ed. 282; Asylum v. New Orleans, 105 U. S. 362, 369, 26 L. Ed. 1128; Metropolitan St.

b. *Effect of Charter Provisions as to Construction.*—Because by a section of the charter it is provided that the act “shall be construed liberally in all courts for the purposes therein expressed,” this language was not intended to nor could be held to change or qualify the general rules of construction applicable to the section under consideration.⁹¹

c. *Presumptions and Burden of Proof.*—(1) *Presumptions.*—The power to tax rests upon necessity and is inherent in every sovereignty, therefore grants of immunity from taxation are never to be presumed. On the contrary, all presumptions are the other way, and, unless an exemption is clearly established, all property must bear its just share of the burdens of taxation.⁹² As has been often said by the supreme court, the whole community is interested in retaining the power of taxation undiminished, and has a right to insist that its abandonment shall not be presumed in any case where the deliberate purpose of the state to abandon it does not appear.⁹³ The established rule of construction is that rights, privileges, and immunities not expressly granted are reserved.⁹⁴

(2) *Burden of Proof.*—The burden of proof is upon the party claiming the exemption, to make it entirely clear that, by contract or otherwise, the property is not subject to taxation.⁹⁵

R. Co. v. New York State Board, 199 U. S. 1, 43, 50 L. Ed. 65; Twenty-Third St. R. Co. v. New York State Board, 199 U. S. 53, 50 L. Ed. 87; New Jersey v. Yard, 95 U. S. 104, 24 L. Ed. 352.

91. Chicago Theological Seminary v. Illinois, 188 U. S. 662, 677, 47 L. Ed. 641.

92. Railroad Cos. v. Gaines, 97 U. S. 697, 24 L. Ed. 1091. See, also, Bank v. Tennessee, 104 U. S. 493, 26 L. Ed. 810; Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 371, 27 L. Ed. 419.

Exemptions from taxation not to be presumed.—The Delaware Railroad Tax Case, 18 Wall. 206, 21 L. Ed. 888; Bailey v. Maguire, 22 Wall. 215, 226, 22 L. Ed. 850; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; Railroad Cos. v. Gaines, 97 U. S. 697, 708, 24 L. Ed. 1091; Railroad Co. v. Commissioners, 103 U. S. 1, 26 L. Ed. 359; Ruggles v. Illinois, 108 U. S. 526, 531, 27 L. Ed. 812; Illinois Cent. R. Co. v. Illinois, 108 U. S. 541, 27 L. Ed. 818; Northwestern R. Co. v. Wright, 116 U. S. 231, 236, 29 L. Ed. 626; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 668, 29 L. Ed. 770; Tennessee v. Whitworth, 117 U. S. 139, 149, 29 L. Ed. 833; New Orleans City, etc., R. Co. v. New Orleans, 143 U. S. 192, 195, 36 L. Ed. 121; Northern Pac. R. Co. v. Clark, 153 U. S. 252, 271, 38 L. Ed. 706. See, also, Charles River Bridge v. Warren Bridge, 11 Pet. 420, 422, 9 L. Ed. 773; Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 617, 43 L. Ed. 823; Henderson Bridge Co. v. Henderson City, 173 U. S. 624, 43 L. Ed. 835.

Because the power to tax may be so wielded as to defeat the purpose for which the charter was granted, an exemption is not to be presumed. Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939.

Repeated decisions of the supreme court have held, in respect to private corporations, that the taxing power of the state is never presumed to be relinquished,

and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous terms. Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939, quoted with approval in Metropolitan St. R. Co. v. New York State Board, 199 U. S. 36, 50 L. Ed. 65; Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 393, 13 L. Ed. 461; Society for Savings v. Coite, 6 Wall. 594, 606, 18 L. Ed. 987; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770; Tennessee v. Whitworth, 117 U. S. 139, 148, 29 L. Ed. 833; Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 306, 38 L. Ed. 450, followed in Keokuk, etc., R. Co. v. Scotland County, 152 U. S. 317, 38 L. Ed. 457; New Mexico v. United States Trust Co., 174 U. S. 545, 547, 43 L. Ed. 1079. See, also, State Bank v. Knoop, 16 How. 369, 388, 14 L. Ed. 977; Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461.

93. Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939; Charles River Bridge v. Warren Bridge, 11 Pet. 420, 422, 9 L. Ed. 773; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Morgan v. Louisiana, 93 U. S. 217, 222, 23 L. Ed. 860; Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 393, 13 L. Ed. 461; Jefferson Branch Bank v. Skelly, 1 Black 436, 447, 17 L. Ed. 173; Tucker v. Ferguson, 22 Wall. 527, 575, 22 L. Ed. 805; Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 667, 29 L. Ed. 770.

94. The Delaware Railroad Tax, 18 Wall. 206, 225, 21 L. Ed. 888.

95. **One claiming exemptions must clearly and satisfactorily establish same.**—Ohio Life Ins., etc., Co. v. Debolt, 16 How. 416, 451, 14 L. Ed. 997; Raleigh, etc., R. Co. v. Reid, 13 Wall. 269, 20 L. Ed. 570; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; Canal, etc., Co. v. New Orleans, 99 U. S. 97, 99, 25 L. Ed. 409; Hoge v. Railroad Co., 99 U. S. 348, 25 L. Ed. 303; Sturges

d. *Implied Exemptions*—(1) *In General*.—In order to raise an exemption from taxation by necessary implication, the language must be of such a character as, fairly interpreted, leaves no room for controversy. The power to tax rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment.⁹⁶

(2) *Effect of Silence in Charter as to Exemption*.—Mere silence is the same as a denial of exemption.⁹⁷

(3) *Effect of Inaction by Taxing Officers*.—"The omission of the taxing officers of the state in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed."⁹⁸

(4) *Effect of Failure to Mention Mode of Assessment*.—The fact that special provision is made in an incorporating act for ascertaining the taxes to become due by the corporation to the state (nothing being said about the manner of ascertaining other taxes), is not of itself enough to work an exemption of the property of the corporation from all taxation not levied for state purposes. Silence, in regard to such other taxes, cannot be construed as a waiver of the right of the state to levy them.⁹⁹

(5) *Construction of Commutation Taxes*.—See ante, "Commutation of Taxes," III, A, 2, b, (3), (e).

(6) *Construction of Covenant for Quiet Enjoyment*.—The covenant on the part of the city on a sale of lots upon a ground rent, that the purchasers should have peaceable and quiet possession, use, occupation and enjoyment of the lots upon payment of the rent as it became due, is in nowise violated by the taxation of the lots in the hands of the purchasers of their assigns. A covenant for

v. Carter, 114 U. S. 511, 29 L. Ed. 240; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. Ed. 656; *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 35, 50 L. Ed. 65.

Exemption from municipal taxes.—*Wells v. Savannah*, 181 U. S. 531, 45 L. Ed. 986.

96. Implied exemptions.—*Bailey v. Maguire*, 22 Wall. 215, 22 L. Ed. 850, where the property was declared to be "subject to taxation," meaning general taxation.

A mere grant of privileges in respect to constructing and operating a street railway insufficient. *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 37, 50 L. Ed. 65; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

Contract between a city and a street railway company as to extending its tracks and license tax.—See ante, "Statutes Exempting Property," V, C, 1.

Contract of exemption not implied from mere privilege to manufacture and vend gas.—*Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, 400, 27 L. Ed. 976, followed in *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 192, 195, 36 L. Ed. 121.

Mere direction to pay a certain sum does not exempt from further taxation.—*Railway Co. v. Philadelphia*, 101 U. S. 528, 538, 29 L. Ed. 912.

Certificate authorizing foreign insurance company to do business in state does

not impliedly exempt from municipal taxation. *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. Ed. 825; *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497, approved in *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.*, 125 U. S. 18, 31 L. Ed. 607; *Postal Tel. Cable Co. v. Charleston*, 153 U. S. 692, 695, 38 L. Ed. 871.

97. Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 178, 40 L. Ed. 660. See ante, "Presumptions," V, C, 1, c, (1).

98. Vicksburg, etc., R. Co. v. Dennis, 116 U. S. 665, 670, 29 L. Ed. 770; *Yazoo R'y Co. v. Thomas*, 132 U. S. 174, 185, 33 L. Ed. 302. See ante, "Waiver," III, D, 1, d; post, "Assessment and Levy," VI. See, also, the title *CONSTITUTIONAL LAW*, vol. 4, p. 438.

99. Bailey v. Maguire, 22 Wall. 215, 22 L. Ed. 850.

And the specification of the mode of assessment does not amount to a contract against any change thereof. Whether or not an act prescribing such particular mode has been impliedly repealed by a general revenue act, not in terms repealing it, is a matter peculiarly within the province of the highest courts of the state, whose acts are the subjects of the question, to decide. And when such courts have decided the question, their decision is controlling. *Bailey v. Maguire*, 22 Wall. 215, 22 L. Ed. 850. See ante, "Designation of Taxing Agencies and Procedure," VI, A, 2.

quiet enjoyment would not under these circumstances include an exemption from taxation, although a right of re-entry is retained.¹

e. Construction by State Courts Is Binding.—The rule in such a case is that the federal courts follow the construction placed upon the statute by the state courts, and in advance of such construction they should not declare property beyond the scope of the statute and exempt from taxation unless it is clear that such is the fact.²

2. STATUTES IMPOSING TAXES.—See ante, "Express Authority of Law Essential, and Construction," III, A, 1, j.

D. Impairment of Obligation of Contracts—1. IN GENERAL.—It is well settled that a grant of exemption from taxation may constitute a contract within the meaning of the provision of the federal constitution forbidding the state to pass any law impairing the obligation of contracts, so that a subsequent tax cannot be laid.³ For example, if a state expressly engages in a grant that cer-

1. *Wells v. Savannah*, 181 U. S. 531, 544, 45 L. Ed. 986. See post, "Property of Municipal Corporation," V, G, 2, c.

2. *New Orleans v. Stempel*, 175 U. S. 309, 44 L. Ed. 174; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 674, 675, 47 L. Ed. 641; *State Board v. Comptoir National De'Scompte*, 191 U. S. 388, 402, 48 L. Ed. 232; *Olcott v. The Supervisors*, 16 Wall. 678, 21 L. Ed. 382. See the title COURTS, vol. 4, p. 1118.

Taxing corporations consolidated from existing corporations enjoying exemption.—*Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359; *Flash v. Conn.*, 109 U. S. 371, 379, 27 L. Ed. 966; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88; *Board of Liquidation v. Louisiana*, 179 U. S. 622, 45 L. Ed. 347; *Yazoo, etc., R. Co. v. Adams*, 181 U. S. 580, 582, 45 L. Ed. 1011.

3. **Impairment of obligation of contracts.**—*New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Gordon v. Planters' Bank v. Sharp*, 6 How. 301, 12 L. Ed. 447; *Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 429, 14 L. Ed. 997; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 17 L. Ed. 173; *Franklin Branch Bank v. Ohio*, 1 Black 474, 17 L. Ed. 180; *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Salt Co. v. East Saginaw*, 13 Wall. 373, 376, 20 L. Ed. 611; *Tomlinson v. Jessup*, 15 Wall. 454, 24 L. Ed. 204; *Tomlinson v. Branch*, 15 Wall. 460, 469, 21 L. Ed. 189; *Humphrey v. Pegues*, 16 Wall. 244, 247, 21 L. Ed. 326; *Osborne v. Mobile*, 16 Wall. 479, 481, 21 L. Ed. 470; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 498, 22 L. Ed. 595; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 42, 22 L. Ed. 282; *Bailey v. Maguire*, 22 Wall. 215, 226, 22 L. Ed. 850; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860, citing *Wilmington Railroad v. Reid*, 13

Wall. 264, 20 L. Ed. 568; *New Jersey v. Yard*, 95 U. S. 104, 24 L. Ed. 352; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Welch v. Cook*, 97 U. S. 541, 542, 24 L. Ed. 1112, approved in *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379, 386, 48 L. Ed. 229; *Railway Co. v. Philadelphia*, 101 U. S. 528, 29 L. Ed. 912; *Asylum v. New Orleans*, 105 U. S. 362, 369, 26 L. Ed. 1128; *Williamson v. New Jersey*, 130 U. S. 189, 197, 32 L. Ed. 915; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645; *Grand Lodge v. New Orleans*, 166 U. S. 143, 146, 41 L. Ed. 951; *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 559, 50 L. Ed. 860.

Charter of corporation held to be an inviolable contract.—The *Delaware Railroad Tax*, 18 Tex. 206, 225, 21 L. Ed. 888; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495, followed in *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498; *Wilmington Railroad v. Reid*, 13 Wall. 264, 266, 20 L. Ed. 568; *Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 20 L. Ed. 570; *Salt Co. v. East Saginaw*, 13 Wall. 373, 378, 20 L. Ed. 611; *Holyoke Co. v. Lyman*, 15 Wall. 500, 511, 21 L. Ed. 133; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 43, 22 L. Ed. 282; *Railway Co. v. Philadelphia*, 101 U. S. 528, 539, 29 L. Ed. 912; *Henderson Bridge Co. v. Henderson City*, 141 U. S. 679, 35 L. Ed. 900; *St. Paul, etc., R. Co. v. Todd County*, 142 U. S. 282, 35 L. Ed. 1014; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972.

Such an exemption applies to all corporations thereafter formed, either by original charter or by the consolidation of prior corporations under a subsequent act. *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 312, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457.

Where the effect of the constitution of Louisiana of 1879, was to renew and establish the obligation of the corporation under § 1, article 5, of its charter, to pay to the state the annual sum of \$40,000, in consideration of which it is declared to be "exempt from all other taxes and li-

tain lands shall never be taxed, a law afterwards passed to tax them impairs the obligation of contracts.⁴

2. **LIMITATIONS OF GENERAL RULE.**—But the elementary rule is that if at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control.⁵ The foundation of this rule is that a general statute reserving

censes of any kind whatever, whether from state, parish, or municipal authorities," this constitutes a contract. *New Orleans v. Houston*, 119 U. S. 265, 274, 30 L. Ed. 411.

The charter of the Louisiana State Lottery Company.—*New Orleans v. Houston*, 119 U. S. 265, 274, 30 L. Ed. 411.

Exemption of swamp and overflowed lands.—*McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 795. See, also, ante, "Swamp and Overflowed Lands Granted to State," IV. H, 2, c, (4).

Ultra vires contract between city and waterworks company cannot be impaired.—*New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 80, 88, 35 L. Ed. 943.

4. **Exemption of land held irrevocable.**—*Planters' Bank v. Sharp*, 6 How. 301, 331, 12 L. Ed. 447, citing *New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303.

Exemption of Indian lands.—*New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303, distinguished and affirmed in *Armstrong v. Athens County*, 16 Pet. 281, 10 L. Ed. 965, cited and approved in *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *State Bank v. Knoop*, 16 How. 369, 385, 14 L. Ed. 977. See the title **INDIANS**, vol. 6, p. 955.

5. **Tomlinson v. Jessup**, 15 Wall. 454, 457, 24 L. Ed. 204; *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 28, 108, 34 L. Ed. 898; *Louisville Water Co. v. Clark*, 143 U. S. 1, 12, 36 L. Ed. 55; *Covington v. Kentucky*, 173 U. S. 231, 238, 240, 43 L. Ed. 679; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 644, 43 L. Ed. 840; *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 74, 46 L. Ed. 86.

The mere grant for a designated time of an immunity from taxation does not take it out of the rule subjecting such grant to the general law retaining the power to amend or repeal, unless the granting act contain an express provision to that effect. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 650, 43 L. Ed. 840.

Evidence of legislative intent to repeal.—Where the act contains the significant proviso that nothing therein contained shall be held to discharge, release, impair or affect any irrepealable contract or obligation of any kind whatso-

ever existing at the date of the passage of the act, this proviso evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, if any such existed, and to bring all property within the taxing power of the state. *Commissioners v. Bancroft*, 203 U. S. 112, 119, 51 L. Ed. 112.

Water companies.—So as to water companies. This is not changed by the fact that the water company was to furnish the city free water for certain purposes. The obligation to furnish free water fell with the repeal of the exemption from taxation. *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55, reaffirmed in *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Louisville Water Co. v. Kentucky*, 170 U. S. 127, 130, 42 L. Ed. 975; *Covington v. Kentucky*, 173 U. S. 231, 234, 43 L. Ed. 679, where a city had built the waterworks under an act granting a perpetual exemption, but it was held not irrepealable.

"The acquisition by the sinking fund of the stock of the water company, whether before or after the passage of the act of 1882, was subject to the reserved power of the legislature, at its will, by amending or repealing that act, to withdraw the exemption from taxation." *Louisville Water Co. v. Clark*, 143 U. S. 1, 17, 36 L. Ed. 55.

Consolidation of corporations.—So as to a consolidation of corporations while such a general statute was in force, unless it was excepted therefrom. The consolidated corporation is taxable. *Railroad Co. v. Maine*, 96 U. S. 499, 510, 24 L. Ed. 836.

"To the same effect are *Railroad Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185; *Hoge v. Railroad Co.*, 99 U. S. 348, 353, 25 L. Ed. 303; *Sinking Fund Cases*, 99 U. S. 700, 720, 25 L. Ed. 496; *Greenwood v. Freight Co.*, 105 U. S. 13, 21, 26 L. Ed. 961; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. Ed. 408; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 352, 28 L. Ed. 173; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 696, 29 L. Ed. 510; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979; *Sioux City St. R. Co. v. Sioux City*, 138 U. S. 98, 108, 34 L. Ed. 898." *Louisville Water Co. v. Clark*, 143 U. S. 1, 13, 36 L. Ed. 55; *Citizens' Sav. Bank v.*

the power to repeal, alter or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable.⁶ And before a statute—particularly one relating to taxation—should be held to be irrepealable, or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no room for doubt; otherwise, the intent is not plainly expressed. It is not so expressed when the existence of the intent arises only from inference or conjecture.⁷ Likewise, in dealing with an exemption from taxation, good faith is required on the part of both parties to the contract. While the state may not impair or restrict its operation, neither may the railroad company enlarge it at will and without limitation.⁸

3. REQUISITES AND VALIDITY OF CONTRACT—*a. In General.*—But before the contract clause of the federal constitution can be invoked a valid contract must be shown to exist.⁹

b. Consideration for Contract.—(1) *Necessity for Consideration.*—An act of the legislature exempting property from taxation is not a contract within the meaning of the constitutional provision, unless it be supported by a sufficient consideration.¹⁰

Owensboro, 173 U. S. 636, 645, 43 L. Ed. 840.

But an obligation assumed by the recipient of the exemption in consideration thereof, falls with its repeal. The state cannot continue the obligation in full, and at the same time deny to the company, either in whole or in part, the exemption conferred by the contract. *Stearns v. Minnesota*, 179 U. S. 223, 240, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201. See, also, *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. Ed. 55.

Charters not subject to provision of general law concerning repeal and amendment.—But a state which, after granting a charter in which an exemption from taxation is expressly placed outside the operation of a statutory power to alter, amend or repeal, passes a law taxing exempting property, violates the obligation of a contract; and consequently such a law is void under the constitution. *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498; *Trask v. Maguire*, 18 Wall. 391, 392, 21 L. Ed. 938.

Commutation taxes.—Where a state statute provides for the taxation of all railroad property on the basis of a per cent of the gross earnings, in lieu of all other taxation upon that property, such statute creates a valid contract by the legislature with the company, which is impaired by withdrawing the lands from this arrangement, and directing the taxation according to the actual cash value, notwithstanding the fact that the power to alter, amend, or repeal by the vote of the people a statute exempting a corporation from taxation is especially reserved by the state constitution. *Stearns v. Minnesota*, 179 U. S. 223, 45 L. Ed. 162, reaffirmed in *Duluth, etc., R. Co. v.*

St. Louis County, 179 U. S. 302, 45 L. Ed. 201.

6. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 644, 43 L. Ed. 840.

7. *Covington v. Kentucky*, 173 U. S. 231, 239, 43 L. Ed. 679; *Louisville v. Bank*, 174 U. S. 439, 445, 43 L. Ed. 1039.

8. *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 506, 38 L. Ed. 793.

9. **Necessity for contract.**—*Tucker v. Ferguson*, 22 Wall. 527, 575, 22 L. Ed. 805; *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379, 385, 48 L. Ed. 229; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529.

The fact that annual ordinances were passed exempting land sold and conveyed by municipalities from taxation for each particular year, does not constitute a contract for exemption thereof. *Wells v. Savannah*, 181 U. S. 531, 45 L. Ed. 986.

The statements of officials when lots were sold, that they were not taxable, did not constitute a contract. The reports of committees that the lots were not taxable are of the same character—merely the opinions of officials upon a question of law, and not in the nature of a contract. *Wells v. Savannah*, 181 U. S. 531, 540, 45 L. Ed. 986.

Nor expression of an opinion by railroad commissioners respecting the meaning of a statute, in regard to which the company had the same knowledge that the commissioners had. *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 727, 24 L. Ed. 310.

10. **Consideration for contract of exemption is necessary.**—*Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *Christ Church v. County of Philadelphia*, 24 How. 300, 16 L. Ed. 602; *Home of The Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Loan Ass'n v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 23 L. Ed. 814; *Parkersburg v.*

(2) *Sufficiency of Consideration*—aa. *In General*.—The benefit accruing to the community from the creation of a corporation constitutes the consideration for the contract, and no other is required to support it.¹¹

bb. *Mutual Promises*.—No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting.¹²

cc. *Building and Operating Railroad*.—The building and operating of a railroad is a sufficient detriment or change of position to constitute a consideration for an exemption.¹³

dd. *Payment of Arrears of Taxes*.—A mere payment of arrearages of taxation alone does not constitute a sufficient consideration for an exemption from taxation.¹⁴

ee. *General Encouragements and Bounties*.—There is a distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise.¹⁵ "If the

Brown, 106 U. S. 487, 27 L. Ed. 238; Pollock v. Farmers' Loan, etc., Co., 157 U. S. 429, 595, 39 L. Ed. 759; Wells v. Savannah, 181 U. S. 531, 539, 45 L. Ed. 986; Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229; Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 L. Ed. 860; Stanislaus County v. San Joaquin, etc., Co., 192 U. S. 201, 207, 48 L. Ed. 406.

The necessity for a consideration moving to the state is the same that exists in the case of contracts between private persons. If there is no consideration for the grant of exemption, it is a mere offer of a bounty which may be withdrawn at any time, though the recipient of the bounty may have incurred expense on the faith of the offer. Tomlinson v. Jessup, 15 Wall. 454, 458, 24 L. Ed. 204; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; Grand Lodge v. New Orleans, 166 U. S. 143, 146, 41 L. Ed. 951. See also, Providence Bank v. Billings, 4 Pet. 514, 7 L. Ed. 939; West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 23 L. Ed. 814; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666, 24 L. Ed. 1036; Louisiana v. Jumel, 107 U. S. 750, 803, 27 L. Ed. 448.

11. *Sufficiency of consideration*.—Home of the Friendless v. Rouse, 8 Wall. 430, 437, 19 L. Ed. 495, followed in Washington University v. Rouse, 8 Wall. 439, 19 L. Ed. 498.

"In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made * * * by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and

carry out the purposes of its creation." Tomlinson v. Jessup, 15 Wall. 454, 459, 24 L. Ed. 204. See, also, State Bank v. Knoop, 16 How. 369, 390, 14 L. Ed. 977.

Where the exemption was expressed in the charter itself, and was one of the inducements offered for its acceptance, and for making donations for the establishment of the institution, it constituted a contract which the legislature could not impair in the absence of a reserved right to do so. Asylum v. New Orleans, 105 U. S. 362, 368, 26 L. Ed. 1128. See, also, post, "Presumption of Consideration," V, D, 3, c.

12. *Mutual promises*.—Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 386, 48 L. Ed. 229.

13. *Building of railroad*.—Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229; Christ Church v. County of Philadelphia, 24 How. 300, 16 L. Ed. 602; Home of the Friendless v. Rouse, 8 Wall. 430, 19 L. Ed. 495; Salt Co. v. East Saginaw, 13 Wall. 373, 20 L. Ed. 611; Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805; Grand Lodge v. New Orleans, 166 U. S. 143, 41 L. Ed. 951; Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 L. Ed. 860.

But where the tax law of the state provides that railroads building and operating railroads shall be exempted from taxes for a certain length of time, the mere building and operating the railroad is not sufficient detriment or change of position to constitute a consideration, unless the promise and detriment are the conventional inducements each for the other. Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229.

14. *Payment of arrearages*.—Northern Pac. R. Co. v. Clark, 153 U. S. 252, 271, 38 L. Ed. 706.

15. *General encouragements and bounties*.—Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 385, 48 L. Ed. 229, citing Salt Co. v. East Saginaw, 13 Wall. 373, 20 L. Ed. 611, and approved in Stanislaus

law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer."¹⁶

(3) *Privileges*.—In order that the exemption may be effectual it must appear that the contract was made in consequence of some beneficial equivalent received by the state; if the exemption is granted only as a privilege it may be recalled at the pleasure of the legislature.¹⁷

c. *Presumption of Consideration*.—It is well settled that the exemption is presumed to be on sufficient consideration, and binds the state if the charter containing it is accepted.¹⁸

County v. San Joaquin, etc., Co., 192 U. S. 201, 210, 46 L. Ed. 406; Powers v. Detroit, etc., R. Co., 201 U. S. 543, 557, 50 L. Ed. 860; Grand Rapids, etc., R. Co. v. Osborn, 193 U. S. 17, 30, 48 L. Ed. 598.

So in Tucker v. Ferguson, 22 Wall. 527, 22 L. Ed. 805, and in West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 23 L. Ed. 814, it was held that an act of the legislature exempting property of all railroads from taxation was not a contract to exempt, unless there were a consideration for the act; that the promise of a gratuity, spontaneously made, may be kept, changed or recalled at pleasure, and that this rule applied to the agreements of states, made without consideration, as well as to those of persons. Grand Lodge v. New Orleans, 166 U. S. 143, 149, 41 L. Ed. 951.

A statute which, after levying a specific tax on railroads, provides that the rate of taxation fixed by the state laws shall not apply to any railway hereafter building and operating a line of railroad within the state north of parallel 44 of latitude until the same has been operated for the full period of ten years, unless the gross earnings are equal to \$4,000 per mile, does not constitute an irrevocable contract between the state and railroad so that a subsequent law levying a tax on a railroad north of such parallel would impair the obligation of contract. Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229. See, also, West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 23 L. Ed. 814, where an exemption by statute of lands granted to a railroad, was held a mere gratuity which the state might revoke.

It was immaterial that the company had executed mortgages upon the land prior to the revocation of the exemption, as the statute provided could be done without forfeiting the exemption. West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 596, 23 L. Ed. 814.

A like ruling was made in Welch v. Cook, 97 U. S. 541, 24 L. Ed. 1112, in which an act of the legislature of the District of Columbia, exempting from general taxation for ten years such real and personal property as might be employed within the district for manufacturing purposes, did not create an irrevocable contract with the owners of such

property, but merely conferred a bounty, liable at any time to be withdrawn. Citing Salt Co. v. East Saginaw, 13 Wall. 373, 20 L. Ed. 611, approved in Grand Lodge v. New Orleans, 166 U. S. 143, 147, 41 L. Ed. 951; Stanislaus County v. San Joaquin, etc., Co., 192 U. S. 201, 209, 48 L. Ed. 406.

Bounty for salt manufactured and exemption of property employed.—Salt Co. v. East Saginaw, 13 Wall. 373, 20 L. Ed. 611, approved in Welch v. Cook, 97 U. S. 541, 24 L. Ed. 1112.

Exemption of fraternal organization.—Grand Lodge v. New Orleans, 166 U. S. 143, 146, 41 L. Ed. 951.

Power to dispense with consideration.—It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement or bounty, holding out a hope but not amounting to a covenant. Wisconsin, etc., R. Co. v. Powers, 191 U. S. 379, 386, 48 L. Ed. 229, distinguished in Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 L. Ed. 860.

16. Grand Lodge v. New Orleans, 166 U. S. 143, 146, 41 L. Ed. 951; West Wisconsin R. Co. v. Board of Supervisors, 93 U. S. 595, 23 L. Ed. 814.

Gratuitous exemption is revocable at pleasure.—Christ Church v. County of Philadelphia, 24 How. 300, 302, 303, 16 L. Ed. 602.

17. Railway Co. v. Philadelphia, 101 U. S. 528, 532, 29 L. Ed. 912.

18. **Consideration is presumed.**—New Jersey v. Wilson, 7 Cranch 164, 3 L. Ed. 303; Gordon v. Appeal Tax Court, 3 How. 133, 11 L. Ed. 529; State Bank v. Knoop, 16 How. 369, 14 L. Ed. 977; Ohio Life Ins. etc., Co. v. Debolt, 16 How. 416, 14 L. Ed. 997; Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; Mechanics', etc., Bank v. Debolt, 18 How. 380, 15 L. Ed. 458;

4. RULES AS TO OCCUPATION AND BUSINESS TAXES.—Privilege taxes being taxes upon property are subject to the constitutional limitations as to exemptions, and their exemption is equally repealable as that of ad valorem taxes.¹⁹

E. Scope and Extent of Exemptions—1. IN GENERAL.—Where it is contended that an exemption from taxation has been granted by contract with the state, the exemption, if any be found to exist, will not be extended by construction, but will be confined to that which is clearly within the terms of the contract.²⁰

2. CONSTRUCTION OF GENERAL EXEMPTIONS.—It has been frequently decided that a general exemption of the property of a corporation from taxation is to be construed as referring only to the property held for the transaction of the business of the company.²¹

3. CONSTRUCTION OF WORD "PROPERTY" IN EXEMPTING CLAUSE.—Property is a word of large import, and in its application to a statute exempting "the property" of a company from taxation includes all the real and personal estate required by it for the successful prosecution of its business.²² But property, either real or personal estate acquired by the company beyond its legitimate wants, would not be within the protection of the contract.²³

4. PARTIAL EXEMPTIONS.—"Property must be wholly exempted or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes exclusively upon one class of taxable property is as much a discrimination as to vary the rates of the same or other taxes upon different classes of property."²⁴

5. PROPERTY USED IN COMPANY'S BUSINESS—*a. In General*.—The exemption from taxation generally applies (if at all) only to property used in the business of the company claiming the exemption.²⁵

Mechanics', etc., *Bank v. Thomas*, 18 How. 384, 15 L. Ed. 460; *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314; *Home of the Friendless v. Rouse*, 8 Wall. 430, 438, 19 L. Ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498; *Powers v. Detroit*, etc., R. Co., 201 U. S. 543, 559, 50 L. Ed. 860.

"A grant of exemption is never to be considered as a mere gratuity—a simple gift from the legislature. No such intent to throw away the revenues of the state, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the state would otherwise be under obligations to do." *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 201, 37 L. Ed. 132. See ante, "In General," V, D, 3, b, (2), aa.

19. *Gulf*, etc., R. Co. v. *Hewes*, 183 U. S. 66, 78, 46 L. Ed. 86.

20. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544, 9 L. Ed. 773; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 435, 14 L. Ed. 997; *Dubuque, etc., R. Co. v. Litchfield*, 23 How. 66, 88, 16 L. Ed. 500; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 597, 23 L. Ed. 814; *Railway Co. v. Loftin*, 98 U. S. 559, 564, 25 L. Ed. 222; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 29 L. Ed. 770; *Yazoo, etc., R. Co. v. Thomas*,

132 U. S. 174, 185, 33 L. Ed. 302; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 295, 36 L. Ed. 972; *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 37 L. Ed. 132; *Schurz v. Cook*, 148 U. S. 397, 409, 37 L. Ed. 498; *Bank v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 177, 40 L. Ed. 660; *Citizens' Bank v. Parker*, 192 U. S. 73, 87, 48 L. Ed. 346.

21. *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805; *Bank v. Tennessee*, 161 U. S. 493, 497, 26 L. Ed. 810; *Ford v. Delta*, etc., Land Co., 164 U. S. 662, 667, 41 L. Ed. 590.

22. What word "property" includes.—*Wilmington Railroad v. Reid*, 13 Wall. 264, 267, 20 L. Ed. 568.

A statute exempting all "the property" of a railroad corporation from taxation, exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also. *Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Veazie Bank v. Fenno*, 8 Wall. 533, 547, 19 L. Ed. 482; *Adams Express Co. v. Ohio*, 165 U. S. 194, 195, 41 L. Ed. 683; *Gulf*, etc., R. Co. v. *Hewes*, 183 U. S. 66, 77, 46 L. Ed. 86.

23. *Wilmington Railroad v. Reid*, 13 Wall. 264, 268, 20 L. Ed. 568.

24. Partial exemptions not allowable.—*Gilman v. Sheboygan*, 2 Black 510, 518, 17 L. Ed. 305.

25. Exemption does not extend to property not necessary for business of corporation.—*Ford v. Delta*, etc., Land

b. *Structures Constituting Essential Part of Railroad*.—It has been held in several well-considered cases that where a railroad is exempt from taxation, such exemption extends to structures constituting an essential part of the railroad.²⁶

c. *Future Acquisitions*.—An exemption may cover property subsequently acquired.²⁷

6. WHAT TAXES COVERED BY EXEMPTION—*a. Occupation and Business Taxes*.—A general exemption from taxation undoubtedly implies an exemption from privilege as well as ad valorem taxes.²⁸

b. *County and Municipal Taxes*.—Some courts, strictly construing exemption statutes, have held that a general exemption of the property of persons or corporations is to be confined to state taxes, and does not apply to burdens laid upon the property by a municipality.²⁹

c. *Special Assessments*.—An exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments.³⁰

Co., 164 U. S. 662, 41 L. Ed. 590; *McHenry v. Alford*, 168 U. S. 651, 662, 42 L. Ed. 614.

"Even if the exemption is properly construed as applying not only to the property necessary for the business of the railroad company but also to all other property which by the terms of its charter it was at liberty to acquire, it does not extend to property which, not necessary for its business, it acquired under the authority of a subsequent act of the legislature, in which is found no exemption clause." *Ford v. Delta, etc.*, Land Co., 164 U. S. 662, 668, 41 L. Ed. 590.

"Presumably all that a corporation has is used in the transaction of its business, and if it has accumulated assets which for any reason affect the question of taxation, it should disclose them. It is called upon to make return of its property, and if its return admits that it is possessed of property of a certain value, and does not disclose anything to show that any portion thereof is not subject to taxation, it cannot complain if the state treats its property as all taxable." *Adams Express Co. v. Ohio*, 166 U. S. 185, 223, 41 L. Ed. 965; *Adams Express Co. v. Ohio*, 165 U. S. 194, 227, 41 L. Ed. 683.

If the company have bonds, stocks or other investments which produce a part of the value of its capital stock, and which have a special situs in other states or are exempt from taxation, it must show the fact. * * * "That if such facts exist they must be taken into consideration by a state in its proceedings under such tax laws as are here presented has been heretofore recognized and distinctly affirmed by this court. *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 438, 38 L. Ed. 1031; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 23, 41 L. Ed. 49; *Adams Express Co. v. Ohio*, 165 U. S. 194, 227, 41 L. Ed. 683." *Adams Express Co. v. Ohio*, 166 U. S. 185, 222, 41 L. Ed. 965.

26. *United States v. Denver, etc., R. Co.*, 150 U. S. 1, 13, 37 L. Ed. 975.

27. *Exemption held to apply to future acquisitions of property*.—*Asylum v. New Orleans*, 105 U. S. 362, 367, 26 L. Ed. 1128.

But not where acquired under a subsequent act of the legislature, in which is no exemption clause. *Ford v. Delta, etc.*, Land Co., 164 U. S. 662, 668, 41 L. Ed. 590.

28. Exemption may include license tax on property as well as taxes on property. *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 76, 46 L. Ed. 86; *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. Ed. 346.

29. *County and municipal taxation*.—A claim of exemption from county and municipal taxation cannot be supported, any more than a claim from state taxation, except upon language so strong as that, fairly interpreted, no room is left for controversy. No presumption can be made in favor of the exemption; and if there be reasonable doubt, the doubt is to be solved in favor of the state. *Bailey v. Maguire*, 22 Wall. 215, 22 L. Ed. 850, distinguished in *Savannah v. Jesup*, 106 U. S. 563, 27 L. Ed. 276.

An exemption from municipal taxation cannot arise from mere implication, but only from words clearly and unmistakably granting such an immunity. *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 617, 43 L. Ed. 823.

30. *Exemption from "taxation" held not to include special assessments*.—*Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 37 L. Ed. 132, distinguishing *McGee v. Mathis*, 4 Wall. 143, 18 L. Ed. 314, on the ground that the exemption in that case was not contained in a general tax law, or in a law in framing which the legislature might reasonably be supposed to have in view the general taxation only. But the provision in that case was found in a law providing for the construction of levees and drains, and devoting to that object funds supposed to be more than adequate, derived from the very lands ex-

F. Transfer of Immunity from Taxation—1. RIGHT OF OWNER TO TRANSFER EXEMPTION.—Although the obligations of a contract of exemption from taxation are protected by the federal constitution from impairment by the state, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract, or its benefits, to a successor.³¹

2. WHEN EXEMPTION PASSES.—But immunity of particular property from taxation is a privilege which may sometimes be transferred under that designation,³² but only to the extent that such privilege was enjoyed by the original

empted. *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 670, 41 L. Ed. 590.

Statute imposing special assessment—Not a contract against second assessment for same purpose.—*Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616.

Paving assessment.—Exemption from "all public taxes, rates and assessments," was held not to discharge from liability for a paving assessment. *Illinois Cent. R. Co. v. Decatur*, 147 U. S. 190, 200, 37 L. Ed. 132.

Exemption of swamp lands.—But it has been held that a state law exempting swamp lands from taxation included special assessments for the construction of drains to reclaim such lands, as well as assessments for general taxation purposes. *McGee v. Mathis*, 4 Wall. 143, 157, 18 L. Ed. 314.

31. Immunity from taxation a personal privilege.—*Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 39 L. Ed. 567; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 247, 51 L. Ed. 784.

An immunity from taxation is not a franchise. In the absence of words making it assignable, or extending it to purchasers and assignees; it does not pass to subsequent owners of the property acquiring it by purchase, assignment or foreclosure. Taxation of the property in the hands of such purchasers and assignees does not, therefore, violate the obligation of the contract of exemption. *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 184, 29 L. Ed. 121; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326.

Under the Missouri statute authorizing a foreign corporation to lease or pur-

chase a domestic railroad (act of March 24, 1870, art. 2, ch. 37, § 57, *Wagner's Statutes*, 1872), the road so leased or purchased became subject to taxation although exempt in the hands of its former owners. The immunity did not pass. Here the statute provided that the exemption should cease. *Chicago, etc., Railroad v. Guffey*, 122 U. S. 561, 571, 30 L. Ed. 1135.

Where lands vested in the corporation of a state university, and declared to be exempt from taxation forever, were afterwards sold by legislative authority, no exemption from state taxation being contained in the statute under which the purchasers took title, or in their deeds, it was held that the exemption did not pass to such purchasers, but the lands were taxable by the state in their hands. *Armstrong v. Athens County*, 16 Pet. 281, 288, 10 L. Ed. 965, approved in *Planters' Bank v. Sharp*, 6 How. 301, 12 L. Ed. 447, distinguishing *New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303.

Lands granted in aid of railroads.—See ante, "Railroad Grants," IV, H, 2, c, (3).

32. When exemption passes.—*Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Morgan v. Louisiana*, 93 U. S. 217, 224, 23 L. Ed. 860.

Commutation taxes.—Where a railroad corporation (the Atlantic and Gulf Railroad Company) was formed by the consolidation of two other companies—one, the Savannah, Albany, and Gulf Railroad Company, incorporated Dec. 25, 1847; and the other, the Atlantic and Gulf Railroad Company, incorporated Feb. 27, 1856, and the two constituent companies acquired, by their respective charters, an immunity from all taxation in excess of one-half of one per cent upon its annual net income or the annual net proceeds of its investments—whether the one or the other is not material in the present case, this immunity passed to the consolidated company, subject, however, to the right of the state, reserved in the Code of Georgia (which was in force on and after Jan. 1, 1863), to withdraw it altogether. *Savannah v. Jesup*, 106 U. S. 563, 565, 27 L. Ed. 276.

companies.³³ Nor can the exemption extend to a portion of the line to which it had not extended before the union.³⁴

3. EFFECT OF CONSOLIDATION OR SALE OF CORPORATION ENJOYING EXEMPTION.—In the absence of express statutory direction, or of an equivalent implication by necessary construction, a special statutory exemption, such as immunity from taxation, does not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee.³⁵ Especially so if the organization of the new

33. To what extent immunity passes.—Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 393, 13 L. Ed. 461; Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Charleston v. Branch, 15 Wall. 470, 21 L. Ed. 193, both followed in Branch v. Charleston, 92 U. S. 677, 23 L. Ed. 750; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Central R., etc., Co. v. Georgia, 92 U. S. 665, 675, 23 L. Ed. 757, followed in Southwestern R. Co. v. Georgia, 92 U. S. 676, 23 L. Ed. 762; Chesapeake, etc., R. Co. v. Virginia, 94 U. S. 718, 726, 24 L. Ed. 310; Wilmington, etc., R. Co. v. Alsbrough, 146 U. S. 279, 300, 36 L. Ed. 972.

A railroad corporation, formed, under an act of the legislature, by the consolidation of existing companies, and "vested with all the rights, privileges, franchises, and property which may have been vested in either company prior to the act of consolidation," acquires no greater immunity from taxation than they severally enjoyed as to the portions of the road which belonged to them under their respective charters. Whatever property was subject to taxation would, after the consolidation, remain so. Chesapeake, etc., R. Co. v. Virginia, 94 U. S. 718, 24 L. Ed. 310.

Such an exemption in the charter of one of the constituent corporations extends only to the property acquired from such corporation. That portion of the property acquired which was exempt under the charter of the constituent corporations will remain exempt, and that portion which was subject to taxation will remain so subject. Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461; Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Charleston v. Branch, 15 Wall. 470, 21 L. Ed. 193; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Central R., etc., Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757; Chesapeake, etc., R. Co. v. Virginia, 94 U. S. 718, 24 L. Ed. 310.

If, as was the case in Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189, one road loses its identity and is merged in another, the latter preserving its identity, and issuing new stock in favor of the stockholders of the former, it is not the creation of a new corporation but an enlargement of the old one, in such case it was held that where the company which had preserved its identity held as to its own property a perpetual exemption from

taxation, it would not be extended to the property of the merged company without express words to that effect. Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461; Central R., etc., Co. v. Georgia, 92 U. S. 665, 670, 23 L. Ed. 757; Yazoo, etc., R. Co. v. Adams, 180 U. S. 1, 19, 45 L. Ed. 395; Yazoo, etc., R. Co. v. Adams, 180 U. S. 86, 45 L. Ed. 408. See, also, Keokuk, etc., R. Co. v. Missouri, 152 U. S. 301, 306, 38 L. Ed. 450, followed in Keokuk, etc., R. Co. v. Scotland County, 152 U. S. 317, 38 L. Ed. 457.

Exemption limited to property acquired under charter giving exemption.—Where the roads and properties of two railroad corporations were consolidated in the hands of a third company, an exemption in the charter of the latter was held not to extend to these roads and properties, they not being exempt in the hands of the other companies. This principle applies to repairs or improvements on the old line or property of the old company and makes such liable to taxation in toto. Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Charleston v. Branch, 15 Wall. 470, 21 L. Ed. 193; Branch v. Charleston, 92 U. S. 677, 23 L. Ed. 750.

Unless it could be fairly shown that any of the old unexempt company's property was acquired by the successor company for the accommodation of the business belonging to its original roads, or for the joint accommodation of the entire system of roads under its control, in which case such property would, pro tanto and in fair proportion, be exempt from taxation. Branch v. Charleston, 92 U. S. 677, 23 L. Ed. 750.

34. Philadelphia, etc., R. Co. v. Maryland, 10 How. 376, 13 L. Ed. 461; Tomlinson v. Branch, 15 Wall. 460, 465, 466, 21 L. Ed. 189; City of Charleston v. Branch, 15 Wall. 470, 21 L. Ed. 193.

35. Effect of consolidation or sale of corporation enjoying immunity.—Tomlinson v. Branch, 15 Wall. 460, 21 L. Ed. 189; Charleston v. Branch, 15 Wall. 470, 21 L. Ed. 193; The Delaware Railroad Tax, 18 Wall. 206, 21 L. Ed. 888; Central R., etc., Co. v. Georgia, 92 U. S. 665, 23 L. Ed. 757; Branch v. Charleston, 92 U. S. 677, 23 L. Ed. 750; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860; Chesapeake, etc., R. Co. v. Virginia, 94 U. S. 718, 24 L. Ed. 310; Railroad Co. v. Maine, 96 U. S. 499, 509, 511, 24 L. Ed. 836; Railroad Co. v. County of Hamblen, 102 U. S. 273, 26 L.

corporation is such that it is unable, or is not required, to perform the conditions upon which the exemption claimed is dependent, the exemption possessed

Ed. 152; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 252, 27 L. Ed. 922; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 182, 29 L. Ed. 121; *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501, 508, 29 L. Ed. 244, quoting from *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860; *Chicago, etc., Railroad v. Guffey*, 122 U. S. 561, 575, 30 L. Ed. 1135; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174, 32 L. Ed. 577; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457; *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649, 656, 39 L. Ed. 567; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574; *Covington, etc., Turnpike Road Co. v. Sanford*, 164 U. S. 578, 586, 41 L. Ed. 560; *Minneapolis, etc., R. Co. v. Gardner*, 177 U. S. 332, 44 L. Ed. 793; *People's Gas Light, etc., Co. v. Chicago*, 194 U. S. 1, 17, 48 L. Ed. 851.

The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation. *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 641, 32 L. Ed. 1051; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 617, 28 L. Ed. 837; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401, and *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 617, 28 L. Ed. 837.

The possession of the rights and privileges of a former corporation does not endow a new corporation with an exemption from taxation enjoyed by the old. *Morgan v. Louisiana* (1876), 93 U. S. 217, 23 L. Ed. 860; *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 270, 47 L. Ed. 167.

Exemption may be withdrawn when charter is subject to amendment, alteration or modification.—*Tomlinson v. Jessup*, 15 Wall. 454, 24 L. Ed. 204, referred to and qualified. *Hoge v. Railroad Co.*, 99 U. S. 348, 25 L. Ed. 303.

Passes only to extent enjoyed by original companies.—See ante, "When Exemption Passes," V, F, 2.

Rule where consolidation of two companies does not work an extinction of the original companies, nor create a new company.—*Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757, followed

in *Southwestern R. Co. v. Georgia*, 92 U. S. 676, 23 L. Ed. 762; *Central R., etc., Co. v. Wright*, 164 U. S. 327, 331, 41 L. Ed. 454. See the title CORPORATIONS, vol. 4, p. 779.

Where consolidation creates new corporation.—Here the new corporation is subject to a right of repeal reserved by a general statute then in force, and the exemptions can be taken away by the legislature. *Railroad Co. v. Georgia*, 93 U. S. 359, 362, 25 L. Ed. 185, distinguishing the case of *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757. See *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 307, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457. See, also, *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836. See the title CORPORATIONS, vol. 4, p. 779, et seq.

Sale of railroad under foreclosure.—Upon a sale of the property and franchises of a railroad corporation under a decree founded upon a mortgage which in terms covers the franchises, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company provided in the act of incorporation does not accompany the property in its transfer to the purchaser. The immunity from taxation in such cases is a personal privilege of the company, and not transferable. *New Jersey v. Wilson*, 7 Cranch 164, 3 L. Ed. 303; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 250, 27 L. Ed. 922; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 670, 29 L. Ed. 770; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 21, 45 L. Ed. 395; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 26, 45 L. Ed. 408. See, also, *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 26 L. Ed. 152; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 641, 32 L. Ed. 1051.

Where, under a decree to enforce a statutory lien retained by the state upon the property, real and personal, stock, and franchises of a railroad company, the property and franchises were sold, held, that the property was thereafter subject to taxation under the laws of the state, as immunity therefrom, if possessed by the company, did not pass to the purchaser. *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 26 L. Ed. 152, approved in *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 642, 32 L. Ed. 1051. See, also,

by the original corporation is extinguished.³⁶ And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided.³⁷ Such immunity is not itself a franchise of a railroad corporation which passes as such without other description to a purchaser of its property. The franchise may be conveyed as part of the property of the company; the immunity is personal and incapable of transfer without special statutory direction.³⁸ More especially will an exemption from taxation be denied the consolidated company, where such consolidation was not accepted and acted upon until a change in the state law forbidding the creation of corporations capable of holding property exempt from taxation,³⁹ or where at the time of consolidation there was a general statute or constitutional provision in force in the state reserving the right to amend, alter or repeal any act of incorporation at the pleasure of the legislature.⁴⁰

Wilson v. Gaines, 103 U. S. 417, 26 L. Ed. 401, citing and approving *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860.

So under a statute regulating such sales, and declaring that a new corporation should result, it became subject to general laws in force retaining the right to alter and repeal the charter. *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121.

An immunity from taxation enjoyed by the former corporation was not embraced in the words "rights, franchises and privileges," and did not pass to the new corporation, under a statute declaring these to pass by sale under foreclosure. *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121.

The judicial sale of the franchise of a corporation does not transfer to the purchaser the franchise to be such a corporation, but only the right to reorganize as a corporation, subject to the laws, constitutional and otherwise, existing at the time of the reorganization. *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 28 L. Ed. 837. The franchise to be a corporation is distinguished from the franchise to exercise as a corporation the powers named in this charter. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 171, 40 L. Ed. 656.

Fact that state is a stockholder.—The claim of the company is not at all strengthened by the fact that the state was to be the largest stockholder, and to some extent preferred in the division of profits. The corporation was not in that way made a part of the government. *Railroad Co. v. Commissioners*, 103 U. S. 1, 4, 5, 26 L. Ed. 359.

36. Rule where new corporation does not perform conditions of exemption.—*Railroad v. Maine*, 96 U. S. 499, 24 L. Ed. 836.

37. People's Gas Light, etc., Co. v. Chicago, 194 U. S. 1, 17, 48 L. Ed. 851.

38. Immunity from taxation not a franchise.—*Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 186, 29 L. Ed. 121; *Trask v. Maguire*, 18 Wall. 391, 408, 21 L. Ed. 938; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 641, 32 L. Ed. 1051.

Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860, held that immunity from taxation was not such a franchise of a railroad corporation as would pass by a sale under a mortgage "on the property and franchises of the company," and that the term "franchises" was not synonymous with "rights, privileges, and franchises," "rights, powers, and privileges," and the like. *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 274, 26 L. Ed. 152. See *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 641, 32 L. Ed. 1051; *Railroad Cos. v. Gaines*, 97 U. S. 697, 711, 24 L. Ed. 1091. See post, "Construction of Particular Words and Phrases in Grant," V, F, 4, b.

Exemption from taxation is a personal privilege of corporation specially referred to.—*Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 617, 28 L. Ed. 837.

39. Louisville, etc., R. Co. v. Palmes, 109 U. S. 244, 27 L. Ed. 922; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 475, 476, 28 L. Ed. 1055; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450.

40. Effect of statute reserving right to alter, amend or repeal all charters.—*Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836.

Consolidation subsequent to adoption of constitution.—Where, at the time of the consolidation, the constitution prohibits legislative exemptions from taxation, the consolidated corporation will not acquire an exemption contained in the charter of one of the constituent corporations, granted before the adoption of the constitutional provision, the consolidation being the creation of a new corporation,

4. POWER OF LEGISLATURE TO TRANSMUTE EXEMPTION—*a. In General.*—In the absence of constitutional prohibitions,⁴¹ the state, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the state in authorizing or directing its transfer.⁴²

*b. Construction of Particular Words and Phrases in Grant.*⁴³—**Rights, Powers and Privileges.**—By the former decisions of the federal supreme court it was held that where one corporation is given the "rights, powers and privileges" of another, such legislative grant carried with it an exemption from taxation previously granted.⁴⁴ But other and later cases have essentially mod-

which would therefore be subject to all constitutional provisions in force at the time. *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Northern Central R. Co. v. Maryland*, 187 U. S. 258, 268, 47 L. Ed. 167; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 17, 45 L. Ed. 395; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 26, 45 L. Ed. 408. See, also, *Morgan v. Louisiana*, 93 U. S. 217, 224, 23 L. Ed. 860; *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938.

The courts will not be misled by the fact that the grant is in the form of a renewal of a previously existing grant. *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 254, 27 L. Ed. 922.

"Nor was the exemption saved by § 3 of article 11, providing that 'all statute laws of this state now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the general assembly.' This referred to statutes in force at the time the constitution was adopted, the operation of which is continued, notwithstanding the constitution. In this case, however, the exemption contained in § 9 of the charter of the Alexandria and Bloomfield Railway Company ceased to exist, not by the operation of the constitution, but by the dissolution of the corporation to which it was attached." *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 311, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457.

"In *Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938, * * * it was decided, however, that the legislature was prohibited by the constitution from conferring the privilege, and that the law, passed under the ordinance adopted with the new constitution, provided for a sale of the franchises of a defaulting railroad company with its road, did not require immunity from taxation to be embraced within them; the language being construed to refer to such franchises as were essential to the

operation of the road sold, and without which the ownership of the road would be comparatively valueless." *Morgan v. Louisiana*, 93 U. S. 217, 224, 23 L. Ed. 860.

41. **Legislature, if prohibited by state constitution, cannot pass exemption.**—*Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 27 L. Ed. 922; *Memphis, etc., R. Co. v. Commissioners*, 112 U. S. 609, 28 L. Ed. 837; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 310, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457. See ante, preceding section.

Florida constitution.—*Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 253, 27 L. Ed. 922.

Renewals of exemptions.—In *Trask v. Maguire*, 18 Wall. 391, 409, 21 L. Ed. 938, it was said, speaking of a provision in the constitution of Missouri: "The inhibition of the constitution applies in all its force against the renewal of an exemption equally as against its original creation." *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 254, 27 L. Ed. 922.

42. **State may transfer exemption to successor in title.**—*Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 312, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 248, 51 L. Ed. 784.

43. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 841.

44. **Immunity formerly passed under grant of rights, powers and privileges of another company.**—*Humphrey v. Pegues*, 16 Wall. 244, 21 L. Ed. 326; *Trask v. Maguire*, 18 Wall. 391, 404, 21 L. Ed. 938, cited in *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, 23 L. Ed. 762; *Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Tennessee v. Whitworth*, 117 U. S. 139, 145, 29 L. Ed. 833; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 306, 38 L. Ed. 450, followed in *Keokuk, etc., R. Co. v. Scotland County*,

ified the rule as stated in these former decisions. It is now the rule, notwithstanding early decisions and dicta to the contrary, that a statute authorizing or directing a grant or transfer of the "powers, rights and privileges" of a corporation which enjoys immunity from taxation, does not include such immunity.⁴⁵ There must be other language than the mere word "privilege," or other provisions in the statute, removing all doubt as to the intention of the legislature, before the exemption will be admitted.⁴⁶

Franchises.—A sale or transfer merely of the franchises of another company will not pass an immunity from taxation.⁴⁷

The words, "franchises, rights and privileges" do not necessarily embrace an immunity from taxation.⁴⁸

152 U. S. 317, 38 L. Ed. 457. See, also, *Philadelphia, etc., R. Co. v. Maryland*, 10 How. 376, 13 L. Ed. 461; *Central R., etc., Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Railroad Cos. v. Gaines*, 97 U. S. 697, 711, 24 L. Ed. 1091; *Railroad Co. v. Georgia*, 98 U. S. 359, 360, 25 L. Ed. 185; *Railroad Co. v. County of Hamblen*, 102 U. S. 273, 277, 26 L. Ed. 152; *Railroad Co. v. Commissioners*, 103 U. S. 1, 4, 26 L. Ed. 359; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244, 253, 27 L. Ed. 922, and *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 185, 29 L. Ed. 121; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. Ed. 626; *Tennessee v. Whitworth*, 117 U. S. 139, 145, 29 L. Ed. 833. See IMMUNITY, vol. 6, p. 756.

"In *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833, it was held that a statute conferring upon a railroad corporation 'all the rights, powers and privileges' of another railroad corporation, and 'all the powers and privileges' of a third railroad corporation, included the immunities from taxation enjoyed respectively by the latter corporations, the ground of the decision being that an exemption from taxation is, in the common acceptance of the term, a privilege." *Rochester R. Co. v. Rochester*, 205 U. S. 236, 250, 51 L. Ed. 784.

"Powers, rights and privileges" for the purpose of making and using road.—Under such language, even under the old rule, the immunity was held not to pass as not necessary for such purposes. *Tennessee v. Whitworth*, 117 U. S. 139, 148, 29 L. Ed. 833, citing with approval, but distinguishing, *Railroad Cos. v. Gaines*, 97 U. S. 697, 711, 24 L. Ed. 1091; *Railroad Co. v. Commissioners*, 103 U. S. 1, 26 L. Ed. 359, as decided on this principle.

45. Grant of "powers, rights and privileges" of another corporation does not, under present decisions, carry exemption from taxation.—*Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 642, 32 L. Ed. 1051; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 295, 36 L. Ed. 972; *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667, 39 L. Ed. 574; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660.

"In *Keokuk, etc., R. Co. v. Missouri*,

152 U. S. 301, 38 L. Ed. 450. Mr. Justice Brown, in delivering the opinion of the court, said: 'Whether under the name "franchises and privileges" an immunity from taxation would pass to the new company may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled.'" *Rochester R. Co. v. Rochester*, 205 U. S. 236, 251, 51 L. Ed. 784. See, also, *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121, where the immunity was held not to pass under the term "Privilege."

A corporation upon which by statute was conferred "all the rights and privileges" of a prior corporation, which had in its turn been endowed with "all the rights, privileges and immunities" of a pre-existing corporation, did not thereby succeed to an immunity from taxation possessed by such corporations. *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660, reaffirmed in *Home Ins., etc., Co. v. Tennessee*, 161 U. S. 198, 40 L. Ed. 669.

Subrogation.—The better opinion is that a subrogation to the "rights and privileges" of a former corporation does not include an immunity from taxation. *Gulf, etc., R. Co. v. Hewes*, 183 U. S. 66, 70, 46 L. Ed. 86; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660.

46. *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660, citing *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972.

When legislative intent is clear, exemption from taxation may be included in term privilege. *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972.

47. Meaning of word "franchises."—See ante, "Effect of Consolidation or Sale of Corporation Enjoying Exemption," V. F. 3.

48. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121; *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833; *Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 32 L. Ed. 1051; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 297, 36 L. Ed. 972; *Keokuk*,

Immunity.—The word “immunity” expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the words “rights” and “privileges.”⁴⁹

c. *Extraterritorial Operation of Grant.*—But an act of consolidation which grants to the consolidated company the rights and privileges of the original companies, can have no extraterritorial effect, and where, by joint state action, two corporations were consolidated, the new company stood in each state as the old company then had stood, invested with the same rights and subject to the same liabilities.⁵⁰

G. Property Entitled to Exemption.—1. *IN GENERAL.*—It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation.⁵¹

2. *PUBLIC PROPERTY.*—a. *Property of the State.*—(1) *In General.*—**State Taxation.**—General tax acts of a state are never, without the clearest words, held to include its own property, or that of its municipal corporations, although not in terms exempted from taxation. Whether such property is taxable under the state laws depends upon the intention of the state as manifested in its laws.⁵² But a constitutional exemption from taxation of the property of a state will not apply to property in which the state's interest is not immediate, but very remote and contingent, such as a reserved right to purchase at end of a long term.⁵³

Federal Taxation.—See ante, “Infringement on Rights of States,” III, C, 1, b, (2). Public property of the states and of the United States was exempted from the direct tax of 1861.⁵⁴

(2) *Registered Public Debt of State.*—See ante, “Federal, State and Municipal Securities,” IV, D.

b. *Property and Instrumentalities of Federal Government.*—Upon the most fundamental principles of government the property of the United States is immune from state taxation.⁵⁵ But this exempts private individuals and corporations only as instrumentalities of government.⁵⁶

etc., *R. Co. v. Missouri*, 152 U. S. 301, 311, 38 L. Ed. 450, followed in *Keokuk*, etc., *R. Co. v. Scotland County*, 152 U. S. 317, 38 L. Ed. 457.

49. **Construction of word “immunity.”**—*Trask v. Maguire*, 18 Wall. 391, 21 L. Ed. 938; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660, in which the court said that considerable meaning was to be attached to the omission of the word “immunities.”

50. *The Delaware Railroad Tax*, 18 Wall. 206, 207, 21 L. Ed. 888.

51. *People v. The Commissioners*, 4 Wall. 244, 256, 18 L. Ed. 344, quoted in *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, 449, 41 L. Ed. 1069.

52. **State property usually exempted.**—*Bank v. New York City*, 2 Black 620, 17 L. Ed. 451; *Calhoun County v. American Emigrant Co.*, 93 U. S. 124, 125, 23 L. Ed. 826; *Van Brocklin v. Tennessee*, 117 U. S. 151, 173, 174, 29 L. Ed. 845.

53. **Property in which state has remote interest.**—*Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792.

54. **Direct tax.**—*United States v. Louisiana*, 123 U. S. 32, 38, 31 L. Ed. 69; *Ensinger v. Powers*, 108 U. S. 292, 303, 27 L. Ed. 732. See ante, “Internal Revenue Taxes,” VI, C, 1, h.

55. **Property of United States exempt from taxation.**—*Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, 504, 33 L. Ed. 687. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 193, et seq. See, also, ante, “Of the States,” III, D. As to public lands, see ante, “Public Lands of the United States,” IV, H, 2.

As soon as the title becomes vested in the federal government this exemption attaches, and does not depend upon the property being used as a means or instrumentality for the execution of any of the powers of the federal government. *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845, holding that the immunity applies to lands struck off to the United States for taxes assessed by the general government, as well as to land permanently owned for public purposes.

56. **Instrumentalities of government only are exempt.**—The government may lease a building from a private owner for the purpose of better carrying on its governmental duties, and yet the building is not such an instrumentality of government as prevents its taxation by or under state authority, certainly where congress has not constituted this corporation

c. *Property of Municipal Corporation*—(1) *In General*.—By statute in most states, all buildings and other property used exclusively for public purposes, and not leased to private individuals, are exempted from all taxation.⁵⁷ Land sold by a municipality is taxable in the hands of the purchaser or his grantee,⁵⁸ unless there be a special contract to the contrary.⁵⁹

(2) *Power of State to Tax Property of Municipality*.—This power exists and cannot be questioned under the federal constitution. Neither the charter nor a legislative act is such a contract as will stand in the way of so doing.⁶⁰

an agency of its own for the purpose of discharging any duties which the government may owe to the Indians. *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 129, 50 L. Ed. 398.

Thus, an independent private corporation for gain, created by a state, is not exempt from state taxation, either in its corporate person, or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time. *Thomson v. Pacific Railroad*, 9 Wall. 579, 19 L. Ed. 792; *Railroad Co. v. Peniston*, 18 Wall. 5, 21 L. Ed. 787; *Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 382, 49 L. Ed. 242. See the title CONSTITUTIONAL LAW, vol. 4, p. 201, et seq., for other cases.

Effect of possibility of reverter to United States.—This does not exempt from state taxation. *Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 382, 49 L. Ed. 242.

Land conveyed by United States to dry dock company.—*Maish v. Arizona*, 164 U. S. 599, 607, 609, 41 L. Ed. 567; *Northern Pac. R. Co. v. Myers*, 172 U. S. 589, 598, 43 L. Ed. 564; *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 525, 40 L. Ed. 1057; *Northern Pac. R. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044; *Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 382, 49 L. Ed. 242.

57. Property of municipalities.—*Ensminger v. Powers*, 108 U. S. 292, 27 L. Ed. 732.

Navy yard owned by city.—So under the acts of 1861 and 1862, laying a direct tax on land. *Ensminger v. Powers*, 108 U. S. 292, 303, 27 L. Ed. 732. See the title CONSTITUTIONAL LAW, vol. 4, p. 210.

The words "for public purposes" have been held to mean in that connection the same as the words "for governmental purposes" and therefore property used by a city for public or governmental purposes is held to be exempt, while that adapted or used for the profit or convenience of the citizens, individually or collectively, is held to be subject to taxation; and recognizing and applying that distinction waterworks property of a city has been invariably treated by the supreme court as belonging to the latter class, and consequently subject to the state and county taxation. *Covington v. Kentucky*, 173 U. S. 231, 43 L. Ed. 679.

58. *Wells v. Savannah*, 181 U. S. 531, 45 L. Ed. 986.

59. Contract not to tax until conveyance.—A county, by its contract for the sale of lands, whereof it was the owner, stipulated that it would not assess taxes against them until after they should be conveyed. The deed was executed, and deposited with the clerk of the board of county supervisors as an escrow, and was not to be delivered until the performance by the grantee of a certain condition. The condition was not performed; and the deed having been surreptitiously placed on record, the county brought suit to set it and the contract aside. The court, on May 20, 1872, by consent, dismissed the bill, and decreed that such dismissal should forever bar and estop the county from setting up any right or title to the lands in controversy. In July following, the county listed certain of the lands for taxes for the years 1870 and 1871; and was proceeding to enforce collection, when the court below, upon a bill filed for that purpose by the appellee, decreed that the assessment was void, and enjoined all proceedings by the county in the matter. Held, that the decree was proper, as the lands were not taxable prior to such settlement. *Calhoun County v. American Emigrant Co.*, 93 U. S. 124, 23 L. Ed. 826.

"Where a municipal corporation sells a tract of land, and their authorized agents represent that there are no municipal taxes assessed against the same, neither the municipality nor its proper officers can collect from the grantees taxes for preceding years, if assessed subsequently to the conveyance. Omissions resulting from inadvertence or mistake of the assessors may doubtless be corrected, and such an assessment, if not doubted, is legal, and may be collected; but good faith forbids such an assessment as the one before the court, which was made in violation of a written agreement and of an explicit understanding between the parties in the adjustment of a pending controversy." *Calhoun County v. American Emigrant Co.*, 93 U. S. 124, 129, 23 L. Ed. 826. See ante, "Construction of Covenant for Quiet Enjoyment," V, C, 1, d, (6).

60. *Covington v. Kentucky*, 173 U. S. 231, 241, 43 L. Ed. 679. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 843.

3. **PROPERTY USED FOR SCHOOL, RELIGIOUS OR CHARITABLE PURPOSES**—a. *In General*.—The statutes or constitutions of most states exempt from taxation property necessary for school, religious and charitable purposes.⁶¹

b. *Educational Establishments*.—Property from which an educational institution derives a profit or income may be entitled to enjoy an exemption from taxation, as well as that in its actual and immediate use.⁶²

c. *Church Property*.—The grounds around a church may be exempt,⁶³ but not lands separated from the lot upon which the church edifice stands and not necessary to the use of the church.⁶⁴

d. *Charities*—(1) *Power to Exempt*.—There can be no doubt as to the power of a state legislature to exempt from taxation property used for charitable purposes,⁶⁵ and such contract will be protected under the contract clause of the federal constitution⁶⁶ unless it is in the form of a mere continuing gratuity.⁶⁷

61. **Property used for school, religious or charitable purposes**.—*University v. People*, 99 U. S. 309, 319, 25 L. Ed. 387.

Not intended to apply to a purely political or governmental corporation like the United States. *United States v. Perkins*, 163 U. S. 625, 630, 41 L. Ed. 287.

62. **Exemption of property used "for school purposes"**.—*University v. People*, 99 U. S. 309, 25 L. Ed. 387.

A statute of Illinois, passed in 1855, declares that all the property "belonging to or owned by" the Northwestern University shall be for ever free from taxation. As construed by the assessors and by the supreme court of the state, a statute of 1872, conforming taxation to the new constitution of 1870, limited this exemption to land and other property in immediate use by the institution. Held, that the latter statute impaired the obligation of the contract of exemption found in the statute of 1855. *University v. People*, 99 U. S. 309, 25 L. Ed. 387, construing the words "for school purposes" in the Illinois Constitution to authorize the exemption given by the statute of 1855.

Distinction between terms "owned by" and "belonging to" in statutes exempting educational institutions.—But it was held in a later case in Illinois that under a statute exempting the property "belonging or appertaining to said seminary," such property was not exempted, as "belonging" was of narrower import than "owned by," and only included property in immediate and actual use. And this ruling was followed by the supreme court of the United States. *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 675, 47 L. Ed. 641, distinguishing *University v. People*, 99 U. S. 309, 25 L. Ed. 387.

Meaning of words "said seminary".—Held to limit the exemption to that particular property. *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 673, 47 L. Ed. 641. See, also, post, "Property Entitled to Exemption," V. G. 3, d. (2).

63. **Grounds left open around a church**, not merely to admit light and air, but also to add to its beauty and attractiveness, may, if not used or intended to be

used for any other purpose, be exempt from taxation under statutes exempting from taxation church buildings and grounds actually occupied by such buildings. *Gibbons v. District of Columbia*, 116 U. S. 404, 407, 29 L. Ed. 680.

64. *Gibbons v. District of Columbia*, 116 U. S. 404, 407, 29 L. Ed. 680.

65. **Power to exempt property used for charity**.—*Williamson v. New Jersey*, 130 U. S. 189, 200, 32 L. Ed. 915.

66. **Contract inviolable**.—So long as the corporation owns it and applies it to the purposes for which the charter was granted. *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495, followed in *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498, distinguished in *Grand Lodge v. New Orleans*, 166 U. S. 143, 148, 41 L. Ed. 951. Approved in *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860.

Although the right to repeal the charter was reserved by general law, with a proviso protecting contract rights, from impairment without indemnity, no indemnity short of the amount of the tax would be adequate. *Asylum v. New Orleans*, 105 U. S. 362, 368, 26 L. Ed. 1128, distinguishing *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805, and *West Wisconsin R. Co. v. Board of Supervisors*, 93 U. S. 595, 23 L. Ed. 814. So where it was expressly provided that an existing statutory provision reserving the right to alter and repeal, should not apply to the charitable institution. *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495.

67. **Mere gratuitous exemptions of charities may be revoked**.—*Christ Church v. County of Philadelphia*, 24 How. 300, 16 L. Ed. 602, approved in *Stanislaus County v. San Joaquin, etc., Co.*, 192 U. S. 201, 208, 48 L. Ed. 406, followed in *Grand Lodge v. New Orleans*, 166 U. S. 143, 41 L. Ed. 951, which distinguishes *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495, and *Asylum v. New Orleans*, 105 U. S. 362, 26 L. Ed. 1128, on the ground that the exemption claimed by them was contained in their original charter, and therefore, having considera-

(2) *Property Entitled to Exemption*.—This exemption extends not only to the buildings and other physical properties of the institution, but funds invested to carry on the work,⁶⁸ as well as to subsequently-acquired property, although a subsequent constitutional amendment required all property to be taxed according to value, etc. Subsequent gratuitous donations to it were exempt under the contract.⁶⁹

4. CORPORATIONS—*a. Corporate Stock*—(1) *Exemption of Capital Stock as Exempting Shareholders*.—The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock, is now well settled.⁷⁰ But where the legislature has enacted that "The capital stock of said company" is exempt from taxation, the owner or owners of the stock are necessarily relieved from all taxation on this account.⁷¹

tion to support it, was a contract within the meaning of the United States constitution, § 10, art. 1.

68. *Property entitled to exemption*.—*Asylum v. New Orleans*, 105 U. S. 362, 365, 26 L. Ed. 1128.

69. *After-acquired property*.—*Asylum v. New Orleans*, 105 U. S. 362, 367, 26 L. Ed. 1128, Miller and Field dissenting, distinguished in *Grand Lodge v. New Orleans*, 166 U. S. 143, 41 L. Ed. 951.

Though "undoubtedly, if the corporation should acquire property not needed or used for carrying on the institution, it would be an act outside of the objects and purposes of the charter, and ultra vires; and, as to such property, it could not, in its own wrong, justly claim the benefit of the exemption." *Asylum v. New Orleans*, 105 U. S. 362, 365, 26 L. Ed. 1128. See ante, "Educational Establishments," V, G, 3, b.

70. *Exemption of capital stock as exemption of shareholders*.—*New Orleans v. Citizens' Bank*, 167 U. S. 371, 402, 42 L. Ed. 202; *Bank v. Tennessee*, 161 U. S. 134, 146, 40 L. Ed. 645; *Bank v. Tennessee*, 163 U. S. 416, 41 L. Ed. 211. See, also, *Trask v. Maguire*, 18 Wall. 391, 401, 21 L. Ed. 938.

"The terms 'share,' 'stock,' 'capital,' 'capital stock' are of frequent and not uniform use, and we have often to turn to the context to see what is intended by its use in a particular case. That a distinction exists between that which is the property of the several shareholders and subject to taxation as other property belonging to them, and that which is the property of the collective incorporated person we call a corporation, and subject to taxation as such, has been repeatedly pointed out. See *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Railroad Cos. v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091; *Railway Co. v. Loftin*, 98 U. S. 559, 25 L. Ed. 222; *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830; *Bank v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645; *Shelby County v. Union, etc., Bank*, 161 U. S. 149, 40 L. Ed. 650; *Central R., etc., Co. v. Wright*, 164 U. S. 327, 41 L. Ed. 454; *New Orleans v. Citizens'*

Bank, 167 U. S. 371, 42 L. Ed. 202; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850; *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. Ed. 346; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. Ed. 1077." *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 559, 50 L. Ed. 860.

A tax "on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed," clearly refers to the property which the corporation has received and presumably holds, and not to the individual property of the shareholders, and constitutes a valid exemption of corporate property within the protection of the impairment clause of the federal constitution. *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 561, 50 L. Ed. 860, distinguishing *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558.

Legislative intent governs.—"In all cases of this kind the question is as to the intent of the legislature, the presumption always being against any surrender of the taxing power." *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830, followed in *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833, citing *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, as a case where the intent was held to be that the shares were exempted by the payment by the company of a tax on each share subscribed in lieu of all other taxes.

71. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *Planters' Bank v. Sharp*, 6 How. 301, 332, 12 L. Ed. 447; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 415, 429, 14 L. Ed. 997; *Jefferson Branch Bank v. Skelly*, 1 Black 436, 446, 17 L. Ed. 173; *People v. The Commissioners*, 4 Wall. 244, 259, 18 L. Ed. 344; *Farrington v. Tennessee*, 95 U. S. 679, 690, 24 L. Ed. 558; *Tennessee v. Whitworth*, 117 U. S. 129, 137, 29 L. Ed. 830, followed in *Tennessee v. Whitworth*, 117 U. S. 139, 150, 29 L. Ed. 833; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202.

A tax of one-half of one per cent on each share of the bank's capital stock, which was declared in the charter to be in lieu of all other taxes, exempts the

(2) *Exemption of Capital Stock as Embracing Lands Granted by State.*—An exemption of the capital stock of a corporation does not embrace lands granted by the state to the company to aid in the construction of its railroad.⁷²

(3) *Exemption of Stock as Exemption of Property Represented Thereby.*—See, also, ante, "Capital and Property Represented," III, A, 2, b, (5), (d).

"The general tenor of the authorities is to the effect that where there is a general exemption of the stock or capital stock of a corporation, without other explanatory words, the exemption applies equally to the property of the corporation represented by its shares of stock."⁷³ But this is only true where there is no legislative intent to the contrary.⁷⁴

(4) *Investment in Stocks.*—By statute in some jurisdictions, certificates of stock in a corporation are exempt, if its capital stock is taxed in the name of the company.⁷⁵

(5) *Exemption Measured by Dividend.*—By statute in some jurisdictions the exemption is measured by the amount of dividends the company earns.⁷⁶

shares in the hands of individuals shareholders, but does not include either capital stock or the surplus, which is the property of the corporation itself. *Shelby County v. Union, etc., Bank*, 161 U. S. 149, 40 L. Ed. 650, citing and reconciling *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830. This case is cited in *Union, etc., Bank v. Memphis*, 189 U. S. 71, 74, 47 L. Ed. 713. See, also, ante, "Capital Stock and Shares Held by Stockholders," III, A, 2, b, (5), (c); "Corporate Stock," IV, C, 2, d.

72. Exemption of capital stock as embracing lands granted by state.—*Railroad Co. v. Loftin*, 105 U. S. 258, 259, 26 L. Ed. 1042; *Railway Co. v. Loftin*, 98 U. S. 559, 25 L. Ed. 222.

Quære, whether, if the lands had been accepted in payment for increased stock, the exemption contended for would follow. *Railroad Co. v. Loftin*, 105 U. S. 258, 260, 26 L. Ed. 1042.

73. Central R., etc., Co. v. Wright, 164 U. S. 327, 331, 41 L. Ed. 454.

But this is true only when the context does not require a different construction, as it does here, where the charter expressly authorized municipalities to tax the corporate property. *Central R., etc., Co. v. Wright*, 164 U. S. 327, 329, 334, 41 L. Ed. 454. See *Railroad Cos. v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091.

Exemption of stock as exempting roads and fixtures purchased therewith.—*Railroad Cos. v. Gaines*, 97 U. S. 697, 707, 24 L. Ed. 1091.

74. Central R., etc., Co. v. Wright, 164 U. S. 327, 335, 41 L. Ed. 454.

"There are undoubtedly many cases to be found in this and other courts where it has been held that an exemption of the capital stock of a corporation from taxation was equivalent to an exemption of the property into which the capital had been converted. But in all these cases we think it will be found that the question turned upon the effect to be given

the term 'capital,' or 'capital stock,' as used in the particular charter under consideration, and that when the property has been exempted by reason of the exemption of the capital, it has been because, taking the whole charter together, it was apparent that the legislature so intended." *Railroad Cos. v. Gaines*, 97 U. S. 697, 707, 24 L. Ed. 1091. See, also, *Railway Co. v. Loftin*, 98 U. S. 559, 564, 25 L. Ed. 222, when it was held that the capital stock alone was exempt.

A provision in the charter of a railroad company that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, machinery, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer," does not, after the expiration of that period, exempt from taxation the road, with its fixtures, etc., although the same were purchased with or represented by capital. *Railroad Cos. v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091; *Tennessee v. Whitworth*, 117 U. S. 129, 135, 29 L. Ed. 830, followed in *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. Ed. 833.

75. Investments in stock.—*Sturges v. Carter*, 114 U. S. 511, 520, 29 L. Ed. 240, construing the Ohio statute.

"The exemption from taxation of investments in stocks, provided by the statute, applies only to shares of those corporations which are required to return their capital and property for taxation in the state. *Jones v. Davis*, 35 Ohio St. 474. This clearly means those corporations which are required to return all, or substantially all, their capital and property. There is no rule of interpretation by which the statute can be held to apply to corporations who list only a small part of their property for taxation in Ohio." *Sturges v. Carter*, 114 U. S. 511, 522, 29 L. Ed. 240.

76. Exemption measured by amount of dividends earned.—A charter provision that "no tax shall ever be laid on said

(6) *Allowance of Exemptions of Shareholders or Property Represented.*—See ante, "Power to Tax," III, C, 3, b; "Corporate Stock," IV, C, 2, d; "Banks and Bank Stock," IV, C, 3, a.

b. *Banks.*—See, generally, ante, "Banks and Bank Stock," IV, C, 3, a.

(1) *Power to Grant Exemptions.*—The people of a state may confer upon their legislature the power to exempt banks and other corporations from taxation either wholly or partially, and either by general legislation or by contracts embodied in charters. Whether, therefore, a state legislature has the power to exempt an individual or corporation from taxation depends upon the powers which have been vested in or withheld from such legislature by the state constitution. There is nothing in the constitution of the United States forbidding the state legislature from making such exemption.⁷⁷

(2) *Inviolability of Contract*—aa. *In General.*—See ante, "Impairment of Obligation of Contracts," V, D. See note.⁷⁸ But it must possess the requisites of a contract, such as consideration, etc.⁷⁹ And this contract can no more be impaired by a subsequent constitution of the state imposing a tax, than by statutory enactment.⁸⁰

bb. *Rule as to Commutation Taxes.*—Where a state statute lays certain terms

road or its fixtures which will reduce the dividends below eight per cent," was clearly a stipulation on the part of the legislature to forego the exertion of its taxing power to the extent of allowing the corporation to pay its shareholders eight per cent dividends from the net earnings of the company. By the previous clauses of the section the capital stock was exempt from taxation forever, and the road, with all its fixtures and franchises, was exempt for the period of twenty-five years from its completion. These exemptions were primarily for the benefit of the corporation. The shares of stock were subject to taxation against the owners or holders thereof, and this last clause was clearly intended for their benefit to the extent of securing, as far as an immunity from taxation would do so, against any reduction of dividends on their stock below eight per cent per annum. *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 500, 38 L. Ed. 793.

As to what is meant by "dividends," see the title STOCK AND STOCKHOLDERS, ante, p. 193.

But sustaining the validity of the exemption in the present case is not to be understood as holding that the railroad company has the right in its discretion, hereafter, to issue additional capital stock, or to increase its bonded indebtedness, even for legitimate purposes, and have the same taken into consideration upon the question of its liability for taxation under the eight per cent dividend clause of the charter. *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 506, 38 L. Ed. 793.

77. *Power to exempt banks.*—*State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977; *Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 416, 428, 429, 14 L. Ed. 997, citing *Providence Bank v. Billings*, 4 Pet. 514, 7 L. Ed. 939.

No impairment where exemption allowed was forbidden by state constitution.—*Ohio Life Ins., etc., Co. v. Debolt*, 16 How. 415, 14 L. Ed. 997.

78. A provision in a statute for the extension of the charters of the banks in the state for a certain number of years, upon the payment by the banks, at their option, of a round sum, or an annual charge, for the privilege of conducting their banking business during the period of such extension, is a condition to be accepted and complied with before the charters are extended, and when accepted and complied with by the banks such condition becomes a contract, and such contract is a limitation upon the taxing power of the legislature making it and upon succeeding legislatures, to impose any further tax upon the franchise. *Gordon v. Appeal Tax Court*, 3 How. 133, 145, 11 L. Ed. 529.

Law increasing tax impairs contract.—*State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977.

But the corporate property of the bank is separable from the franchise, and may be taxed, unless there is a special agreement to the contrary. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. Ed. 529.

79. *Requisites and validity of contract.*—See ante, "Requisites and Validity of Contract," V, D, 3.

Bonus or payment unnecessary.—*State Bank v. Knoop*, 16 How. 369, 390, 14 L. Ed. 977.

80. Cannot be impaired by state constitution.—*Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401. The case of *State Bank v. Knoop*, 16 How. 369, 14 L. Ed. 977, again affirmed, citing *Mechanics', etc., Bank v. Debolt*, 18 How. 380, 15 L. Ed. 458; *Mechanics', etc., Bank v. Thomas*, 18 How. 384, 15 L. Ed. 460; *Jefferson Branch Bank v. Skelly*, 1 Black' 436, 17 L. Ed. 173.

and conditions on a bank, proposing to pledge its faith, if the bank shall accept the act, not to impose any further burden or tax upon it, such act is a contract which is impaired by a further tax upon the franchise of the bank.⁸¹

cc. *Limitations of General Rule.*—But a charter exemption from taxation granted to a bank by a state may be repealed at any time, if the state has a constitutional or statutory provision that all charters of incorporation and other grants shall be subject to repeal or amendment in the discretion of the legislature.⁸²

(3) *Rule in Absence of Express Exemption in Charter.*—See ante, "Power to Tax," IV, C, 3, a, (1).

(4) *Scope and Extent of Exemption*—aa. *In General.*—Where the words of the charter are "the capital of the bank shall be exempt from any tax," the word any excludes selection or distinction. It declares the exemption without limitation.⁸³

bb. *What Property within Exemption.*—The exemption usually extends only to such property as is needed for the purposes of its banking business.⁸⁴

81. Commutation taxes.—Gordon v. Appeal Tax Court, 3 How. 133, 11 L. Ed. 529, cited and approved in State Bank v. Knoop, 16 How. 369, 386, 14 L. Ed. 977.

A law passed by a state legislature chartering a banking corporation, and stipulating the amount of tax which the bank should pay, in lieu of all other taxes, is a contract between the state and the corporation and the stockholders, which is violated by a subsequent law, although contained in a new state constitution, by which taxes to a greater amount and founded upon a different principle are levied. Gordon v. Appeal Tax Court, 3 How. 133, 11 L. Ed. 529; Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401; State Bank v. Knoop, 16 How. 369, 14 L. Ed. 977, distinguished in Shelby County v. Union, etc., Bank, 161 U. S. 149, 155, 40 L. Ed. 650; Mechanics', etc., Bank v. Debolt, 18 How. 380, 15 L. Ed. 458; Mechanics', etc., Bank v. Thomas, 18 How. 384, 15 L. Ed. 460; Jefferson Branch Bank v. Skelly, 1 Black 436, 448, 17 L. Ed. 173; Franklin Branch Bank v. Ohio, 1 Black 474, 17 L. Ed. 180; Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558.

A subsequent revenue law of the state, imposing an additional tax on the shares in the hands of stockholders, impairs the obligation of that contract, and is void. Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558; Bank v. Tennessee, 161 U. S. 134, 140, 40 L. Ed. 645.

82. Effect of constitutional provision or law subjecting all charters to repeal.—Deposit Bank v. Owensboro, 173 U. S. 662, 43 L. Ed. 850; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 666, 43 L. Ed. 850; Kentucky Bank Tax Cases, 174 U. S. 408; Stone v. Bank, 174 U. S. 412, 419, 420, 43 L. Ed. 1028; Fidelity Trust, etc., Co. v. Louisville, 174 U. S. 429, 43 L. Ed. 1034; Third Nat. Bank v. Stone, 174 U. S. 432, 43 L. Ed. 1035; Louisville v. Third Nat. Bank, 174 U. S. 435, 43 L. Ed. 1037; Louisville v. Citizens' Nat. Bank, 174 U. S. 436, 437, 43 L. Ed. 1037;

First Nat. Bank v. Louisville, 174 U. S. 438, 439, 43 L. Ed. 1038; Louisville v. Bank, 174 U. S. 439, 443, 43 L. Ed. 1039; Covington v. First Nat. Bank, 198 U. S. 100, 107, 49 L. Ed. 693.

Extension of charter subject to repeal.—And where there is nothing in the extending act expressing the plain intent of the legislature that the charter as extended should not be subject to the repealing power reserved by the general law, the act of extension, therefore, was not taken out of the general rule arising therefrom by the exception mentioned in that act, saving from the power to repeal, alter or amend "all charters and grants of or to corporations or amendments thereof" when "the contrary intent be therein plainly expressed." Louisville v. Bank, 174 U. S. 439, 443, 43 L. Ed. 1039.

It may be now regarded as the settled law that the so-called "Hewitt Law" of Ohio did not constitute a contract between the state and the banks as to taxation, but is subject to modification and repeal by subsequent laws of the state undertaking to tax bank property. Deposit Bank v. Frankfort, 191 U. S. 499, 508, 48 L. Ed. 276; Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 641, 43 L. Ed. 840. See ante, "Limitations of General Rule," V, D, 2.

83. Exemption from "any" tax.—Citizens' Bank v. Parker, 192 U. S. 73, 81, 82, 48 L. Ed. 346.

84. Property needed for banking purposes is exempt.—Central R., etc., Co. v. Wright, 164 U. S. 327, 335, 41 L. Ed. 454, following Bank v. Tennessee, 104 U. S. 493, 26 L. Ed. 810, where a bank was required to "pay to the state an annual tax of one-half of one per cent upon each share of capital stock, in lieu of all other taxes," and was also allowed to "purchase and hold a lot of ground" for its place of business, and hold such real property as might be conveyed to it to secure its debts. It was held that the immunity from taxation extended only to

cc. *Accumulated Surplus*.—When the bank had accumulated a surplus made up of undivided profits from the year, the surplus was held properly taxed, although the charter declared it exempt from all taxes except an annual tax on each share of capital stock.⁸⁵

dd. *Exemption of Charter as Including License Tax*.—Where the words of a charter organizing a bank were that "the capital of the bank shall be exempt from any tax," it was held that this would also exempt the bank from the payment of any license or property tax, especially where it appears, in the light of surrounding circumstances, that it must have been the intention of the state to exempt banking institutions from taxation as an inducement or encouragement to them to locate within the state.⁸⁶

c. *Railroads*.—See, generally, ante, "Railroad and Canal Companies," IV, C, 3, h.

(1) *Inviolability of Contract*.—An exemption from taxation granted by one legislative act to a railroad company, as an inducement to it to build its railroad, cannot by a subsequent one be taken away.⁸⁷

(2) *Scope and Extent of Exemption*—aa. *In General*.—Where the language of the exempting clause in a railroad charter is, not that the company or its stock shall be taxed in a certain way and otherwise exempt, but that the "said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher," etc., this clearly means the railroad specified in the charter, and none other.⁸⁸ Moreover, such exemption generally applies only to property used in the business of the company claiming the exemption,⁸⁹ and which is indispensable, and not merely concurrent, to the operation of the railway.⁹⁰ By statutes in some jurisdictions the exemption is measured by the profits or dividends the company earns; until this point is reached the property is not subject to any tax.⁹¹

bb. *Lateral or Branch Railroads*.—Although the original charter of a railroad

so much of the building as was required by the actual wants of the bank to carry on its business. See, also, *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. Ed. 419, and *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830. The *Citizens' Bank of New Orleans* is not liable, by the exemption contained in its charter and its renewals, to taxation, state, parochial and municipal, on its capital stock, its banking house and furniture acquired and used for the purposes of its banking business, or to a tax on shareholders eo nomine, accompanied with a legal obligation on the bank to pay the tax. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 407, 42 L. Ed. 262.

85. *Accumulated surplus*.—*Bank v. Tennessee*, 161 U. S. 134, 148, 40 L. Ed. 645, distinguishing *Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810. See, also, *Shelby County v. Union, etc., Bank*, 161 U. S. 149, 40 L. Ed. 650.

86. *Exemption of charter as including license tax*.—*Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. Ed. 346, citing and explaining *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 262.

87. *Contract exempting railroad is inviolable*.—*Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568; *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. Ed. 282.

88. *Scope and extent of exemption*.—*Southwestern R. Co. v. Wright*, 116 U.

S. 231, 235, 29 L. Ed. 626, where such exemption is held not to apply to another road purchased under an act which declared it subject to additional taxation by the legislature.

89. *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614, distinguishing *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 41 L. Ed. 590.

A commutation tax on a railroad does not embrace lands owned by the company but not used or necessary to the operation of the road. *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805. See, however, *McHenry v. Alford*, 168 U. S. 651, 42 L. Ed. 614, holding lands granted to aid the construction of the road, but outside of its right of way, and not shown to be used in its business, to be exempt under the language used, and distinguishing *Ford v. Delta, etc., Land Co.*, 164 U. S. 662, 41 L. Ed. 590. See ante, "Railroad Grants," IV, H, 2, c, (3).

90. *Property must be indispensable*.—*Bank v. Tennessee*, 104 U. S. 493, 26 L. Ed. 810, cited in *Humphreys v. McKissock*, 140 U. S. 304, 35 L. Ed. 473. See, also, ante, "Scope and Extent of Exemptions," V, E.

91. *Exemption limited by earning capacity*.—*Raleigh, etc., R. Co. v. Reid*, 13 Wall. 269, 20 L. Ed. 570; *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 38 L. Ed. 793.

company contained an exemption from taxation, yet if it did not give the road the right to build an extension or branch, such branch road is subject to taxation when built under authority subsequently given.⁹² In other words, an exemption contained in the original charter of a railroad company will not, by mere implication, exempt branch roads subsequently acquired or built;⁹³ such exemption will be denied unless granted in terms too plain to be mistaken.⁹⁴

cc. *Right of Way*.—Where a "right of way" is granted by an act of congress to a railroad company, and the same exempted from taxation within the territories, such a tangible and corporeal property is granted, that all that was attached to it became part of it and partook of its exemption from taxation, but it is confined to what was acquired under that act.⁹⁵

5. MANUFACTORIES.—See ante, "Manufacturing Corporations," IV, C, 3, g. Statutes are found in some jurisdictions exempting manufactories from taxation for a limited period as an encouragement to such to locate within the state.⁹⁶

H. Commencement and Termination of Exemption—1. COMMENCEMENT OF EXEMPTION.—Sometimes railroad charters provide for an exemption after the road is completed. In such cases the period of exemption does not begin until the road is finished and in operation.⁹⁷

2. TERMINATION OF EXEMPTION—*a. By Lapse of Time*—(1) *In General*.—Where an exemption from taxation is granted for a limited time, it of course ter-

92. Exemption in original charter will not exempt branches subsequently built or acquired.—*Chesapeake, etc., R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. Ed. 626; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 294, 36 L. Ed. 972.

Where an "amending act does not in terms or by fair implication apply the exemption to the additional road which was to be built under it, we must presume that nothing of the kind was intended, and that the state was left free to tax that road like other property." *Southwestern R. Co. v. Wright*, 116 U. S. 231, 236, 29 L. Ed. 626; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 301, 36 L. Ed. 972.

93. Chicago, etc., R. Co. v. Guffey, 120 U. S. 569, 572, 30 L. Ed. 732, reaffirmed in *Chicago, etc., Railroad v. Guffey*, 122 U. S. 561, 570, 30 L. Ed. 1135; *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 296, 36 L. Ed. 972.

The transfer of the road of the one company to the other did not make it in law such an extension of the main road of the latter as to bring it within the exemption from taxation which was confined to the main road alone. *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 299, 36 L. Ed. 972.

94. Exemption of branch must be in plain terms.—*Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569, 574, 30 L. Ed. 732.

Where a railroad is incorporated with an exemption from taxation, a grant by a subsequent section of the act of incorporation of the power to build branch roads and the extension with respect to them of "all the powers, rights, and privileges" conferred on the company with respect to the main road in the lay-

ing out, construction, use, and preservation of the branch roads, will not extend the exemption to the branch lines. *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. Ed. 972.

95. Exemption of right of way includes all attached thereto.—Under the act of July 27, 1866, c. 278, exempting from taxation the right of way thereby granted the Atlantic and Pacific Railroad Company the exemption from taxation must be confined to the right of way granted by the United States by § 2 of the act, and to the superstructures which become a part of it, and does not extend to the right of way which the railroad company may have acquired under § 7, or independently of that section. *New Mexico v. United States Trust Co.*, 174 U. S. 545, 547, 43 L. Ed. 1079.

96. Property used for manufacturing purposes.—The act of the legislative assembly of the District of Columbia of June 26, 1873, exempting from general taxes for ten years thereafter such real and personal property as might be actually employed within said district for manufacturing purposes, provided its value should not be less than \$5,000, did not create an irrepealable contract with the owners of such property, but merely conferred a bounty liable at any time to be withdrawn, and which was withdrawn by the act of June 20, 1874 (18 Stat. 117) taxing all real estate with certain exceptions. *Welch v. Cook*, 97 U. S. 541, 24 L. Ed. 1112. See, also, *Salt Co. v. East Saginaw*, 13 Wall. 373, 20 L. Ed. 611.

97. Exemption to attach on completion of road.—*Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174, 188, 33 L. Ed. 302; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665, 669, 29 L. Ed. 770, construing the words of the exemption "for ten years

minates at the expiration of such time.⁹⁸ "The exemption of the property for twenty years only is equivalent to an express power to tax after that time."⁹⁹ If the limitation of taxation in the original charter is during the life of the corporation, and it is carried forward by amendment, it is only for the new period, that is, during the extended charter.¹

(2) *Construction of Word "Forever."*—The presence or absence of the word "forever" would seem to have little effect on the case.²

b. *By Alienation of Property.*—The exemption usually ceases when the property enjoying the exemption is sold by the owner entitled to claim it.³

c. *By Merger.*—Where exempted property comes into the possession of the state, the exemption ceases of necessity; and a second grant, made after a new state constitution has prohibited exemptions, carries no contract right to immunity.⁴

d. *By Repeal or Withdrawal of Exemption.*—(1) *In General.*—An exemption from taxation may be terminated by repeal of the corporate charter.⁵ And the same result is impliedly accomplished by directing the assessment of property that had previously enjoyed the exemption.⁶

(2) *Commutation Taxes.*—Where an exemption is granted by the state in consideration of the performance of some act for the benefit of the state, the withdrawal of such exemption likewise terminates the obligation of the company to perform its part of the obligation.⁷

after the completion of said road" to exclude the time before such completion as clearly as the time succeeding the ten year's period after it.

Burden of showing completion on complainant.—*Picard v. Tennessee, etc., R. Co.*, 130 U. S. 637, 640, 32 L. Ed. 1051.

98. Termination by expiration of time for which granted.—*Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830; *Wells v. Savannah*, 181 U. S. 531, 540, 45 L. Ed. 986; *Bailey v. Maguire*, 22 Wall. 215, 226, 22 L. Ed. 850; *Savannah v. Jesup*, 106 U. S. 563, 569, 27 L. Ed. 276.

And where an exemption for twenty years has the qualifying phrase, "but not to extend beyond twenty-five years from the date of the approval of this act," this operated to reduce the term of the twenty years exemption by so much as the completion of the road to the river took over five years. *Yazoo, etc., R. Co. v. Thomas*, 132 U. S. 174, 184, 33 L. Ed. 302.

Exemption of capital as including property purchased.—See ante, "Exemption of Stock as Exemption of Property Represented Thereby," V. G. 4, a. (3).

Exemption of swamp and overflowed lands until reclaimed.—*Railroad Co. v. Loftin*, 105 U. S. 258, 26 L. Ed. 1042.

99. Railroad Cos. v. Gaines, 97 U. S. 697, 708, 24 L. Ed. 1091.

1. Amendment of charter.—*Louisville v. Bank*, 174 U. S. 439, 444, 43 L. Ed. 1039.

2. The expression "forever exempt" falls short of a plain expression by the legislature that at no time would it exercise the reserved power of amending or repealing the act under which the property was acquired. *Covington v. Kentucky*, 173 U. S. 231, 238, 43 L. Ed. 679.

Absence immaterial.—Where "all property of said corporation shall be exempt from taxation," are the words used in the act of incorporation, there is no need of supplying any words to ascertain the legislative intention. To add the word "forever" after the word "taxation" could not make the meaning any clearer. *Home of the Friendless v. Rouse*, 8 Wall. 430, 437, 19 L. Ed. 495, followed in *Washington University v. Rouse*, 8 Wall. 439, 19 L. Ed. 498.

3. By alienation of exempt property.—*Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. Ed. 495; *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569, 30 L. Ed. 732. See ante, "Transfer of Immunity from Taxation," V. F.

4. By merger.—*Trask v. Maguire*, 18 Wall. 391, 404, 21 L. Ed. 938.

5. Repeal of corporate charter terminates exemption.—*Louisville v. Bank*, 174 U. S. 439, 43 L. Ed. 1039.

6. Commissioners v. Bancroft, 203 U. S. 112, 119, 51 L. Ed. 112.

When limited to state taxation.—In *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185, it was held that an immunity or limited exemption was, in law, withdrawn by the state in the act of Feb. 28, 1874, entitled "An act to amend the tax laws of the state so far as the same relate to railroad companies and to define the liabilities of said companies to taxation, to repeal so much of the charters of such companies respectively as may conflict with the provisions of this act," but this was held not to repeal the immunity from municipal, as distinguished from state taxation. *Savannah v. Jesup*, 106 U. S. 563, 565, 27 L. Ed. 276.

7. Withdrawal of commutation tax.—Where a railroad company is exempted

e. *By Fulfillment of Conditions*.—"And when a statute creates an exemption with the evident design of aiding in accomplishing a particular result, the exemption should be expected to cease when that result has been accomplished, and the statute should be read in the light of such expectation."⁸

f. *By Surrender and Waiver*—(1) *By Surrender*.—Long acquiescence of landowners under the imposition of taxes, raises a presumption that the exemption, which once existed, has been surrendered.⁹

(2) *By Waiver*.—It is well settled that an exemption from taxation may be waived wholly, or with such limitations and qualifications as may be deemed proper; but the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.¹⁰

g. *By Change in Character of Business*.—Where a corporation changes its business and employs its capital in a totally different character of enterprise, an exemption from taxation granted to it in its charter ceases unless preserved by a valid legislative act.¹¹

h. *By Nonuser for Purposes Designated*.—By nonuser of the property for the purposes designated, the right of exemption from taxation may be lost.¹²

I. Conclusiveness of Adjudication to Establish—1. **IN GENERAL**.—See note.¹³

2. **IDENTITY OF PARTIES**.—The decree upholding an exemption, in order to be res adjudicata must have been rendered in a suit between the same parties or their privies.¹⁴

from taxation in consideration of a payment to the state of a percentage of his gross earnings, such exemption cannot be withdrawn and still continue in force the obligation of the railroad to pay to the state such percentage of its gross earnings. *Stearns v. Minnesota*, 179 U. S. 223, 45 L. Ed. 162; *Duluth, etc., R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. Ed. 201. See, also, *Louisville Water Co v. Clark*, 143 U. S. 1, 36 L. Ed. 55, where the obligation was to furnish water free to the city. See, however, ante, "Impairment of Obligation of Contracts," V, D.

8. **By fulfillment of conditions upon which granted**.—*Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 531, 40 L. Ed. 247.

9. **Surrender of exemption by submitting to taxation**.—*Given v. Wright*, 117 U. S. 648, 655, 29 L. Ed. 1021; where an acquiescence of sixty years was held amply sufficient.

10. **Waiver of exemption**.—*Austin v. Aldermen*, 7 Wall. 694, 19 L. Ed. 224.

Disqualification to comply with conditions.—If, by a change in its character, a corporation has disqualified itself to comply with the conditions on the performance of which the exemption was granted, it must be considered as having waived the exemption. *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Chicago, etc., Railroad v. Guffey*, 122 U. S. 561, 30 L. Ed. 1135.

11. **By change in character of business**.—*Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. Ed. 664. Here there was a new constitution in force forbidding a

new grant of an exemption from taxation, and the change was from an insurance business to that of banking.

12. **By nonuser of property for purposes designated**.—*Mackell v. Chesapeake, etc., Canal Co.*, 94 U. S. 308, 24 L. Ed. 161.

But the question of the company's forfeiture of their right to hold, free from taxation, property after they ceased to use it for canal purposes, can be judicially determined only in a direct proceeding by the public authorities. It cannot be made an issue for the first time in the trial of a question of private right between other parties. *Mackell v. Chesapeake, etc., Canal Co.*, 94 U. S. 308, 24 L. Ed. 161.

13. See the title **RES ADJUDICATA**, vol. 10, p. 729. And see ante, "Application of Doctrine of Res Judicata," IV, A, 5.

14. **Identity of parties**.—*Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. Ed. 840; *Stone v. Farmers' Bank*, 174 U. S. 409, 412, 43 L. Ed. 1027.

Unauthorized agreement to abide the event.—It was held in *Stone v. Farmers' Bank*, 174 U. S. 409, 412, 43 L. Ed. 1027, and *Louisville v. Bank*, 174 U. S. 428, 43 L. Ed. 1034, that the agreement of the commissioners of the sinking fund of the city of Louisville and the attorney of the city with certain banks, trust companies, etc., including the complainant bank, that the rights of those institutions should abide the result of test suits to be brought, was dehors the power of the commissioners of the sinking fund and the city attorney, and therefore that the decree in the test suit in question did not constitute res judicata as to those not actually parties to the record. *Louis-*

3. **IDENTITY OF SUBJECT MATTER.**¹⁵—And the causes of action must be identical and the point or questions actually litigated the same.¹⁶ But a decree between the same parties or their privies, that an irrevocable contract existed as respects taxation as to certain years, constitutes *res adjudicata* as to the taxes attempted to be laid for other years upon the same party and kind of property under the same statute that was declared invalid in the former suit,¹⁷

ville v. Bank, 174 U. S. 439, 442, 443, 43 L. Ed. 1039.

An attorney whose authority to represent a party has ceased or never existed is not a privy.—*Fidelity Trust, etc., Co. v. Louisville*, 174 U. S. 429, 431, 43 L. Ed. 1034.

15. See the title *RES ADJUDICATA*, vol. 10, p. 763.

16. **Identity of subject matter.**—It having been decided that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also (*Wilmington Railroad v. Reid*, 13 Wall. 264, 20 L. Ed. 568), this decision cannot be relied on as an estoppel so far as a branch road is concerned, or as controlling authority in the premises. The causes of action are not identical and the points or questions actually litigated are not the same. The distinction between the branch road as to which the question is here, and the main road, was not adverted to; and even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been, but was not brought in issue and passed upon. *Wilmington, etc., R. Co. v. Alsbrook*, 146 U. S. 279, 302, 36 L. Ed. 972, citing *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Nesbit v. Riverside Independent District*, 144 U. S. 610, 36 L. Ed. 562. See, also, ante, "Lateral or Branch Railroads," V, G, 4, c, (2), bb.

Where the taxes on land for one year have been decided as valid, such ruling will be conclusive as to taxes for subsequent years if the taxes for later years stand in the same condition as those of the former years. *Baldwin v. Maryland*, 179 U. S. 220, 222, 45 L. Ed. 160.

Where the claim in a petition is wholly for taxes based upon additional assessments for prior years, an adjudication that such petition upon its face showed a tax claim against the property, was an adjudication in favor of the validity of such additional assessments. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 46 L. Ed. 315.

"In Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a state court shall have as *res judicata* is a question of

state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. Ed. 660." *Union, etc., Bank v. Memphis*, 189 U. S. 71, 75, 47 L. Ed. 713.

Judgment declaring "capital stock" of a bank exempt, is not conclusive of the exemption of the shareholders on their shares. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202; *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247.

Property bought under foreclosure not "capital stock."—In *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202, it was held that the property bought in by the bank under foreclosure of its stock mortgages was not the capital of the bank, and therefore was not covered by the estoppel of the thing adjudged. Followed in *Louisiana v. New Orleans*, 167 U. S. 407, 408, 42 L. Ed. 215.

17. **Conclusiveness of adjudication as to other years.**—*Stone v. Farmers' Bank*, 174 U. S. 409, 411, 43 L. Ed. 1027; *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. Ed. 276, distinguished in *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. Ed. 963; *Gunter v. Atlantic, etc., R. Co.*, 200 U. S. 273, 50 L. Ed. 477, citing *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202. And see *Southern Pac. R. Co. v. United States*, 168 U. S. 1, 42 L. Ed. 355.

"The mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed." *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398, 42 L. Ed. 202. See, also, *Deposit Bank v. Frankfort*, 191 U. S. 499, 513, 48 L. Ed. 276.

Where a petition states that a tax is "illegal and without warrant of law" and also that it is excessive, but asks that it be decreed "null and void" and be "cancelled and annulled" and judgment is entered thereon, not that the tax is excessive, not that it should be reduced, but that it is null and void and should be cancelled, such judgment will be *res judicata* as to such exemption. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 389, 391, 42 L. Ed. 202.

Controversy as to the force and effect of the Hewitt law as a contract.—*Deposit*

unless the rule of decision in the state court is otherwise.¹⁸ But a decree establishing the existence of an irrevocable contract, exempting a bank, or limiting the right to tax, for one charter term, is not a thing adjudged as to whether the bank was subject to taxation under a new charter, or a renewal thereof.¹⁹

4. AS BETWEEN STATE AND FEDERAL COURTS.—A decree of a federal court upholding an exemption is binding upon the state,²⁰ and is *res adjudicata* between the same parties, although the state judgment upon which the federal decree is based, is reversed by the state court.²¹ But such judgment will be accorded no greater force or effect in the federal courts than it receives in the state court.^{21a}

VI. Assessment and Levy.

A. General Principles—1. DEFINITION AND NECESSITY.—An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers or by the law itself.²² It is not necessary where the law makes the assessment.²³

Bank v. Frankfort, 191 U. S. 499, 513, 48 L. Ed. 276; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202.

18. **Effect of judgment in state court as controlling in federal court.**—Where a judgment as to exemption from taxes is rendered in a state court, and such judgment would be recognized as *res adjudicata* only as to the taxes of the years brought in litigation in such state court, the same rule will prevail in the federal courts also. *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. Ed. 963, distinguishing *Deposit Bank v. Frankfort*, 191 U. S. 499, 48 L. Ed. 276. See, also, *Union, etc., Bank v. Memphis*, 189 U. S. 71, 47 L. Ed. 713.

19. **Decree establishing contract right of exemption not res adjudicata under new charter.**—*Third Nat. Bank v. Stone*, 174 U. S. 432, 43 L. Ed. 1035, followed in *Louisville v. Third Nat. Bank*, 174 U. S. 435, 43 L. Ed. 1037, and *Louisville v. Citizens' Nat. Bank*, 174 U. S. 436, 43 L. Ed. 1037. See *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202.

In *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202, where a plea of *res adjudicata* as to a contract of exemption was maintained, after the renewal of a charter, the court eliminated from consideration all the judgments which had been rendered prior to the period when the amended charter took effect.

Where a company was doing business as an insurance company, a judgment was rendered that the shareholders should be exempt from any further taxation than that provided in its charter. Later the company became a banking corporation. Held, that the former judgment would not work as an estoppel or operate in any manner as a bar to the maintenance of a later action for taxes upon the banking company, being based upon facts of a totally different nature, and arising long after the judgment in the former action was obtained. *Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. Ed. 664.

Extended period of bank's charter.—

Citizens' Bank v. Parker, 192 U. S. 73, 79, 48 L. Ed. 346.

20. **Binding effect of decree of federal court.**—*Gunter v. Atlantic, etc., R. Co.*, 200 U. S. 273, 50 L. Ed. 477; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202.

21. *Deposit Bank v. Frankfort*, 191 U. S. 499, 508, 509, 510, 48 L. Ed. 276.

21a. *Union, etc., Bank v. Memphis*, 189 U. S. 71, 72, 47 L. Ed. 713.

22. **Definition.**—*Dollar Sav. Bank v. United States*, 19 Wall. 227, 240, 22 L. Ed. 80; *United States v. Erie R. Co.*, 107 U. S. 1, 27 L. Ed. 385. For other definitions, see *People v. Weaver*, 100 U. S. 539, 545, 25 L. Ed. 705.

Entire and continuous process.—"The levy and collection of a tax is not only an entire thing, although accomplished by successive steps and by separate officials, but is a continuous transaction, each one taking it up where his predecessor left it." *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 224, 28 L. Ed. 698. See, also, *People v. Weaver*, 100 U. S. 539, 545, 25 L. Ed. 705.

23. **Necessity.**—"In *Dollar Sav. Bank v. United States*, 19 Wall. 227, 240, 22 L. Ed. 80, it was decided that a suit at law might be maintained for the recovery of a tax on interest paid, even though no list had been returned and no assessment made. * * * In the present case the statute required every savings bank to pay a tax of five per cent on all undistributed earnings made, or added during the year to their contingent funds. There was no occasion or room for any other assessment. This was a charge of a certain sum upon the bank, and without more it made the bank a debtor." *United States v. Erie R. Co.*, 107 U. S. 1, 2, 27 L. Ed. 385. This was under the Internal Revenue Acts of 1864 and 1866. See, also, *Clinkenbeard v. United States*, 21 Wall. 65, 22 L. Ed. 477; *United States v. Ferrary*, 93 U. S. 625, 23 L. Ed. 832; *King v. United States*, 99 U. S. 229, 233, 25 L. Ed. 373; *United States v. Reading R. Co.*, 123 U. S. 113, 31 L.

2. DESIGNATION OF TAXING AGENCIES AND PROCEDURE.—**In General.**—Matters of procedure in assessment are matters of detail within the legislative discretion. It is the lawmaking power which is to determine all questions of discretion or policy in ordering and apportioning taxes; which must make all the necessary rules and regulations, and decide upon the agencies by means of which the taxes shall be collected.²⁴ It is only when the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of a citizen is confiscated or taken, for private purposes, that the judiciary has the right and duty to interpose.²⁵

Designation of Levying Officers.—The legislature designates the officers who are to levy the taxes.²⁶

Classification as to Mode of Assessment.—The legislature may authorize different modes of assessment for different properties, providing the rule of assessment is the same.²⁷

3. NATURE OF AUTHORITY AND NECESSITY THEREFOR—*a. Ministerial Act and Necessity for Legislative Authority.*—The assessment of taxes is not a judicial but a ministerial act, and when the assessors exceeded their powers in

Ed. 138. See post, "Payment without Assessment," VI, C, 2, e.

Omission as Waiver.—See ante, "Effect of Inaction by Taxing Officers," V, C, 1, d, (3), also "Waiver," III, D, 1, 'd.

24. In general.—*Thomas v. Gay*, 169 U. S. 264, 283, 42 L. Ed. 740. See, also, *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 501, 22 L. Ed. 189; *Williams v. Supervisors*, 122 U. S. 154, 163, 164, 30 L. Ed. 1088; *Castillo v. McConnico*, 168 U. S. 674, 682, 42 L. Ed. 622; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Ballard v. Hunter*, 204 U. S. 241, 257, 51 L. Ed. 461; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 39, 43 L. Ed. 354. See ante, "As Legislative Power," III, A, 1, d. See, also, the title *MANDAMUS*, vol. 8, p. 68.

It would seem incontestable that the state could neither prescribe the method of assessment or confer upon its taxing officers the power to adopt a suitable one. And there is nothing in the *Adams Express Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960; *Adams Express Co. v. Ohio*, 166 U. S. 185, 226, 41 L. Ed. 965, to the contrary. *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 425, 47 L. Ed. 1116.

But if a particular mode of assessment has been prescribed for the property of a particular company, it should be followed until, in some way, a different mode is prescribed, as may of course be done by the legislature without impairing any contract. *Bailey v. Magwire*, 22 Wall. 215, 22 L. Ed. 850.

Whether by general or special assessment.—*Hager v. Reclamation District*, No. 108, 111 U. S. 701, 705, 28 L. Ed. 569; *Mobile County v. Kimball*, 102 U. S. 691, 704, 26 L. Ed. 238. See ante, "Nature and Origin," III, A, 1.

25. Discretion of legislature.—*Thomas v. Gay*, 169 U. S. 264, 283, 42 L. Ed. 740.

As said in *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. Ed. 339, it is not the

province of the United States supreme court to interfere with the policy of the revenue laws of the states, nor with the interpretation given to them by their courts. Each state has the right to determine the manner of levying and collecting taxes. *Castillo v. McConnico*, 168 U. S. 674, 682, 42 L. Ed. 622. See, also, *Turpin v. Lemon*, 187 U. S. 51, 58, 47 L. Ed. 70. See *King v. Mullins*, 171 U. S. 404, 436, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227; *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 609, 49 L. Ed. 615; *Ballard v. Hunter*, 204 U. S. 241, 257, 51 L. Ed. 461.

26. Designation of levying officers.—*Labette County Comm'rs v. Moulton*, 112 U. S. 217, 222, 28 L. Ed. 698; *County Comm'rs v. Wilson*, 109 U. S. 621, 27 L. Ed. 1053; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 240, 22 L. Ed. 80.

So as to bonds issued for railroad purposes by a township in Kansas, it was the legal duty of the commissioners of the county to make the proper levy of a tax for their payment, without regard to the trustee of the township. *Labette County Comm'rs v. Moulton*, 112 U. S. 217, 222, 28 L. Ed. 698. See, also, *County Comm'rs v. Wilson*, 109 U. S. 621, 27 L. Ed. 1053.

Levy by officer appointed to execute mandamus.—See the title *MANDAMUS*, vol. 8, p. 95.

27. Classification as to mode of assessment.—*Weyerhaeuser v. Minnesota*, 176 U. S. 550, 557, 44 L. Ed. 583, citing *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 29 L. Ed. 414; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 38 L. Ed. 1031. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 395.

Assessment of railroad property by different officers.—*Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 425, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

making it, the officer is not protected.²⁸ And the power to levy a tax must be derived from authority conferred by the legislature, or the assessment is illegal and cannot form the basis of an action to collect the tax.²⁹

Want of Authority as to Inseparable Part Invalidates Whole.—Where, in assessments, all parts of the property are blended together and are inseparable, if it be true, therefore, that property not authorized to be included in the assessments is included therein, the assessments must be declared void.³⁰

b. *Directory and Mandatory Provisions.*—The provisions of statutes as to the form and mode of assessments, as to tax lists, and the place where the tax lists are to be deposited, are, according to the highest authority, designed for the benefit of the taxpayers, and the protection of their property from sacrifice, and are mandatory.³¹

Failure to Take Oath Prescribed by Law Fatal.—An assessment made by an assessor without taking the oath or affirmation prescribed by statute, is invalid, not a mere irregularity, and will not support a sale.³²

28. Ministerial act and necessity for legislative authority.—*Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 600, 15 L. Ed. 254. See, however, *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477, where the decisions of an assessor or board of assessors are said to be of a quasi judicial character, and not to be questioned collaterally when made within the scope of their jurisdiction. See post, "Conclusiveness of Assessment," VI, A, 5; "To Third Parties," VII, B, 2, b.

29. *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477; *St. Louis v. Ferry Co.*, 11 Wall. 423, 431, 20 L. Ed. 192. See ante, "Express Authority of Law Essential, and Construction," III, A, 1, j.

Section 3275 of the Code of Iowa, declaring merely that a "tax must be levied as early as practicable," confers no independent power to levy a specific tax, beyond the ordinary limit of indebtedness, in order to pay a judgment recovered against a municipal corporation on warrants for ordinary county expenditures issued by such corporation since 1863, in which year (as repeatedly since) the supreme court of Iowa decided this to be the true interpretation of the section, and that where the power had not otherwise been conferred it was not given by that section. *Supervisors v. United States*, 18 Wall. 71, 21 L. Ed. 771, distinguishing *Butz v. Muscatine*, 8 Wall. 575, 19 L. Ed. 490, as having been decided before the rule was settled by the state decisions. See the title *MANDAMUS*, vol. 8, pp. 68, et seq., 72, et seq.

Liability of officer for failure to levy as official duty.—See the title *PUBLIC OFFICERS*, vol. 10, p. 428.

Taxation to pay municipal bonds, and right thereto.—See the titles *MANDAMUS*, vol. 8, p. 68, et seq.; *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 7, p. 685. See, also, the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 846, et seq.

Levy by county court to pay judgment.—See the title *COUNTIES*, vol. 4, p. 836.

30. Want of authority as to inseparable part invalidates whole.—*California v. Central Pac. R. Co.*, 127 U. S. 1, 29, 32 L. Ed. 150; *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1777; *United States v. Rindskopf*, 105 U. S. 418, 422, 26 L. Ed. 1131, where this is said to follow where an erroneous rate has been adopted by the officer, or jurisdiction is wanting. See post, "As Dependent on Lawful Assessment," VII, D, 1.

31. Directory and mandatory provisions.—*Lyon v. Alley*, 130 U. S. 177, 185, 32 L. Ed. 899; *Erhardt v. Schroeder*, 155 U. S. 124, 128, 39 L. Ed. 94. See, also, *French v. Edwards*, 13 Wall. 506, 511, 20 L. Ed. 702.

Income tax.—Where it is admitted that plaintiffs never complied with the requirement which made it their duty to make and render a list or return to the assessor or assistant assessor of the interest, coupons, or dividends described in the internal revenue act, of 1864, as the proper objects of taxation, it cannot be complained that the assessor did not pursue the directions of the fourteenth section of the internal revenue act before he made the assessment in this case as the powers there given the assessor were conferred for the benefit of the United States, where he did substantially comply with the requirement of written notice to make the return. *Bailey v. Railroad Co.*, 22 Wall. 604, 639, 22 L. Ed. 840.

32. Failure to take oath prescribed by law fatal.—*Martin v. Barbour*, 140 U. S. 634, 643, 35 L. Ed. 546. See *Parker v. Overman*, 18 How. 137, 142, 15 L. Ed. 318.

But objection to a defect in the form of oath to the assessment roll may be waived. *Stanley v. Supervisors*, 121 U. S. 535, 552, 30 L. Ed. 1000. See ante, "Boards of Revision or Equalization," VI, E.

Time for Filing.—It has been so held as to the time prescribed for filing the assessment.³³

4. **DUE PROCESS OF LAW.**—See the title **DUE PROCESS OF LAW**, vol. 5, pp. 631, 632. As to equal protection of laws, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 393, et seq.

a. **General Statement.**—Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.³⁴ So when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute.³⁵ But under the fourteenth amendment the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice.³⁶

33. **Time for filing.**—*Parker v. Overman*, 18 How. 137, 15 L. Ed. 318.

34. **General requirements of due process.**—*Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, quoted with approval in *Marchant v. Pennsylvania R. Co.*, 153 U. S. 380, 386, 387, 38 L. Ed. 751; *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 711, 28 L. Ed. 569; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335, 29 L. Ed. 414; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. Ed. 544; *Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. Ed. 772; *Lent v. Tillson*, 140 U. S. 316, 327, 35 L. Ed. 419; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 157, 41 L. Ed. 369; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 333, 45 L. Ed. 879; *Leigh v. Green*, 193 U. S. 79, 88, 48 L. Ed. 623; *Ballard v. Hunter*, 204 U. S. 241, 255, 51 L. Ed. 461.

Appropriate notice and opportunity to contest is due process of law even in an assessment against a nonresident. *Bristol v. Washington County*, 177 U. S. 133, 146, 44 L. Ed. 701.

35. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 168, 41 L. Ed. 369. See, also, *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. Ed. 583; *Turpin v. Lemon*, 187 U. S. 51, 52, 58, 47 L. Ed. 70; *Hibben v. Smith*, 191 U. S. 310, 322, 48 L. Ed. 195; *Leigh v. Green*, 193 U. S. 79, 87, 48 L. Ed. 623, where it is said that whether there is due process depends on whether the settled maxims of law have been observed, and the circumstances of each particular case.

36. *Turpin v. Lemon*, 187 U. S. 51, 52, 60, 47 L. Ed. 70.

And due process of law within the meaning of the amendment is secured if

the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Giozza v. Tiernan*, 148 U. S. 657, 662, 37 L. Ed. 599; *McMillen v. Anderson*, 95 U. S. 37, 41, 24 L. Ed. 335; *Leeper v. Texas*, 139 U. S. 462, 35 L. Ed. 225.

Individual hardship or inequality of burden does not invalidate.—*Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658.

The upholding of an act as embodying a principle generally fair and doing as nearly equal justice as can be expected, imports that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things. And this has been the implication of the cases. *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616; *Mattingly v. District of Columbia*, 97 U. S. 687, 692, 24 L. Ed. 1098; *Parsons v. District of Columbia*, 170 U. S. 45, 52, 55, 42 L. Ed. 943; *Detroit v. Parker*, 181 U. S. 399, 400, 45 L. Ed. 917; *Chadwick v. Kelley*, 187 U. S. 540, 544, 47 L. Ed. 293; *Louisville, etc., R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 434, 49 L. Ed. 819.

So as to matters of detail within the discretion, and therefore the power, of the lawmaking body within whose jurisdiction the parties live. *Kelly v. Pittsburgh*, 104 U. S. 78, 82, 26 L. Ed. 658.

Disregard of unconstitutional law.—There can be no deprivation of property without due process of law where a board of railroad commissioners, instead of omitting from their schedule of the taxable property of the roads, certain items of a taxable value, as directed by an unconstitutional act of the legislature, disregard the statute and comply with the requirements of the state constitution

b. *Notice and Hearing*—(1) *Necessity Generally*.—Where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable.³⁷ But where a tax is levied on property according to its value, provision must be made for correction of errors by boards of revision or equalization, or by proceedings in the courts. Where both or either is done, it is due process of law.³⁸ But the due process clause of the fourteenth amendment is satisfied if an opportunity be given to question the validity or the amount of the tax either before that amount is determined or in subsequent proceedings for its collection.³⁹

(2) *Character of Notice and Hearing*.—As respects taxation and assessment for local improvements, such notice and hearing as are appropriate to the nature of the case and afford the opportunity to assert objections to the methods pursued or to the amount charged, are deemed sufficient for the pro-

that all property shall be taxed according to its value, and no one species to be taxed higher than another species of equal value. *Huntington v. Worthen*, 120 U. S. 97, 30 L. Ed. 588.

Distinguished from requirements of state law.—There is an important distinction between the essentials of due process of law under the fourteenth amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and can not be departed from without violating the constitution of the United States. The other depends on the law-making power of the state, and as it is solely the result of such authority may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of the supreme court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. *Castillo v. McConnico*, 163 U. S. 674, 683, 42 L. Ed. 622. See, also, the title DUE PROCESS OF LAW, vol. 5, pp. 541, 586, et seq., 625, et seq., 631, et seq.

Does not prevent two different states from taxing same property.—See ante, "Double Taxation," III, A, 2, b, (5).

Who may raise question.—One who admits that his own tax is correct, and that he would have no case under the fourteenth amendment if the companies, whose property he alleges to have been undervalued, had been exempted altogether (*Magoun v. Illinois Trust, etc., Bank*, 170 U. S. 283, 293, 295, 42 L. Ed. 1037; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562, 46 L. Ed. 679), has no ground to complain that he has been denied its protection. *Missouri v. Dockery*, 191 U. S. 165, 170, 48 L. Ed. 133.

37. Notice.—*Lent v. Tillson*, 140 U. S. 316, 327, 35 L. Ed. 419; *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 708, 28 L. Ed. 569; *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 402, 45 L. Ed. 1151; *Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70; *People's Nat. Bank v. Marye*, 191 U. S. 272, 282, 48 L. Ed. 180.

Poll taxes, license taxes and specific taxes generally.—As to these, where the license tax is not dependent on extent of business, notice is useless and unnecessary. *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 709, 28 L. Ed. 569. See, also, *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. Ed. 943; *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 402, 45 L. Ed. 1151.

38. *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 710, 28 L. Ed. 569; *Kelly v. Pittsburg*, 104 U. S. 78, 26 L. Ed. 658; *Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. Ed. 772; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 38 L. Ed. 1031; *Castillo v. McConnico*, 168 U. S. 674, 681, 42 L. Ed. 622; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 45, 43 L. Ed. 354; *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. Ed. 583.

39. *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. Ed. 583; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 40 L. Ed. 247, citing the following as supporting this rule. *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District, No. 108*, 111 U. S. 701, 28 L. Ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772; *Lent v. Tillson*, 140 U. S. 316, 35 L. Ed. 419; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 38 L. Ed. 1031.

Whether the opportunity to be heard which had been afforded to the plaintiff has been pursuant to the provisions of some statute, as in *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335, and

tection of the individual.⁴⁰ Due process of law in matters of taxation does not require that the owner shall have notice of every step in the taxation proceedings.⁴¹ And personal notice has never been considered an essential to due process in respect to taxation, but notice by statute and publication is sufficient.⁴² If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi judicial character, or before a tribunal provided by the state for the purpose of determining such questions, due

Hagar v. Reclamation District, No. 108, 111 U. S. 701, 28 L. Ed. 569, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204.

Application for abatement and appeal.—Where provision is also made for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax, these proceedings are amply sufficient to constitute due process of law, particularly where such abatement was applied for and, after hearing, refused. *Glidden v. Harrington*, 189 U. S. 255, 258, 47 L. Ed. 798.

Boards of revisors not essential.—And the fact that most of the states now have boards of revisors of tax assessments does not prove that taxes levied without them are void. *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 332, 45 L. Ed. 879.

Omitted property.—See post, "Omitted Property," VI, E.

40. Character of notice and hearing.—*Origet v. Hedden*, 155 U. S. 228, 238, 39 L. Ed. 130; *Lent v. Tillson*, 140 U. S. 316, 327, 35 L. Ed. 419; *Glidden v. Harrington*, 189 U. S. 255, 258, 47 L. Ed. 798, where it is said that it is only where the proceedings are arbitrary, oppressive or unjust that they are declared not due process of law, and that the proceedings are to be liberally construed.

41. *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 555, 44 L. Ed. 583; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 43 L. Ed. 354; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 40 L. Ed. 247.

42. Personal notice unnecessary.—*Merchants, etc., Bank v. Pennsylvania*, 167 U. S. 461, 466, 42 L. Ed. 236. See *Castillo v. McConico*, 168 U. S. 674, 42 L. Ed. 622, where thirty days notice by publication, without naming the owner, was held due process. Cited in *Ballard v. Hunter*, 204 U. S. 241, 256, 51 L. Ed. 461.

"That the notice is not personal but by

publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law. *State Railroad Tax Cases*, 92 U. S. 575, 609, 23 L. Ed. 663; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 810, 28 L. Ed. 569; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. Ed. 414; *Lent v. Tillson*, 140 U. S. 316, 328, 35 L. Ed. 419; *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 38 L. Ed. 1031." *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 537, 40 L. Ed. 247. See, also, *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. Ed. 892; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *Glidden v. Harrington*, 189 U. S. 255, 258, 47 L. Ed. 798; *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204.

"Where the statute names the time and place for the meeting of the assessing board, that is sufficient in tax proceedings; personal notice is unnecessary." *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 426, 38 L. Ed. 1031; *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 710, 28 L. Ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. Ed. 772; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. Ed. 892; *Lent v. Tillson*, 140 U. S. 316, 35 L. Ed. 419; *Paulsen v. Portland*, 149 U. S. 30, 37 L. Ed. 637; *Merchants, etc., Bank v. Pennsylvania*, 167 U. S. 461, 466, 42 L. Ed. 236; *Glidden v. Harrington*, 189 U. S. 255, 259, 47 L. Ed. 798; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 301, 50 L. Ed. 744.

Property held in trust.—*Glidden v. Harrington*, 189 U. S. 255, 259, 47 L. Ed. 798;

Statute taxing bank shares.—*Merchants, etc., Bank v. Pennsylvania*, 167 U. S. 461, 466, 42 L. Ed. 236.

Nonresident owner of land.—So as to real estate of a nonresident owner, though the notice fail to reach him. *Ballard v. Hunter*, 204 U. S. 241, 262, 51 L. Ed. 461.

Attachment or distraint against non-

process of law is not denied.⁴³ Although no opportunity was given to be present at the time of assessment,⁴⁴ and one hearing is sufficient, without appeal or new trial.⁴⁵

(3) *Judicial Proceeding Not Essential*.—The phrase "due process of law" does not necessarily mean a judicial proceeding, or that the tax must be collected by suit.⁴⁶

c. *Taxation in Rem*.—A statute providing for taxation in rem is constitutional. Summary methods of seizure and sale can be had; and the court, having jurisdiction over the res, may proceed to adjudicate the right to the property; and the same can be sold and a tax deed issued thereunder will be valid; and such proceedings do not abridge the protection guaranteed by the

resident with publication or personal service.—*Bristol v. Washington County*, 177 U. S. 133, 146, 44 L. Ed. 701.

When irregularity in giving notice not material.—Irregularity in giving the notice of the assessment is unimportant, where the party assessed did appeal and claim a review of the action of the commissioner, such an appeal having been granted and all rights under it fully exercised and enjoyed. *Bailey v. Railroad Co.*, 22 Wall. 604, 640, 22 L. Ed. 840.

43. *Hodge v. Muscatine County*, 196 U. S. 276, 281, 49 L. Ed. 477. See, also, *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 708, 28 L. Ed. 569; *Palmer v. McMahon*, 133 U. S. 660, 670, 33 L. Ed. 772; *Bristol v. Washington County*, 177 U. S. 133, 145, 44 L. Ed. 701; *Glidden v. Harrington*, 189 U. S. 255, 259, 47 L. Ed. 798; *Gallup v. Schmidt*, 183 U. S. 300, 307, 46 L. Ed. 207, citing *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 31 L. Ed. 763; *Allen v. Georgia*, 166 U. S. 138, 41 L. Ed. 949; *Orr v. Gilman*, 183 U. S. 278, 46 L. Ed. 196; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 45, 43 L. Ed. 354.

Representation of stockholders by corporation a reasonable rule.—*Corry v. Baltimore*, 196 U. S. 466, 479, 49 L. Ed. 566. See the title DUE PROCESS OF LAW, vol. 5, p. 543.

44. **Presence or opportunity to be present at time of assessment not necessary**.—"In its application to proceedings for the levy and collection of taxes, it was said in *McMillen v. Anderson*, 95 U. S. 37, 42, 24 L. Ed. 335, that it 'is not, and never has been, considered necessary to the validity of a tax' 'that the party charged should have been present or had an opportunity to be present, in some tribunal when he was assessed.'" *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, 29 L. Ed. 414; *Turpin v. Lemon*, 187 U. S. 51, 52, 58, 47 L. Ed. 70. See, also, *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 45, 43 L. Ed. 354, where notice of the decision, with right of appeal therefrom, was held sufficient.

45. *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 426, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040. See, also, *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *King v. Mullins*, 171 U. S. 404, 43 L. Ed. 214; *Hodge v. Muscatine County*, 196 U. S. 276, 281, 49 L. Ed. 477; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 301, 50 L. Ed. 744.

Equal protection of laws.—*Kentucky Railroad Tax Cases*, 115 U. S. 321, 338, 29 L. Ed. 414. See the title CONSTITUTIONAL LAW, vol. 4, p. 396.

46. **Judicial proceeding not essential**.—*Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. Ed. 772; *McMillen v. Anderson*, 95 U. S. 37, 41, 24 L. Ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Kelly v. Pittsburg*, 104 U. S. 78, 80, 26 L. Ed. 658; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 708, 28 L. Ed. 569; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, 29 L. Ed. 414; *Turpin v. Lemon*, 187 U. S. 51, 52, 58, 47 L. Ed. 70; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 280, 281, 282, 15 L. Ed. 372; *King v. Mullins*, 171 U. S. 404, 429, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

"The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them." *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 239, 33 L. Ed. 892." *Leigh v. Green*, 193 U. S. 79, 89, 48 L. Ed. 623, quoted in *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 335; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 332, 45 L. Ed. 879; *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569; *Chester City v. Pennsylvania*, 134 U. S. 240, 33 L. Ed. 896; *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 37 L. Ed. 117; *King v. Mullins*, 171 U. S. 404, 431, 43 L. Ed. 214, followed in *King v. Panther Lumber*

constitution against the taking of property without due process of law.⁴⁷ And the "owner," under such a statute, has been held to be the owner of the fee.⁴⁸

d. *Taxation of Special Franchises.*—Where the provisions of law relating to the taxation of special franchises were enacted as amendments to and part of the general tax law of the state, they are to be construed accordingly, and where the provisions of that law as to valuation, notice, hearing and review, were all complied with, this is due process of law.⁴⁹

e. *Classification of Property Not Prohibited.*—See ante, "Requirement of Equality and Uniformity," III, A, 2, b. And see the title CONSTITUTIONAL LAW, vol. 4, p. 393, et seq. A classification based upon a substantial distinction is not prohibited by the due process clause of the fourteenth amendment.⁵⁰

f. *Exemptions.*—When a petitioner's own tax is correct he is not deprived of his property without due process of law by the action of the legislature making exemptions in the case of property belonging to other persons or corporations which it has the lawful right to make; and if the state could grant a total exemption it could grant a partial exemption, and no objection under the due process clause would lie.⁵¹

g. *Assessment of Back Taxes, and Reassessments.*—See also, post, "Collection of Taxes," VII. Before a special assessment to recover back taxes can be enforced, the taxpayer must have an opportunity to be heard as to its validity and extent, either before or during the enforcement proceeding. It is sufficient that the taxpayer has been afforded a full opportunity to be heard by the state courts. Whether such opportunity has been afforded pursuant to the provisions of statute, or by the holding of the court that the plaintiff has such right in the trial of a suit to enjoin the collection of the tax, is not material. In holding that the taxpayer is entitled to a hearing and in enforcing his right to

Co., 171 U. S. 437, 43 L. Ed. 227; *Turpin v. Lemon*, 187 U. S. 51, 52, 57, 58; 47 L. Ed. 70. See, also, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 331, 29 L. Ed. 414.

47. *Taxation in rem.*—*Leigh v. Green*, 193 U. S. 79, 48 L. Ed. 623, approved in *French v. Taylor*, 199 U. S. 274, 278, 50 L. Ed. 189. See, also, *Turpin v. Lemon*, 187 U. S. 51, 58, 47 L. Ed. 70; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Ballard v. Hunter*, 204 U. S. 241, 262, 51 L. Ed. 461, where the fact that a nonresident owner of land was not made defendant to an in rem proceeding, did not infringe the requirement of due process of law.

"The most summary methods of seizure and sale for the satisfaction of taxes and public dues have been held to be authorized and not to amount to the taking of property without due process of law, as a seizure and sale of property upon warrant issued on ascertainment of the amount due by an administrative officer. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 15 L. Ed. 372." *Leigh v. Green*, 193 U. S. 79, 88, 48 L. Ed. 623, citing *Henderson's Distilled Spirits*, 14 Wall. 44, 20 L. Ed. 815. And see *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 40 L. Ed. 247. See the title DUE PROCESS OF LAW, vol. 5, pp. 629, 631.

48. *Leigh v. Green*, 193 U. S. 79, 87, 48 L. Ed. 623, construing the Nebraska statute.

49. *Taxation of special franchises.*—*Brooklyn City R. Co. v. New York State Board*, 199 U. S. 48, 51, 50 L. Ed. 79.

50. *Savannah, etc., Railway v. Savannah*, 198 U. S. 392, 397, 49 L. Ed. 1097; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 46, 47, 50 L. Ed. 65, followed in *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

Including agricultural lands within city limits and subjecting them to city taxes. —Although the land in question is, and always has been, used as farm land, for agricultural use only, subjecting it to taxation for ordinary city purposes does not deprive the plaintiff in error of his property without due process of law. *Kelly v. Pittsburg*, 104 U. S. 78, 80, 26 L. Ed. 658.

Classification as to number of hearings. —*Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 427, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

51. *Missouri v. Dockery*, 191 U. S. 165, 171, 48 L. Ed. 133; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Metropolitan St. R. Co. v. New York State Board*, 199 U. S. 1, 47, 50 L. Ed. 65, followed in *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 302, 50 L. Ed. 744. See the title CONSTITUTIONAL LAW, vol. 4, p. 401. See, also, ante, "Exemptions from Taxation," V.

such a hearing, the court does not assume the legislative function of making an assessment.⁵²

Reassessments.—The state may institute proceedings for the revaluation of property without notice and hearing upon the question of setting aside the first assessment, the owners of the property being accorded a hearing at some stage of the proceedings for the reassessment as to the amount and validity of the tax.⁵³

Retrospective Assessment.—Statutes cannot have a retrospective effect, and enable the authorities to assess and collect taxes on property for any period when the power to lay such taxes did not exist.⁵⁴

h. *Taxation of Persons and Property without the State.*—See the titles CONSTITUTIONAL LAW, vol. 4, p. 347, et seq.; DUE PROCESS OF LAW, vol. 5, p. 541, et seq. See ante, "Nature and Extent," III, D, 1, b; "Situs for Taxation," III, E, 1, f.

5. **CONCLUSIVENESS OF ASSESSMENT.**—See, generally, post, "Corrections and Additions," VI, F. An assessment is not conclusive upon either party, and in an action to recover the tax the controlling question is not what has been assessed, but what is by law due.⁵⁵ But after being revised and approved by the revising and correcting authority provided by law, they are presumptively correct. Before that they did not conclude anything or anybody.⁵⁶ They are not to be collaterally attacked.⁵⁷

52. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204. See, also, *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 538, 40 L. Ed. 247.

The general statutory notice as to the regular assessment proceedings cannot be regarded as notice of this special assessment made years after the completion of the old assessment. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 330, 331, 332, 51 L. Ed. 204.

If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204.

Want of notice cured by appearance and hearing.—*Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 335, 51 L. Ed. 204.

Classification and diversity of method.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 395, 396.

53. **Reassessments.**—*Weyerhaeuser v. Minnesota*, 176 U. S. 550, 558, 44 L. Ed. 583. See the title CONSTITUTIONAL LAW, vol. 4, pp. 395, 396, 397.

54. **Retrospective assessment.**—*Wagner v. Evans*, 170 U. S. 588, 592, 42 L. Ed. 1154. See the title CONSTITUTIONAL LAW, vol. 4, p. 438. See, also, ante, "Revival and Extension of Tax," III, C, 1, e.

55. **Conclusiveness of assessment.**—*United States v. Reading R. Co.*, 123 U. S. 113, 114, 31 L. Ed. 138; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80; *Clinkenbeard v. United States*, 21 Wall. 65, 22 L. Ed. 477.

"What inquiries may be permitted in such cases, of course, is a matter that

depends upon the particular provisions of the law of the jurisdiction. In the absence of such provisions, and as a principle of general jurisprudence, it is safe to say that any defense is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority upon which it is based, or because it constitutes a denial of a right secured to the party complaining by the constitution of the United States." *Kentucky Railroad Tax Cases*, 115 U. S. 321, 336, 29 L. Ed. 414.

56. **Presumption.**—*Ronkendorff v. Taylor*, 4 Pet. 349, 359, 7 L. Ed. 882.

Where it was not alleged that the assessment was unreasonable or unjust, or in excess of the valuation of other like property for taxation, or that the method of apportionment was erroneous, but that any assessment at all was illegal, the presumption is that the action of the taxing officers was correct and regular, if legal. *Union, etc., Transit Co. v. Lynch*, 177 U. S. 149, 154, 44 L. Ed. 708. See, also, *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477. See post, "Conclusiveness of Action of Assessors," VI, B, 4; "Corrections and Additions," VI, F. See, also, ante, "Nature of Authority and Necessity Therefor," VI, A, 3.

57. "An attack upon the validity of an assessment of personal property, in a proceeding to collect the taxes based thereon, for failure to comply with the state statute in relation to the method of procedure, form of an assessment, oath of assessors, etc., is in its nature collateral. *Palmer v. McMahon*, 133 U. S. 660, 665, 33 L. Ed. 772." *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044.

6. **TIME AND PLACE.**—A state may make the ownership of property subject to taxation relate to any day, or days, or period of the year, it may think proper, and the selection of a particular day on which returns are to be made by taxpayers of their property for the purposes of assessment does not necessarily preclude the making of assessments as of other periods of the year.⁵⁸

7. **UNIFORMITY AND EQUALITY.**—Taxing by a “uniform rule” requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation, and the uniformity must be coextensive with the territory to which it applies, and must extend to all property subject to taxation, so that all property may be taxed alike—equally—which is taxing by a uniform rule.⁵⁹

Individual Instances of Inequality.—Individual instances of omission or undervaluation cannot be relied on to invalidate an assessment.⁶⁰

Classification.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 395.

8. **DESCRIPTION**—a. *In General.*—A description of land for the purpose of taxation is sufficient if it affords the means of identification and does not positively mislead the owner.⁶¹ But if it might probably mislead the owner, it is defective.⁶²

See, also, *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477.

58. **Time.**—*Shotwell v. Moore*, 129 U. S. 590, 598, 32 L. Ed. 827; *People v. Commissioners*, 104 U. S. 466, 468, 26 L. Ed. 632.

Time and place as affected by rule of uniformity and equality.—It is not unusual for tax laws to authorize the assessment of different classes of property at different dates, and even of the same classes of property in different localities at different dates. Such matters of regulation must be supposed to be within the power of the state or territory, and to have their reasons in special facts known to the legislature, without violating the rule of uniformity. *Thomas v. Gay*, 169 U. S. 264, 281, 42 L. Ed. 740.

59. **Uniformity and equality.**—*Gilman v. Shebovgan*, 2 Black 510, 517, 17 L. Ed. 305; *Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903; *Nicol v. Ames*, 173 U. S. 509, 522, 43 L. Ed. 786.

Equal protection of laws under fourteenth amendment.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 393, et seq.

60. **Individual instances of inequality.**—*Palmer v. McMahon*, 133 U. S. 660, 667, 33 L. Ed. 772; *Supervisors v. Stanley*, 105 U. S. 305, 26 L. Ed. 1044; *Kelly v. Pittsburg*, 104 U. S. 78, 26 L. Ed. 658.

No court would venture to intervene merely on the ground of a mistake of judgment on the part of the officer to whom the duty of assessment was intrusted by the law. *Coulter v. Louisville*, etc., R. Co., 196 U. S. 599, 605, 607, 49 L. Ed. 615.

Inequality is nothing, unless it was in pursuance of a scheme, and to make out that scheme it was improper to put members of a tribunal established by law upon the witness stand to testify to the operations of their minds in doing the

work entrusted to them. *Coulter v. Louisville*, etc., R. Co., 196 U. S. 599, 610, 49 L. Ed. 615.

Equality is not the only thing to be considered, but it must yield to practical consideration and usage, at least as to stamp taxes. *Hatch v. Reardon*, 204 U. S. 152, 159, 51 L. Ed. 415. See, also, *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892; *Merchants*, etc., *Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236; *Thomas v. United States*, 192 U. S. 363, 48 L. Ed. 481. See the title **REVENUE LAWS**, vol. 10, p. 1013. See, generally, ante, “Requirement of Equality and Uniformity,” III, A, 2, b.

61. **In General.**—*Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 331, 44 L. Ed. 786, citing *Cooley on Taxation*, 407; *Keely v. Sanders*, 99 U. S. 441, 443, 25 L. Ed. 327; *Raymond v. Longworth*, 14 How. 76, 77, 14 L. Ed. 333.

Where the statute prescribes that the assessor shall set down in the assessment, in separate columns, “a description of each tract or parcel of land to be taxed, specifying, under separate heads, the township, etc., or, if divided into lots and blocks, then the number of the lot and block;” quære whether grouping the lots and fixing the valuation in a gross sum was or was not a valid assessment. *Marx v. Hanthorn*, 148 U. S. 172, 185, 37 L. Ed. 410.

Assessment as unit.—“The assessment being made as a unit, the description of the thing assessed as found in the assessment roll was adequate, and the tax being due as a unit was correctly held to be a lien upon all the property assessed.” *Maricopa, etc., R. Co. v. Arizona*, 156 U. S. 347, 352, 39 L. Ed. 447.

62. *Stout v. Mastin*, 139 U. S. 151, 152, 35 L. Ed. 121. A specific lot included in a larger tract, but reserved therefrom, could not be taxed when its boundaries

b. *Assessment in Owner's Name.—Necessity.*—In the exercise of its taxing power a state may direct that any property subject to its taxing authority shall be assessed without any reference whatever to the name of the owner, that is to say it may assess the property by such description and method as will be legally adequate to convey either actual or constructive notice to the owner.⁶³ But there must be some adequate description to identify the land and give notice to the owner, as to the owner or occupant, or to an unknown owner.⁶⁴

Error in Name.—An assessment cannot be regarded as not constituting due process of law within the fourteenth amendment because of error as to the name of the owner, if the state law might have dispensed with any requirement of mention of the name.⁶⁵

Deceased Owner.—Where property stood assessed upon the books of the corporation of Washington in the name of James Thomas, and was sold for taxes, the sale was good, although James Thomas was dead when the taxes were levied.⁶⁶

Unauthorized Entry.—Where, according to the weight of the evidence, land was never duly entered in the name of the owner (in whose name it was sold) upon the land books of the proper county preceding the sale in 1871 for the

were not known. *Ballance v. Forsyth*, 13 How. 18, 24, 14 L. Ed. 32.

In the state of Ohio, it is not a sufficient description of taxable lands to say "Cooper, James, 5 acres, § 24, T. 4, F. R. 1," because it does not set forth in what part of the section. A deed made in consequences of a sale for taxes under such a description is void. The courts of Ohio have so decided, and the federal supreme court adopts their decision. *Raymond v. Longworth*, 14 How. 76, 14 L. Ed. 333, saying that the description must enable the owner or the public to identify the land.

Perfection by evidence aliunde.—If the description in the tax roll was inaccurate, and it was sought to perfect that description by evidence aliunde, it should have appeared affirmatively, not merely that the description by reasonable correction might apply to the lots in controversy, but also that it was not applicable to any other lots. *Stout v. Mastin*, 139 U. S. 151, 155, 35 L. Ed. 121.

63. *Castillo v. McConnico*, 168 U. S. 674, 682, 42 L. Ed. 622. See, also, *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. Ed. 339; *Turpin v. Lemon*, 187 U. S. 51, 58, 47 L. Ed. 70; *Ballard v. Hunter*, 204 U. S. 241, 256, 51 L. Ed. 461.

64. This land having been surveyed, the separate townships and ranges might have been stated; or if it was all to be assessed as one tract, and the description by the boundaries was too long for insertion, then the description by the name known to the records, and which would impart notice to the owner, should have been used. The owner, as the Florida supreme court has repeatedly held, has a right to rely upon the assessment roll, and if his land be not upon it, to assume that it will not be sold; but on the contrary, is liable to be placed upon the roll of the succeeding year. But he is not bound to hunt through the assessment

roll beyond the proper official description to see if his land may not be found described by some term which is more or less commonly used in the community. *Bird v. Benlisa*, 142 U. S. 664, 669, 35 L. Ed. 1151.

65. **Error in name.**—*French v. Taylor*, 199 U. S. 274, 277, 50 L. Ed. 189, approved in *Castillo v. McConnico*, 168 U. S. 674, 683, 42 L. Ed. 622. See, also, *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Turpin v. Lemon*, 187 U. S. 51, 58, 47 L. Ed. 70; *Ballard v. Hunter*, 204 U. S. 241, 258, 51 L. Ed. 461, where it was said that the state statutes made the land virtually a party to the suit to collect the taxes.

It cannot be said that a property owner who is assessed merely by his surname and the initial of his first name, instead of having both names written out in full, was deprived of his property without due process of law, since the statute afforded both constructive and actual notice of the making of the assessment and ample opportunity to any property owner to correct or resist the same, if he deemed himself injured thereby. *Castillo v. McConnico*, 168 U. S. 674, 681, 42 L. Ed. 622.

It has been held that it is no valid objection to a tax proceeding against land owned by one person, that it was described, not separately but as a portion of a larger tract owned by a different person. *Ballard v. Hunter*, 204 U. S. 241, 258, 51 L. Ed. 461.

66. *Holroyd v. Pumphrey*, 18 How. 69, 15 L. Ed. 264, where it was held that a statute covered the case and cured the irregularity of not being assessed or advertised in the name of the lawful owner, if advertised according to law.

Assessment to "Henry Toland's Heirs."—*Ronkendorff v. Taylor*, 4 Pet. 349, 362, 7 L. Ed. 882.

taxes of 1870 (no survey having been filed or patent issued); and that sale was a mere sham, no rights accrued to the purchasers by reason of it.⁶⁷

9. **CURATIVE ACTS.**—Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation.⁶⁸

10. **EFFECT OF REPEAL OF TAXING ACT.**—See post, "Under Repealed Statute," VII, A, 5.

11. **CONSPIRACY TO PREVENT LEVY OF TAXES.**—To confederate together for the purpose of defeating, by threats and hostile demonstrations, the levy of a tax in obedience to a mandamus obtained by a judgment creditor against a county, constitutes a conspiracy which is actionable and the judgment creditor has an action for damages.⁶⁹

12. **MANDAMUS.**—See the title **MANDAMUS**, vol. 8, p. 1.

B. Valuation.—As to valuation for taxation as evidence of value of water-works. See the title **WATER COMPANIES AND WATERWORKS**.

1. **NECESSITY AND TIME.**—Valuation is a necessary part of the assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation.⁷⁰ A state may take the whole period of a business year already past as the best means of ascertaining how much the taxpayer shall be required to pay on property which is admitted to be taxable, and how much he shall deduct for the nontaxable securities of the state and of the United States, or the average monthly amount or value of property subject to taxation in the preceding year.⁷¹

2. **STANDARD OF VALUATION AND ELEMENTS OF VALUE**—a. *In General.*—"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use."⁷²

67. *Rich v. Braxton*, 158 U. S. 375, 395, 39 L. Ed. 1022.

68. *Castillo v. McConico*, 168 U. S. 674, 682, 42 L. Ed. 622; *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088. See, also, *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339, where it is said that a state may declare that an erroneous assessment does not vitiate a sale for taxes. See, also, *Turpin v. Lemon*, 187 U. S. 51, 47 L. Ed. 70, and *Leigh v. Green*, 193 U. S. 79, 48 L. Ed. 623; *Ballard v. Hunter*, 204 U. S. 241, 257, 51 L. Ed. 461; *Holroyd v. Pumphrey*, 18 How. 69, 15 L. Ed. 264, where the statute cured an assessment in name of deceased owner. *Mattingly v. District of Columbia*, 97 U. S. 687, 690, 24 L. Ed. 1098.

So as to completion of assessment roll by certain date, and form of oath annexed thereto. Being designed to afford taxpayers whose names were on the roll, by notice published thereof, an opportunity for the examination and correction of the assessment of their property, the assessment could not stand if they were deprived of that opportunity, but it is not perceived why it might not be legal-

ized and confirmed by the legislature giving to them such opportunity after the time originally designated had expired. No just right of the taxpayer would thereby be defeated. *Williams v. Supervisors*, 122 U. S. 154, 164, 30 L. Ed. 1088. See post, "Curative Acts," VIII, H, 6.

69. **Conspiracy to prevent levy of taxes.**—*Findlay v. McAllister*, 113 U. S. 104, 28 L. Ed. 930. See the title **CONSPIRACY**, vol. 3, p. 1108.

70. **Necessity.**—*People v. Weaver*, 100 U. S. 539, 545, 25 L. Ed. 705.

71. **Time.**—*Shotwell v. Moore*, 129 U. S. 590, 599, 600, 32 L. Ed. 827.

72. *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439, 445, 38 L. Ed. 1041, quoted in *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 22, 41 L. Ed. 49. See, also, *Adams Express Co. v. Ohio*, 166 U. S. 185, 221, 41 L. Ed. 965, where it is said: "It is a cardinal rule which should never be forgotten that whatever property is worth for the purposes of income and sale it is also worth for purposes of taxation." See, also, *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 501, 22 L. Ed. 189; *Society*

b. *Due Process of Law*.—See, generally, ante, "Due Process of Law," VI, A, 4.

Valuation as Totality.—Valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value. It is often largely a matter of opinion, and all that can be required is that the assessing board exercise an honest judgment based on the best information available.⁷³

Assessment of Bonds at Face Value.—A state law which provides for the assessment of bonds upon their face value instead of upon their actual or market value is not unconstitutional under the due process clause of the fourteenth amendment.⁷⁴

c. *Equal Protection of Laws under Fourteenth Amendment*.—See the title CONSTITUTIONAL LAW, vol. 4, p. 393, et seq.

for *Savings v. Coite*, 6 Wall. 594, 609, 18 L. Ed. 897, followed in *Provident Institution v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907.

Railroad property.—"The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock." *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 429, 38 L. Ed. 1031. See, also, *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Columbus, etc., Co. v. Wright*, 151 U. S. 470, 479, 38 L. Ed. 238.

The words "railroad track" and "rolling stock," used in a statute for the taxation of railroad corporations, will include the entire railroad property and the supreme court of the state construed, and it would seem properly, the two terms as embracing all which goes to make up what is strictly railroad property. *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 430, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

A rule which ascertains the current cash value of the whole funded debt, and the current cash value of the entire number of shares, ascertains the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock. *State Railroad Tax Cases*, 92 U. S. 575, 605, 23 L. Ed. 663. See, generally, ante, "Railroad and Canal Companies," IV, C, 3, h.

Corporate stock and deduction of property outside of state.—Although in ascertaining the value of the stock of a telegraph company no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the commonwealth of Massachusetts, since the corporation was only taxed for that propor-

tion of its shares of capital stock which was supposed to be taxable in that state on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, no deduction should be made from the proportion of the capital stock which is taxed by its authorities. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 552, 31 L. Ed. 790. See, generally, ante, "Express, Telegraph and Telephone Companies," IV, C, 3, c.

Valuation of manufactures under excise law of 1864.—See the title REVENUE LAWS, vol. 10, p. 966.

Assessment of bank stock.—See ante, "National Bank Shares," IV, C, 3, a, (1), (c), bb.

73. *Brooklyn City R. Co. v. New York State Board*, 199 U. S. 48, 52, 50 L. Ed. 79; *Twenty-Third St. R. Co. v. New York State Board*, 199 U. S. 53, 50 L. Ed. 87.

The valuation of a franchise under the New York special franchise tax law is not wanting in due process by reason of the failure of the state board to make a separate valuation of the tangible and of the intangible property. *Brooklyn City R. Co. v. New York State Board*, 199 U. S. 48, 52, 50 L. Ed. 79.

Or in that it does not indicate any principle or method of ascertaining the value of the intangible property included in the special franchise, since the sections relating to the taxation of special franchises were enacted as amendments of, and are to be construed with, the general tax law of the state, which makes provision for the determination of the value by the state board of tax commissioners with notice to the owners of the franchise and opportunity for hearing and for a review of the valuation fixed by the board. *Brooklyn City R. Co. v. New York State Board*, 199 U. S. 48, 51, 50 L. Ed. 79.

74. *Jennings v. Coal Ridge Imp., etc., Co.*, 147 U. S. 147, 149, 37 L. Ed. 117, following *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. Ed. 892.

3. APPORTIONMENT OF VALUATION AND UNIT RULE.—Between Subdivisions of State.—The states may lawfully provide that the property of a railroad corporation within its jurisdiction may be valued as a unit, and such value apportioned equitably among the various municipalities for taxation by them.⁷⁵ And this method may be extended to the aggregate property of corporations having property and exercising franchises in several states, without being a taking of property without due process of law.⁷⁶

Assessment of Interstate Corporation by Unit Rule.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 349, 398. Where the road of a corporation runs through different states, a tax upon the income or franchise is properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation.⁷⁷

4. CONCLUSIVENESS OF ACTION OF ASSESSORS.—See, generally, post, "Corrections and Additions," VI, F. In general an appraisalment of, or an assessment of a tax upon, value is a decision upon a question of fact, and a difference of opinion as to the value between the assessing officer and the court is immaterial, and the decision of the former is final.⁷⁸ To warrant an objection that an as-

75. Apportionment of assessment among municipalities.—Pittsburgh, etc., *R. Co. v. Backus*, 154 U. S. 421, 428, 38 L. Ed. 1031, followed in Indianapolis, etc., *R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; Columbus, etc., *R. Co. v. Wright*, 151 U. S. 470, 481, 38 L. Ed. 238, declaring this to be the only reliable method. See, also, *State Railroad Tax Cases*, 92 U. S. 575, 607, 23 L. Ed. 663, construing this method in harmony with the Illinois constitution.

Taxes assessed by such unit rule on the railroad property by the municipality are uniform when the rate of taxation is the same on the assessment thus ascertained that it is on other property. *State Railroad Tax Cases*, 92 U. S. 575, 611, 23 L. Ed. 663.

The Indiana act of March 6, 1891, providing for such apportionment, is constitutional, and the intent of this act was simply to reach the property of the railroad within the state, and these provisions in respect to apportionment relate simply to apportionment between the different counties, townships, towns, cities, etc., within the state. *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 428, 38 L. Ed. 1031, followed in Indianapolis, etc., *R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

A railroad corporation of Indiana, by a written contract of lease with a railroad corporation of Illinois, acquired the right and assumed the duty of managing and carrying on the business of the main line and a branch road of the latter company. The lease was confirmed by an act of the legislature of Illinois, which declared that said lessee should be a railroad corporation in the latter state, and possess as large powers as were possessed by the lessor, and such other powers as are usual to railroad corporations. The state board for the equalization of taxes in Illinois made an assessment on the capital stock and franchise of the lessor corporation, over and above its tangible property, for

the roads which passed from its control by virtue of the lease, and then assigned to the several counties so much of the assessment as was in the same proportion to the whole as the length of the track within their respective limits bore to the entire length of the leased roads; the taxes due upon such assessment being charged and to be collected from the company which, with the consent of the state, was entitled to have, and did have, exclusive control and management of such roads. Held, that the mode adopted by the state board was in substantial conformity to the laws of Illinois. *Railroad Co. v. Vance*, 96 U. S. 450, 24 L. Ed. 752, followed in Indianapolis, etc., *R. Co. v. Vance*, 154 U. S. 638, 24 L. Ed. 757.

Apportionment as revoking taxing power of municipality.—See ante, "Revocation and Subsequent Limitation," III, E, 1, d, (4).

76. *Adams Express Co. v. Ohio*, 165 U. S. 194, 226, 41 L. Ed. 683; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 22, 35 L. Ed. 613; *Columbus, etc., R. Co. v. Wright*, 151 U. S. 470, 38 L. Ed. 238; *American Express Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707.

77. *State Railroad Tax Cases*, 92 U. S. 575, 611, 23 L. Ed. 663; *The Delaware R. Tax Case*, 18 Wall. 206, 208, 21 L. Ed. 888; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595.

Unit rule as taxation of corporation engaged in interstate commerce.—See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 458, et seq.

78. *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077.

Where the method of appraisalment prescribed by the law was pursued and there were no specific charges of fraud, the general rule is well settled that "whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such de-

assessment was grossly unfair, and that there was a fraudulent discrimination, something more than an error of judgment must be shown, something indicating fraud or misconduct.⁷⁹ A mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive.⁸⁰

Conclusive on Federal Court.—Whether the estimate of the value of property for taxation is in excess of its true value, the federal supreme court cannot inquire. It has been so often decided that it cannot review and correct the errors and mistakes of the state tribunals on that subject, that it is only necessary to refer to those decisions without a restatement of the argument on which they rest.⁸¹

C. Liability for and Payment of Taxes—1. **LIABILITY**—a. *Nature and Source of Obligation.*—See ante, "Nature and Origin," III, A, 1. The foundation of the obligation to pay taxes is not the privilege enjoyed or the protection given to a citizen by government, but the necessity of money for the support of states, in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority.⁸² It is not dependent

termination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." *Adams Express Co. v. Ohio*, 165 U. S. 194, 229, 41 L. Ed. 683; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 435, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 41 L. Ed. 49. See, also, *Maish v. Arizona*, 164 U. S. 599, 611, 41 L. Ed. 567; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 553, 31 L. Ed. 790.

"But where the appraisement is arrived at by including therein tangible property, which is beyond the jurisdiction of the state, and which, therefore, the assessing officers had no jurisdiction to appraise (and none could be given them by the statute), such an appraisement or assessment is absolutely illegal as made without jurisdiction." *Delaware, etc., R. Co. v. Pennsylvania*, 198 U. S. 341, 358, 49 L. Ed. 1077. See ante, "Conclusiveness of Assessment," VI, A, 5.

Appraisement under unit rule.—Testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside the state, is insufficient to impeach its determination. No determination of a special board, charged under the law with the duty of placing a value upon property, can be successfully impeached by such meagre testimony. *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 436, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040.

79. Maish v. Arizona, 164 U. S. 599, 611, 41 L. Ed. 567.

And the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation, is not sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. *Maish v. Arizona*, 164 U. S. 599, 611, 41 L. Ed. 567.

80. Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421, 432, 38 L. Ed. 1031, followed in *Indianapolis, etc., R. Co. v. Backus*, 154 U. S. 438, 38 L. Ed. 1040; *Maish v. Arizona*, 164 U. S. 599, 607, 41 L. Ed. 567, when the testimony was held not to sustain the contention that the value was arbitrarily raised without notice or evidence.

81. Conclusive on federal court.—*Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. Ed. 658, citing *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558; *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469.

82. Nature and source of obligation.—*Dobbins v. Erie County*, 16 Pet. 435, 445, 10 L. Ed. 1022.

Taxes are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not canceled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the state may proceed by all proper means to compel the performance of the obligation. *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 475, 46 L. Ed. 283; *Patton v. Brady*, 184 U. S. 608, 46 L. Ed. 713.

on contract, but on the exercise of the public will as demanded by the public welfare.⁸³ Demand has been held unnecessary.⁸⁴

b. *As Personal Charge*.—Taxes are never assessed, unless it be a capitation tax, upon persons, as persons, but upon them on account of their goods, and the profits made upon professions, trades and occupations. They are so imposed, because public revenue can only be supplied by assessments upon the goods of individuals.⁸⁵ But it may become a personal charge through the state's power to coerce payment by sequestration and imprisonment.⁸⁶

c. *Of Owner Generally*.—The owner, in possession and use of the property, must pay the taxes, though he own only a half interest.⁸⁷

Property of Nonresident.—"A state has the undoubted power to tax private property having a situs within its territorial limits, and may require the party in possession of the property to pay the taxes thereon."⁸⁸ Or the tax may be assessed against the nonresident owner, and proved as a claim against the estate of such deceased owner, to be paid out of assets within the jurisdiction of the state laying the tax, subject to the statutes of limitations of that state.⁸⁹

Assessment Illegal in Part—Duty to Pay Legal Part.—Where the dif-

83. Not contractual.—*Bristol v. Washington County*, 177 U. S. 133, 145, 44 L. Ed. 701; *Patton v. Brady*, 184 U. S. 603, 619, 46 L. Ed. 713; *Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 475, 46 L. Ed. 283; *Seattle v. Keliher*, 195 U. S. 351, 359, 49 L. Ed. 232.

And thereby they are distinguished from debts, although they may be recoverable by the action of debt in some states. *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197. See ante, "Distinctions," II, C.

84. In Nebraska, no demand for taxes is required, but it is the duty of every person subject to taxation to attend at the office of the county treasurer and make payment. *Railroad Co. v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196. See, also, *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016.

85. As personal charge.—*Dobbins v. Erie County*, 16 Pet. 435, 446, 10 L. Ed. 1022.

"And the only sense in which a tax is a personal charge, is, that it is assessed upon personal estate, and the profits of labor and industry. It is called a personal charge, to distinguish such a tax from the tax upon lands and tenements, which are enforced without any regard to the persons who are the owners." *Dobbins v. Erie County*, 16 Pet. 435, 446, 10 L. Ed. 1022.

86. *Dobbins v. Erie County*, 16 Pet. 435, 446, 10 L. Ed. 1022.

87. Liability of owner generally.—*Chapin v. Streeter*, 124 U. S. 360, 362, 31 L. Ed. 475.

"Being in the exclusive possession and control of it during the term of the lease, by virtue of his own written contract, it was his duty to have paid this tax, and thus protected the property from sale." *Chapin v. Streeter*, 124 U. S. 360, 363, 31 L. Ed. 475.

As to estoppel to deny liability, see the title **ESTOPPEL**, vol. 5, pp. 975, 989.

Partnership property.—*Chapin v. Streeter*, 124 U. S. 360, 362, 31 L. Ed. 475. See the title **PARTNERSHIP**, vol. 9, p. 94.

Attaches to ownership.—"With respect to taxation usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon the property which they own, not upon property which others own." *Home Sav. Bank v. Des Moines*, 205 U. S. 503, 510, 51 L. Ed. 901.

"An act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another." This was an act requiring the holders of coupons receivable for taxes by contract to pay the taxes on the bonds from which they were detached. *Hartman v. Greenhow*, 102 U. S. 672, 684, 26 L. Ed. 271.

Lessee paying perpetual ground rent.—"Where the purchaser holds real property for a term which may be in perpetuity, upon the condition of paying a certain ground rent, and where he is entitled to a deed conveying the fee at any time on the payment of certain money, he is more nearly described as an owner than he is as a lessee of such property, and he would be liable to pay the taxes imposed upon the property." *Wells v. Savannah*, 181 U. S. 531, 547, 45 L. Ed. 986.

As to levy of assessment by corporation to pay tax, and sale of stock thereunder.—See the title **STOCK AND STOCK-HOLDERS**, ante, p. 225.

88. *Carstairs v. Cochran*, 193 U. S. 10, 16, 48 L. Ed. 596. See ante, "Situs as Determining Taxability," IV, A, 2, b.

89. *Bristol v. Washington County*, 177 U. S. 133, 44 L. Ed. 701.

ferent kinds of property of a corporation assessed by the state board, under an assessment illegal in part, are not distinct and separable upon the face of the assessment, so that the company was not thereby informed of the amount of taxes levied upon each, it could not be held to have been in default in not tendering such sum, if any, as was legally due.⁹⁰

d. *Between Landlord and Tenant*.—Where a lease required the annual taxes on the property to be paid by the lessee, the custom of the lessor down to the time of the default to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents, does not relieve the lessee of the obligation to pay the taxes as required by the lease, or, where the failure to pay was not caused by the conduct of the lessor, as shown by the facts of the case, relieve the lessee from the forfeiture consequent thereon.⁹¹

e. *Between Tenant for Life and Remainderman*.—Tenants for life are bound in law to pay the taxes upon the property during the continuance of their estate.⁹² And where the life tenants admit that they have determined not to pay the taxes upon the property, the danger of incumbrance by reason of this failure to perform their duties as tenants for life is, therefore, imminent, and the case a proper one for a court of equity to interfere and grant appropriate relief, as by a receivership.⁹³

f. *Between Vendor and Vendee*.—The vendee under a contract for the sale of land, during the running of the contract, was at least the owner of the equitable title, accompanied with the possession and as such was under obligation to take care of and pay the taxes assessed, accruing after his purchase, and the loss of title in consequence of neglect to do so is attributable to his own fault, although the vendors might have paid the taxes and charged them to him had they chosen.⁹⁴ But the summary remedy by motion, judgment and execution, is given only against the person who was proprietor at the time of the assessment of the taxes.⁹⁵

g. *After Consolidation of Corporations*.—The new corporation succeeds to the liabilities of the constituent companies for taxes.⁹⁶

h. *Internal Revenue Taxes*.—**Direct Tax**.—Where a direct tax is laid by congress upon land, no liability attaches to the states in an individual or corporate capacity therefor, unless voluntarily assumed by them. Otherwise the liability is only on the individual owners of the land assessed.⁹⁷

90. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 414, 30 L. Ed. 118.

91. **Landlord and tenant**.—*Kann v. King*, 204 U. S. 43, 57, 51 L. Ed. 360. See the title LANDLORD AND TENANT, vol. 7, p. 830.

92. **Between tenant for life and remainderman**.—*Pike v. Wassell*, 94 U. S. 711, 714, 24 L. Ed. 307; *Bennett v. Hunter*, 9 Wall. 326, 338, 19 L. Ed. 672.

93. *Pike v. Wassell*, 94 U. S. 711, 715, 24 L. Ed. 307.

Purchaser of life estate at confiscation sale.—Where the same person claimed title to lands under a confiscation sale under the act of July 17, 1862, and under an attachment sale of the original owner's interest in fee, such that, as to the property actually seized by the United States and condemned by the decree he holds only by virtue of the confiscation sale, i. e., for the owner's life, but that as to so much as was not actually included in the seizure he did acquire, by the proceedings in the state court, all the title of the owner at the time of the levy of

the attachments, it was held that the children of the owner stand in such a relation to the property confiscated, and not affected by the attachment proceedings, that they may maintain an action to require the defendants to keep down the taxes during the life of their father. *Pike v. Wassell*, 94 U. S. 711, 714, 24 L. Ed. 307.

94. **Between vendor and vendee**.—*Bradford v. Union Bank*, 13 How. 57, 64, 14 L. Ed. 49. See, also, *Noonan v. Lee*, 2 Black 499, 506, 17 L. Ed. 278.

95. *Alexandria v. Preston*, 8 Cranch 53, 3 L. Ed. 485.

Under the charter of the city of Alexandria, as amended in 1804, a purchaser of real estate, in Alexandria, is not personally liable for arrears of taxes, assessed before his purchase. *Alexandria v. Preston*, 8 Cranch 53, 3 L. Ed. 485.

96. *Bailey v. Railroad Co.*, 22 Wall. 604, 630, 22 L. Ed. 840.

97. **Direct tax—Nature of liability**.—*United States v. Louisiana*, 123 U. S. 32, 38, 31 L. Ed. 69.

Set-off.—The unpaid portion of the di-

Tax on Manufacture of Gas.—See note.⁹⁸

Tax on Interest Payments.—See note.⁹⁹

i. *Property in Receiver's Hands.*—See the title RECEIVERS, vol. 10, pp. 565, 570.

2. PAYMENT.—As evidence of adverse possession, see the title LIMITATION OF ACTIONS, AND ADVERSE POSSESSION, vol. 7, pp. 1017, 1048, 1049.

a. *Lawful Tender Equivalent to Payment for Certain Purposes.*—For the purposes of affecting proceedings to enforce the payment of taxes, a lawful tender of payment is equivalent to actual payment, making every subsequent step illegal and void.¹ The owner has the right to pay, either in person or through any one not disavowed by him, who is willing to act for him.² But

rect tax laid by the act of congress of August 5, 1861, which was apportioned to Louisiana, did not constitute any debt to the United States by the state in her political and corporate character, which can be set off against her demands. 12 Stat. 292, c. 45. *United States v. Louisiana*, 123 U. S. 32, 37, 31 L. Ed. 69.

98. A gas company which contracted, for a valuable consideration, to furnish a city with gas "free of charge," paid thereon the tax imposed by § 94 of the internal revenue act of June 30, 1884, on illuminating gas (13 Stat. 264), as amended by the act of July 18, 1866, 14 Id. 128. Held, that the city is not liable to the company for the amount so paid, although authorized by the law to add such tax to the price of "gas sold." *Gas Co. v. Pittsburgh*, 101 U. S. 219, 25 L. Ed. 789.

99. A provision in a defeasance clause in a mortgage given by a railroad company to secure its coupon bonds, that the mortgage shall be void if the mortgagor well and truly pays, etc., the debt and interest, "without any deduction, defalcation or abatement to be made of anything for or in respect of any taxes, charges or assessments whatsoever," does not oblige the company to pay the interest on its bonds clear of the duty of five per cent, which by the 122d section of the revenue act of 1864, such companies "are authorized to deduct and withhold from all payments on account of any interest or coupons due and payable." On the contrary, the company complies with its contract when it pays the interest less five per cent and retains the tax for the government. *Haight v. Railroad Co.*, 6 Wall. 15, 18 L. Ed. 818.

In all assessments of income tax the citizen is credited with the amount thus detained; so that there is no double taxation. *Haight v. Railroad Co.*, 6 Wall. 15, 18, 18 L. Ed. 818.

1. *Lawful tender equivalent to payment.*—*Virginia Coupon Cases*, 114 U. S. 269, 270, 281, 29 L. Ed. 185. See, also, *Royall v. Virginia*, 116 U. S. 572, 579, 29 L. Ed. 735, citing *Woodruff v. Trapnall*, 10 How. 190, 13 L. Ed. 383; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey*

v. Irwin, 18 Wall. 549, 21 L. Ed. 786; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052, followed in *Royall v. Virginia*, 121 U. S. 102, 104, 30 L. Ed. 883; *Sands v. Edmunds*, 116 U. S. 535, 29 L. Ed. 739.

"He has the right to say he will not pay the amount a second time, even for the privilege of recovering it back. And if he chooses to stand upon a lawful payment once made, he asks no remedy to recover back taxes illegally collected, but may resist the exaction, and treat as a wrongdoer the officer who seizes his property to enforce it." *Virginia Coupon Cases*, 114 U. S. 269, 270, 282, 299, 29 L. Ed. 185. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 786, 788. See, also, post, "Liabilities," VII, B, 2.

Application of payments.—See the title PAYMENT, vol. 9, p. 342.

2. *Refusal to receive taxes except when tendered in person.*—Under the act of congress of June 7, 1862, ch. 98, entitled "An act for the collection of direct taxes in the insurrectionary district within the United States," as amended by the act of Feb. 6, 1863, ch. 21, property owners had the right to pay their taxes either in person or through an agent, and where commissioners refused to receive such taxes except from the property owner in person, their action in thus preventing payment was the equivalent of payment in its effect upon the certificate of sale subsequently had because of nonpayment. Under such circumstances it was null and void and vested no title in the purchaser. *United States v. Lee*, 106 U. S. 196, 200, 27 L. Ed. 171, following *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

Distinguished from redemption.—The right of payment is expressly distinguished from the privilege of redemption after sale and complete divestiture of title, which is accorded upon very different principles, and in pursuance of a very different policy. *Bennett v. Hunter*, 9 Wall. 320, 338, 19 L. Ed. 672.

such a tender is not a payment of the taxes, so as to extinguish all claim for them on the part of the state.³

Offer to Pay.—An offer to pay, made to one authorized to receive delinquent taxes generally, at the proper place, is sufficient.⁴ And actual tender is not necessary where waived by previous notice that it will not be accepted.⁵ And objection to the character of the tender, to be of avail, must be made at the time.⁶

Medium.—See note.⁷

b. *Legal Tender Acts Inapplicable.*—The acts of congress making the notes of the United States a legal tender do not apply to involuntary contributions such as taxes, exacted by a state, but only to debts, in the strict sense of that term, that is, to obligations for the payment of money founded on contracts, express or implied.⁸

c. *Payment by Set-Off.*—When a tax debtor becomes by purchase the owner of any part of the debt of a municipal corporation which is by law receivable in payment of its taxes the extinguishment of the tax and the debt is clearly within the doctrine of set off of mutual obligations.⁹

d. *Compromise and Settlement.*—The presumption is that a settlement by

3. In *re Ayers*, 123 U. S. 443, 495, 31 L. Ed. 216, distinguishing *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185, as containing nothing in the opinion to indicate that the party making the tender was relieved from the operation of the rule of law, making it necessary to keep the tender good, or that a subsequent action at law for the recovery of the taxes would be unlawful, reserving, of course, in such a case, the admitted right of the defendant to plead the fact of his tender and bring it into court, in pursuance of the usual practice in such cases, as a defense.

4. **Offer to pay.**—*Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

The court reaffirms the ruling in *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672, and *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786, that a sale for direct taxes under the act of 1862 is void, where, before the sale, the owner, or some one for him, was ready and offered to pay them, and was told that payment would not be accepted. *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

5. "In the case of *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, it was held, that certificate of a sale of land for taxes, made by commissioners, which by law was impeachable by proof that the taxes had been paid previous to sale, was rendered void by proof that the commissioners had refused to receive the taxes, without proof of an actual tender, where the commissioners had waived it by a previous notice that they would not accept it. * * * Citing *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471, and *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052." *Virginia Coupon Cases*, 114 U. S. 269, 270, 282, 29 L. Ed. 185.

6. *Bennett v. Hunter*, 9 Wall. 326, 338, 19 L. Ed. 672.

"There can be no question raised as to the validity of the tender (because it was in bank checks indorsed good by the bank instead of money), unless objection had been made to the character of the tender." *King v. United States*, 99 U. S. 229, 232, 25 L. Ed. 373.

7. **Medium.**—An enactment in a state statute that "the sheriff shall pay over to the county treasurer the full amount of the state and school taxes, in gold and silver coin," and that "the several county treasurers shall pay over to the state treasurer the state tax, in gold and silver coin," requires by legitimate, if not necessary consequence, that the taxes named be collected in coin. But if, in the judgment of the federal supreme court, this were otherwise, yet the supreme court of the state having held this construction to be correct, the federal court will follow their adjudication. *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101.

Payment in cotton notes.—See the title PAYMENT, vol. 9, p. 327.

Receivability of scrip or coupons.—See the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 785, et seq., 883; MANDAMUS, vol. 8, pp. 66, 67, 68.

Adequacy of taxpayer's remedy to enforce right to pay in particular funds.—See the title IMPAIRMENT OF OBLIGATIONS OF CONTRACTS, vol. 6, pp. 785, et seq.; 860, et seq.

8. **Legal tender acts inapplicable.**—*Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 706, 28 L. Ed. 569; *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101.

9. **Payment by set-off.**—*Amy v. Shelby County Taxing District*, 114 U. S. 387, 29 L. Ed. 172.

Right to offset taxes against demands

compromise with the collecting officers, after full investigation, was correct and bars further claims for taxes for the same period.¹⁰

e. *Payment without Assessment.*—When a corporation presents to the collector a statement of taxes long past due, which taxes must in the end be paid to him, and tenders him the full payment of said taxes, he may receive them and give a valid acquittance for the amount so received, although there had been no assessment made other than by the law imposing the tax.¹¹

f. *Payment by Stranger Confers No Title.*—A party who has no title to lands cannot acquire one by mere payment of taxes on them.¹²

g. *Payment by Collector.*—See note.¹³

h. *Time for Payment.*—It has been held that payment prior to sale is sufficient.¹⁴ And compliance with the terms of a taxing act, as to time of payment, may be waived.¹⁵

upon municipality not property.—*New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943. See the title CONSTITUTIONAL LAW, vol. 4, p. 413.

10. *United States v. Reading R. Co.*, 123 U. S. 113, 116, 31 L. Ed. 138, construing a compromise of a claim for taxes under the Internal Revenue Law of 1864.

And an instruction to that effect was correct, although the court indicated its opinion on the evidence that no mistake had been shown, but disclaiming the desire to control the verdict. *United States v. Reading R. Co.*, 123 U. S. 113, 116, 31 L. Ed. 138.

Commutation tax on gross earnings.—Where a taxing statute offered a railroad corporation a compromise as to taxes claimed to be due, which the company accepted, the language of the act providing for the payment of all taxes in arrear under a prior act as a condition for the acceptance of that act, implied that such payment should also be in full of all other claims for taxes assessed for the same years. Such a condition and proposition were entirely within the power of the legislature to impose and make, and when the proposition was accepted and the condition performed by the payment of money into the treasury of the territory, all claim for taxes under any general law levied directly upon the lands necessarily fell with such payment and acceptance. This implied release of the taxes for the year preceding, which the authorities had assumed to levy under the general law and not under the provisions of the special prior act, arises from the language of the subsequent act, and is just as strong and just as clear as if it had been stated in so many words in that act. *McHenry v. Alford*, 168 U. S. 651, 672, 42 L. Ed. 614.

11. **Payment without assessment.**—*King v. United States*, 99 U. S. 229, 232, 25 L. Ed. 373, saying it was unnecessary to decide that it would bar a recovery of anything additional, if found due. See ante, "Definition and Necessity," VI, A, 1.

12. **Payment by stranger confers no**

title.—*Homestead Co. v. Valley Railroad*, 17 Wall. 153, 21 L. Ed. 622.

13. **Receipt of draft as payment of tax by collector.**—When a collector of internal revenue in a rural district of Mississippi—where, owing to the lawless condition in which the rebellion, then but recently suppressed, had left the region, it was not safe to have gold and silver in one's house—in violation of the provisions of the independent treasury act, but with an apparently good motive, openly and without indirection, and because he thought it more safe thus to act than to take gold and silver, took in payment of taxes on cotton, accepted drafts drawn by the shippers of it on consignees of it in New Orleans (which was the place of deposit for taxes collected in Mississippi), afterwards (the drafts not being paid, and he having in his accounts with the government charged himself and been charged by it with the tax as if paid in gold and silver), sued the acceptors, as between the parties the collector's charging himself with the tax and reporting it to the government as paid, would be payment by the collector of the tax, and he could recover of the drawee. *Miltenberger v. Cooke*, 18 Wall. 421, 21 L. Ed. 864. See the title PUBLIC OFFICERS, vol. 10, p. 363.

14. Under the act of 1862, the right to pay the tax and relieve the land from sale is not limited to sixty days after the fixing of the amount of it by the proper authorities. Payment prior to sale is sufficient. *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672.

15. **Waiver.**—Where the payment of a commutation tax on gross receipts, made by a railroad company for a given year, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the law applicable, even if not paid at the exact time provided for in the statute, the failure to so pay might be waived by the public authorities, and when the moneys were in fact paid to and received by the officers of the territory and went into its treasury, and never have been returned or tendered back.

i. *Recovery by Party Paying from Person or Fund Liable.*—A voluntary payment of taxes, by a party not liable therefor, without request of true owners, cannot be recovered back,¹⁶ unless the true owner adopts and claims the benefit of such payment.¹⁷

Allowance to Mortgagee for Taxes Paid.—See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 510. See, also, note.¹⁸

D. Lien for Taxes—1. **LEGISLATIVE DECLARATION ESSENTIAL.**—Taxes are not liens unless declared so by the legislature under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes, which

there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time. *McHenry v. Alford*, 168 U. S. 651, 673, 42 L. Ed. 614.

16. *Homestead Co. v. Valley Railroad*, 17 Wall. 153, 21 L. Ed. 622.

"Ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts." *Homestead Co. v. Valley Railroad*, 17 Wall. 153, 166, 21 L. Ed. 622, followed in *Stryker v. Goodnow*, 123 U. S. 527, 533, 31 L. Ed. 194, but said not to be a judgment in a suit between the same parties upon the same cause of action as there involved, and held that the court below did not fail in its decision to give full faith and credit to that decree. See, also, *Litchfield v. County of Webster*, 101 U. S. 773, 778, 25 L. Ed. 925, followed in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928.

17. Where, therefore, such payment is made by a third person, the taxpayer has a right to ignore the payment if he chooses to do so. But if he chooses not to ignore, but to claim the benefit of it, there is no reason why he may not be regarded as treating the act of payment as done for him; and, if so regarded him, there is no difficulty in finding an implied promise to reimburse the payer or his assignee. *Chapman v. Goodnow*, 123 U. S. 540, 544, 31 L. Ed. 235, followed in *Wells v. Goodnow*, 150 U. S. 84, 37 L. Ed. 1007; *Homestead Co. v. Valley Railroad*, 17 Wall. 153, 21 L. Ed. 622.

It cannot be doubted that if defendants had, after the rendition of the decree, in the other suit, got from the payer permission to use its payments as a defense to the actions brought against them for the taxes, and in consideration thereof had promised to repay what had been advanced for that purpose, a new cause of action would have arisen, to which the decree would not have been a bar, and where by election to avail of the payment, an implied promise to reimburse the payer arose afterwards, the decree in the former suit would not bar an action thereon: *Chapman v. Goodnow*, 123 U. S. 540, 547, 31 L. Ed. 235, followed in *Wells v. Goodnow*, 150 U. S. 84, 37 L.

Ed. 1007. See *Noonan v. Lee*, 2 Black 499, 506, 17 L. Ed. 278.

As to when payment voluntary and when not, see post, "Recovery Back," IX, B. See, also, the title PAYMENT, vol. 9, p. 319.

Outstanding tax title acquired by vendee under sale never consummated.—Where B., claiming to be the owner in his own right of a tract of land, borrowed money of A., and made an absolute conveyance of the land to A. upon an agreement that A., in addition to the stipulated price, should buy in an outstanding tax title thereto, and if A. should, before a certain date, abandon his purchase, he should be repaid what he had advanced and have a lien for the same until adjusted, it was held that as B. had only a legal title as to an equitable interest therein belonging to his wife, and could not make a good title to the whole because she could not be brought to assent to the sale, so that the transaction fell through, the interest of B. in the land was charged with the payment of the advances of A. to purchase the tax title and otherwise the equitable interest of the wife was not liable, although whatever interest B. had was liable, and passed to A. by the deed. *Holgate v. Eaton*, 116 U. S. 33, 29 L. Ed. 538.

As regards the tax title, it may be a perfect title, or it may be a lien for the taxes paid by the purchaser at the tax sale. Or it may be that A. holding the legal title, as B. did in trust, was bound to protect that title by the purchase, and if so, it may be a lien on the land, though not a perfect title. *Holgate v. Eaton*, 116 U. S. 33, 42, 29 L. Ed. 538.

18. Taxes and redemption money paid by mortgagee.—Where there was a covenant in a trust deed on the part of the makers of the deed to pay all taxes and assessments on the property, the act of paying the taxes or taking up the certificates after the sale related back, in legal effect, to a period antedating the sale, and it was equivalent to an advancement of money before the sale for the payment of the taxes and the clearing off of these tax liens and assessments, although the amount necessary to pay off the taxes was not advanced before the sale, but was paid after the sale. It was an item which could be properly taken out of the proceeds of the sale of

has not been performed.¹⁹ But the legislature may make taxes liens upon the property affected, even license taxes, which it may make liens on the property where the business is carried on.²⁰ They are very generally created, but they exist only for the benefit of the public authorities to facilitate the collection of taxes, and public creditors can claim none.²¹

2. **ACCRUAL AND DURATION.**—The lien attaches at the time prescribed by law, and continues, through all transfers, for the benefit of the state or a purchaser from it, until the taxes are paid or a sale therefor has become absolute.²² And the general rule is, that when no time is expressly fixed by the statute for the lien to take effect, it accrues upon the assessment of the tax.²³

3. **PARAMOUNTCY OF LIEN.**—A lien for taxes does not stand upon the footing of an ordinary incumbrance, and, unless otherwise directed by statute, is not displaced by a sale of the property under a pre-existing judgment or decree.²⁴

Several and Distinct.—The lien upon each lot, for the taxes, is several and distinct, and the purchaser of such holds his lot unincumbered with the taxes due on the other lots held by his vendor.²⁵

4. **ENFORCEMENT.**—But a junior incumbrancer must be made a party in a suit to enforce.²⁶

E. Listing and Return by Owner.—Owner's Return Prima Facie Correct.—A party who furnishes a list of property for taxation is estopped from questioning the sufficiency of the description so furnished in an action to collect the taxes. See the title **ESTOPPEL**, vol. 5, p. 989.

Property Held in Trust.—It is as much the duty of a person holding prop-

the property, under the laws of Illinois. *Gormley v. Bunyan*, 138 U. S. 623, 633, 34 L. Ed. 1086.

19. **Legislative declaration essential.**—*Heine v. Levee Comm'rs*, 19 Wall. 655, 22 L. Ed. 223; *Meriwether v. Garrett*, 102 U. S. 472, 514, 26 L. Ed. 197; *Lyon v. Alley*, 130 U. S. 177, 188, 32 L. Ed. 899. See, also, *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72.

"If any lien was created by the terms of the statute, it must have existed and attached according to such terms and conditions as were prescribed by the law creating it." *Lyon v. Alley*, 130 U. S. 177, 188, 32 L. Ed. 899.

An unlawful assessment creates no lien on the land assessed. *Van Brocklin v. Tennessee*, 117 U. S. 151, 180, 29 L. Ed. 845.

Municipal taxes.—So of municipal taxes. It is laid down in the very careful work of Judge Dillon that taxes are not liens upon the property against which they are assessed, unless made so by the charter, or unless the corporation is authorized, by the legislature to declare them to be liens. 2 *Dillon on Corporations*, 659. *Heine v. Levee Comm'rs*, 19 Wall. 655, 659, 22 L. Ed. 223. See, also, *Lyon v. Alley*, 130 U. S. 177, 188, 32 L. Ed. 899.

20. *Hodge v. Muscatine County*, 196 U. S. 276, 280, 49 L. Ed. 477. No matter who is the owner, or in whose name it is assessed and advertised. *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Ballard v. Hunter*, 204 U. S. 241, 257, 51 L. Ed. 461.

21. **Not for creditors.**—*Barkley v.*

Levee Comm'rs, 93 U. S. 258, 265, 23 L. Ed. 893.

22. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 750, 31 L. Ed. 309; *Gould v. Day*, 94 U. S. 405, 413, 24 L. Ed. 232, construing Michigan law.

23. **Time of assessment.**—*Lyon v. Alley*, 130 U. S. 177, 188, 32 L. Ed. 899; *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 750, 31 L. Ed. 309, construing the statutes of Iowa.

24. **Paramountcy of lien.**—*Osterberg v. Union Trust Co.*, 93 U. S. 424, 23 L. Ed. 964.

And receiver's certificates to pay them have priority over mortgage bonds. *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 461, 29 L. Ed. 963.

The doctrine of bona fide purchasers for value has no application. *Seattle v. Kelleher*, 195 U. S. 351, 360, 49 L. Ed. 232; *Gould v. Day*, 94 U. S. 405, 415, 24 L. Ed. 232; *United States Trust Co. v. New Mexico*, 183 U. S. 535, 541, 46 L. Ed. 315.

Foreclosure of Mortgage.—See the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 517.

As to retention of proceeds of judicial sale to pay tax lien, see the title **JUDICIAL SALES**, vol. 7, p. 736.

Priority of claims for taxes in bankruptcy.—See the title **BANKRUPTCY**, vol. 2, p. 916.

25. *Washington v. Pratt*, 8 Wheat. 681, 5 L. Ed. 714.

26. "Although the lien of the state for taxes ranks all other liens, whether prior or subsequent, yet in a suit to enforce such lien, the holder of a junior incum-

erty in trust to disclose it, when required by law, as if it were individual property.²⁷

F. Corrections and Additions—1. GENERAL PRINCIPLES—*a. Due Authority of Law Essential.*—An alteration unauthorized by law, is not a reassessment or amendment.²⁸

b. Constitutional Requirements.—**Due Process in Assessment of Back Taxes and Reassessment.**—See ante, "Assessment of Back Taxes and Reassessments," VI, A, 4, g.

Classification and Equal Protection of Laws.—See the title CONSTITUTIONAL LAW, vol. 4, p. 395, et seq.²⁹

c. Conclusiveness of Finding by Officer or Board.—See ante, "Conclusiveness of Assessment," VI, A, 5; "Conclusiveness of Action of Assessors," VI, B, 4. See, also, ante, "Nature of Authority and Necessity Therefor," VI, A, 3.

2. REASSESSMENT AND RELIEF OF TAXES OF FORMER YEARS.—Where it was provided by law that where a tax or assessment had been set aside or determined to be illegal and void, or the collection thereof prevented by the judgment of any court, or injunction, etc., then, if the property was properly taxable or assessable, that the tax, etc., should be reassessed or relieved within a certain time, the procedure provided was a reassessment and the placing of the taxes on the tax roll for the current year, and where no evidence was offered that the taxes were illegal or had been paid, no objection could be sustained to the legality of the proceeding, as the delinquent list was made prima facie evidence of the legality of the taxes thereon, as well those for past years as for the current year, and the burden of proving invalidity was on the objectors.³⁰

3. OMITTED PROPERTY.—Where omissions were made in the assessments of property to a railroad company for a series of years, additional assessments embracing such property may be subsequently made for said years, although the law required such assessments to be made as an entirety.³¹ A statute for taxing omitted property rests on the assumption that, generally speaking, all property subject to taxation has been reached and aims only to provide for those accidents which may happen under any system of taxation, in consequence of

brance must be made a party, if it is desired to divest him of his rights; otherwise he will be entitled to redeem from the purchaser under the tax lien." *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 318, 327, 38 L. Ed. 457.

It was held, granting the general principles to be correct, that a lien for taxes upon the property is a lien upon all the interests in such property, and that proceedings to enforce such lien will oust the mortgagees of their lien, that these bondholders or their trustees were not privies to the suit in equity to enjoin such taxes. *Keokuk, etc., R. Co. v. Scotland County*, 152 U. S. 318, 325, 38 L. Ed. 457; *Keokuk, etc., R. Co. v. Missouri*, 152 U. S. 301, 316, 38 L. Ed. 450.

27. **Property held in trust.**—*Glidden v. Harrington*, 189 U. S. 255, 259, 47 L. Ed. 798.

28. *Lyon v. Alley*, 130 U. S. 177, 186, 32 L. Ed. 899.

29. **Representation of stockholders by corporation a reasonable rule.**—*Corry v. Baltimore*, 196 U. S. 466, 479, 49 L. Ed. 566. See the title DUE PROCESS OF LAW, vol. 5, p. 543.

30. *Maish v. Arizona*, 164 U. S. 599, 41 L. Ed. 567.

It was the intention of the legislature of Arizona, and a just intention, that no property should escape its proper share of the burden of taxation by means of any defect in the tax proceedings, and that, if there should happen to be such defect, preventing for the time being the collection of the taxes, steps might be taken in a subsequent year to place them again upon the tax roll and collect them. *Maish v. Arizona*, 164 U. S. 599, 607, 41 L. Ed. 567.

31. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 541, 46 L. Ed. 315.

There is no invalidity in the fact of additional assessments. And where the claim in an intervening petition claiming a lien for taxes in a railroad foreclosure suit was wholly for taxes based upon additional assessments for prior years, when the federal supreme court adjudged that that petition upon its face showed a tax claim against the property, it was an adjudication in favor of the validity of such additional assessments. *United States Trust Co. v. New Mexico*, 183 U. S. 535, 541, 46 L. Ed. 315.

which here and there some item of property has escaped its proper burden.³²

By Special or Regular Assessor.—And assessment by a special back tax assessor may be provided for by statute, without depriving the regular assessor of the right to make an assessment of omitted property.³³

Actual Notice and Hearing Sufficient.—One who had actual notice of proceedings to assess omitted property, and has appeared and contested same with a full hearing, cannot complain that the statute made no provision for notice to him and the class to which he belonged, nonresidents of the county where the property was.³⁴ And where the statute requires notice before additions are made, attendance of the owner under subpoena before the revising officer, who examined him and informed him of his intention to increase the amount of property returned by him, was sufficient compliance therewith.³⁵

4. BOARDS OF REVISION OR EQUALIZATION, ETC.—Function and Conclusive-ness of Action.—In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions.³⁶ They may be provided for certain kinds of property, without necessarily infringing the rule of uniformity laid down by the state constitution as to other property for which they are not provided.³⁷ Application for relief must be made to them, their

32. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 539, 40 L. Ed. 247. See, also, *Mandelbaum v. The People*, 8 Wall. 310, 313, 19 L. Ed. 479.

But where the statutes only authorize the assessor to make subsequent assessments upon the property of a citizen or inhabitant, which was subject to taxation at a regular or annual assessment, and had escaped the tax from mistake, or otherwise, and which is a very common provision in every system of taxation, and, if the facts were true as set forth in the answer in a suit for such taxes, the property had been taxed either at the regular assessment, or had been purchased or procured by the defendants after this assessment and, therefore, was not the subject of a subsequent tax within the meaning of the statute, on this ground the answer presented a perfect defense to the action, and this defense should not have been stricken out. *Mandelbaum v. The People*, 8 Wall. 310, 313, 19 L. Ed. 479.

Lands.—Of the validity of a statute providing generally for subjecting to taxation lands that have improperly escaped taxation in prior years, there can be no serious doubt. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 528, 40 L. Ed. 247.

Classification.—*Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 539, 40 L. Ed. 247. See the title CONSTITUTIONAL LAW, vol. 4, pp. 395-397.

33. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 329, 51 L. Ed. 204, construing the statutes of Kentucky, and an ordinance of City of Lexington.

34. *Gallup v. Schmidt*, 183 U. S. 300, 304, 307, 46 L. Ed. 207, holding that no rights secured by the federal constitution had been denied him. See, also, ante, "Notice and Hearing," VI, A, 4, b.

35. *Sturges v. Carter*, 114 U. S. 511, 515, 29 L. Ed. 240, where it was said: "The statute does not require any notice in writing except the compulsory process of subpoena to be served upon the person called to attend and testify. But if any further notice was required, it was waived by the plaintiff in error."

36. **Boards of revision or equalization.**—*Stanley v. Supervisors*, 121 U. S. 535, 550, 30 L. Ed. 1000, followed in *Williams v. Supervisors*, 122 U. S. 154, 163, 30 L. Ed. 1088.

37. *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 301, 50 L. Ed. 744, following *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903, construing the Ohio constitution not to require a state board of equalization for personal property, including moneyed capital other than bank shares, as for other property, county boards being alone provided for personal property other than bank shares.

The statute creating the board for equalizing bank shares, none being provided for other moneyed capital, is not void as a violation of the constitution of Ohio, because if the local assessors would discharge their duty by assessing all property at its actual cash value the operation of the equalizing board would work no inequality of taxation, and a statute cannot be held to be unconstitutional which in itself does not conflict with the constitution, because of the in-

action is judicial in character and conclusive if not corrected in the mode pointed out by the statute, and not open to collateral attack.³⁸ And where the proceedings before the state board of equalization were quasi judicial and the order made by it was within its jurisdiction, it was not void on its face, and cannot be resisted in an action at law for the taxes on the ground of alleged discrimination or overvaluation,³⁹ or overthrown collaterally by injunction.⁴⁰

Record as Best Evidence of Action.—Where the board of equalization and assessment necessarily kept and evidently was expected by the statutes to keep a record, that was the best evidence, at least, of its decisions and acts. If the roads had wished an express ruling by the board upon the deductions which they demanded, they could have asked for it and could have asked to have the action of the board or its refusal to act noted in the record. It would be time enough to offer other evidence, when such a request had been made and refused.⁴¹

Increase of Valuation.—The power of a board of equalization to increase the valuation of property in any county is a power to increase it in all, or, at

justice produced by its maladministration. *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903.

"That no provision is made for a general equalization of railroad with other property in the state does not vitiate the assessment. See *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903, in which the question was distinctly presented and determined, the court saying (p. 161); 'While it may be true that this system of submitting the different kinds of property subject to taxation to different board of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the constitution, it is unfaithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid.'" *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 301, 50 L. Ed. 744. See ante, "Due Process of Law," VI, A, 4, as to sufficiency of notice and hearing.

38. *Stanley v. Supervisors*, 121 U. S. 535, 550, 30 L. Ed. 1000, followed in *Williams v. Supervisors*, 122 U. S. 154, 163, 30 L. Ed. 1088. See *Ronkendorf v. Taylor*, 4 Pet. 349, 359, 7 L. Ed. 882.

"As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed." *Stanley v. Supervisors*, 121 U. S. 535, 550, 30 L. Ed. 1000.

If a method of assessment sometimes led to overvaluation of the shares, the aggrieved party could obtain relief by pursuing the course pointed out by the statute for its correction, unless, as as-

serted, this course was not, in the years mentioned, available to the plaintiff, and the stockholders, whose interests were assigned to him, because their names were not placed on the assessment roll until the time provided by law for revising and correcting the assessment had passed. If that course was thus cut off, they could have resorted to a court of equity to enjoin the collection of the illegal excess upon payment or tender of the amount due upon what they admitted to be a just valuation. *Williams v. Supervisors*, 122 U. S. 154, 163, 30 L. Ed. 1088. See ante, "Conclusiveness of Assessment," VI, A, 5; post, "Recovery Back," IX, B.

Board of public works.—Where it is provided by law that the decision made by the board of public works shall be final, unless the railroad company, within thirty days after such decision comes to its knowledge, appeals (which it is expressly authorized by the statute to do) from the decision, as to the assessment and valuation made in each county through which the railroad runs, to the circuit court of that county, this provision for a review and correction, by the circuit court of the county, of the assessment made by the board of public works affords a convenient and adequate remedy for any error in the taxation, and has been held by the highest court of the state to be in accordance with its constitution. *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 44, 43 L. Ed. 354.

39. *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 426, 47 L. Ed. 1116. See *Stanley v. Supervisors*, 121 U. S. 535, 30 L. Ed. 1000.

40. *Albuquerque Bank v. Perea*, 147 U. S. 87, 89, 37 L. Ed. 91. See post, "Injunction against Taxes," VI, H.

41. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 593, 51 L. Ed. 636. See *Fargo v. Hart*, 193 U. S. 490, 498, 48 L. Ed. 761.

least, to increase the valuation of some kinds of property in all, so as to produce a just relation between them and the other valuations left undisturbed. Where there is nothing in the statute that requires the increase to be so adjusted that the total valuation shall be unchanged, but on the contrary, the prohibition against reducing it implies that the board has the power of change and, but for the prohibition, might reduce the total, therefore it may add to the total since the law does not forbid that.⁴²

Notice of Proceedings and Opportunity for Hearing.—See ante, "Due Process of Law," VI, A, 4. The action of the board of equalization, in increasing the assessed value of the property of a railroad company or an individual above the return made to the board, does not require a notice to the party to make it valid; and the courts cannot substitute their judgment as to such valuation for that of the board.⁴³ And when the statute fixes the time of the meeting of the board, it gives the necessary notice, and notice of the first meeting covers subsequent adjournments if made to days certain.⁴⁴

Apportionment of Assessment between Municipalities.—See ante, "Apportionment of Valuation and Unit Rule," VI, B, 3.

Burden of Proof of Fraud and Mistake.—See post, "Action to Set Aside or Modify Assessment," VI, F, 5.

5. ACTION TO SET ASIDE OR MODIFY ASSESSMENT.—**Jurisdiction.**—Although an action at law by a national bank in a federal court to cancel or modify an assessment on the shares of its capital stock made by state officers, may have been in due conformity with the practice in the courts of the state, in which no distinction is made between the legal and equitable side, yet in the federal courts it must be in regular chancery form.⁴⁵

Burden of Proof.—The burden of proving error in the assessment, or duress and fraud, is on the objectors.⁴⁶ And in such a suit it is highly improper to

42. Increase of valuation.—*Copper Queen, etc., Min. Co. v. Territorial Board*, 206 U. S. 474, 481, 51 L. Ed. 1143, construing § 2282, Rev. Stat. of Arizona.

43. Notice of proceedings and opportunity for hearing.—*State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Lander v. Mercantile Bank*, 186 U. S. 458, 469, 46 L. Ed. 1247. See, also, *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 42 L. Ed. 236.

44. Notice of time fixed by statute.—*Lander v. Mercantile Bank*, 186 U. S. 458, 468, 46 L. Ed. 1247.

Nor, under the circumstances, is the principle affected by an adjournment of the board without fixing a date of meeting, as the rights of the bank were not affected and it was put to no inconvenience. *Lander v. Mercantile Bank*, 186 U. S. 458, 468, 46 L. Ed. 1247.

45. *Lindsav v. First Nat. Bank*, 156 U. S. 485, 492, 39 L. Ed. 505. See the title EQUITY, vol. 5, p. 812.

46. Action of boards of equalization, revision and review.—Upon bills to declare void assessments of taxes made by the state board of equalization and assessment, and to enjoin the collection of the same beyond certain sums tendered, alleging that the board, coerced by political clamor and its fears, arbitrarily determined in advance to add about nine-

teen million dollars to the assessment of railroad property for the previous year, and then pretended to fix the values of the several roads by calculation; that the assessments were fraudulent, and void for want of jurisdiction, and justifying these general allegations by mere specific statements, it was held that the charges of duress and fraud were not sustained. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 591, 51 L. Ed. 636.

A board of equalization and assessment is created for the purpose of using its judgment and its knowledge (*State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663). Within its jurisdiction, except in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end. In this case, whatever grounds for uneasiness may be perceived, nothing has been proved so clearly and palpably as it should be proved, on the principle laid down in *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154, in order to warrant these appeals to the extraordinary jurisdiction of the circuit court. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 598, 51 L. Ed. 636.

The rule of uniformity prescribed by

call and cross-examine the members of a board of equalization and assessment with regard to the operation of their minds in valuing and taxing the roads.⁴⁷

G. Tax Books and Records.—See the title DOCUMENTARY EVIDENCE, vol. 5, pp. 442, 447.

H. Injunction against Taxes—1. JURISDICTION—*a. General Statement of Rule.*—While in general an injunction will not be granted against the collection of taxes,⁴⁸ and mere illegality, injustice or irregularity in the tax is not ground for an injunction against its collection,⁴⁹ unless the illegality or fatal defect

the constitution of Nebraska was not violated, where no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the board of equalization and assessment. See *Coulter v. Louisville, etc., R. Co.*, 196 U. S. 599, 49 L. Ed. 615; *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 597, 51 L. Ed. 636.

Inclusion of federal franchise.—"It does not appear that the present Union Pacific has any United States franchises that were taxed, and, if it has any that were considered in estimating the value of the road, it does not appear that they were considered improperly under the later decisions of this court. *Central Pac. R. Co. v. California*, 162 U. S. 91, 40 L. Ed. 903; *People v. Central Pac. R. R. Co.*, 105 California 576, 590. See *Adams Express Co. v. Ohio*, 166 U. S. 185, 41 L. Ed. 965. And the same thing may be said as to the interstate business of the roads. *Adams Express Co. v. Ohio*, 165 U. S. 194, 41 L. Ed. 683; *S. C.*, 166 U. S. 185, 41 L. Ed. 965." *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 597, 51 L. Ed. 636.

47. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 593, 51 L. Ed. 636.

48. **General rule.**—*Fargo v. Hart*, 193 U. S. 490, 503, 48 L. Ed. 761; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. See *Springer v. United States*, 102 U. S. 586, 594, 26 L. Ed. 253; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 39, 43 L. Ed. 354, where a court of equity is said to be without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one.

A court of equity will never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation, and then only in special cases. *Dows v. Chicago*, 11 Wall. 108, 111, 20 L. Ed. 65.

Injunction against tax levy in obedience to mandamus. See the title MANDAMUS, vol. 8, p. 25.

49. *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447, 451, 47 L. Ed. 253; *Pacific Coast Steamship Co. v. United States*, 187 U. S. 454, 47 L. Ed. 256; *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 464, 47 L. Ed. 256, followed in *Stewart v. Washington,*

etc., *Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 37, 43 L. Ed. 354; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Barnes v. The Railroads*, 17 Wall. 294, 310, 21 L. Ed. 544; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 525, 28 L. Ed. 1098; *Milwaukee v. Koeffler*, 116 U. S. 219, 29 L. Ed. 612; *Lyon v. Alley*, 130 U. S. 177, 187, 32 L. Ed. 899; *Shelton v. Platt*, 139 U. S. 591, 594, 35 L. Ed. 273; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 348, 35 L. Ed. 1035; *Ogden City v. Armstrong*, 168 U. S. 224, 239, 42 L. Ed. 444; *Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 272, 44 L. Ed. 159; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 684, 47 L. Ed. 651.

"There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant." *Ogden City v. Armstrong*, 168 U. S. 224, 237, 42 L. Ed. 444; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Shelton v. Platt*, 139 U. S. 591, 594, 35 L. Ed. 273; *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 661, 35 L. Ed. 303; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 348, 35 L. Ed. 1035; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 684, 47 L. Ed. 651; *Milwaukee v. Koeffler*, 116 U. S. 219, 223, 29 L. Ed. 612; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 37, 43 L. Ed. 354; *Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 272, 44 L. Ed. 159.

"And this is true whether these taxes are local or general, or, if general, whether internal revenue or direct taxes." *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447, 451, 47 L. Ed. 253.

"In the *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 525, 28 L. Ed. 1098, this court thus presents the whole law on this point: 'It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently

does not appear on the face of the record and must be shown by evidence aliunde,⁵⁰ injunction will be a proper remedy in a case which is not a mere case of overvaluation, where it will not lie,⁵¹ unless it be intentional and systematic, affecting not merely the individual complainant, as where national bank shares are illegally taxed, in which case the bank may file a bill in behalf of its stockholders,⁵² or unless fraud, or a clear adoption of a fundamentally wrong

been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied." *Lyon v. Alley*, 130 U. S. 177, 187, 32 L. Ed. 899; *Ogden City v. Armstrong*, 168 U. S. 224, 239, 42 L. Ed. 444.

"Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity. This statement is in general accordance with the decisions of this court as well as of many state courts." *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 525, 28 L. Ed. 1098; *Dows v. Chicago*, 11 Wall. 108, 109, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 549, 21 L. Ed. 231; *State Railway Tax Cases*, 92 U. S. 575, 612, 613, 23 L. Ed. 663 and cases there cited; *Milwaukee v. Koeffler*, 116 U. S. 219, 224, 29 L. Ed. 612.

The illegality of a tax on personalty, and the threatened sale for its payment is not in itself ground on which the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived. *Milwaukee v. Koeffler*, 116 U. S. 219, 223, 29 L. Ed. 612; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65.

A bill for an injunction to restrain the collection of a tax assessed by a city against one as a resident of that city on account of his personal property, on the ground that he did not reside in the city in the year for which the tax was levied against him, nor for some years before or since, and that the assessment was therefore void, cannot be maintained. *Milwaukee v. Koeffler*, 116 U. S. 219, 29 L. Ed. 612, following *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65.

"If there is no personal liability for these taxes—a point which we do not feel called upon to decide—it is perfectly clear that if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law, and there is no necessity to resort to a court of equity for relief. It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and if its theory of the controversy is correct no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction, but leave the party to his defense at law. Revised Statutes of United States, § 723; *Insurance Co. v. Bailey*, 13 Wall. 616, 623, 20 L. Ed. 501; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174; *Deweese v. Reinhard*, 165 U. S. 386, 41 L. Ed. 757." *Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 633, 49 L. Ed. 614.

Assessment in wrong name.—The fact that an assessment was technically in the wrong name, because assessed in the name of an estate after the administration had been finally closed and the property put into the possession of the heirs, would not be an error justifying equitable relief by injunction against the collection of the tax. *New Orleans v. Stempel*, 175 U. S. 309, 311, 44 L. Ed. 174.

50. Illegality not apparent on record.—*Ogden City v. Armstrong*, 168 U. S. 224, 238, 42 L. Ed. 444.

51. Mere overvaluation insufficient.—*Fargo v. Hart*, 193 U. S. 490, 502, 48 L. Ed. 761; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903.

Where the law requires property to be assessed at its cash value, and, confessedly, this plaintiff's property was assessed at fifteen per cent below that value, surely upon the mere fact that other property happened to be assessed at thirty per cent below the value, when this did not come from any design or systematic effort on the part of the county officials, and when the plaintiff has had a hearing as to the correct valuation, on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction, or have that decision of the board of equalization reviewed in this collateral way. *Albuquerque Bank v. Perea*, 147 U. S. 87, 89, 37 L. Ed. 91.

52. Pelton v. National Bank, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. Na-*

principle, is shown,⁵³ and an assessment made upon unconstitutional principles, may be enjoined under certain circumstances.⁵⁴

Injunction against Tax Laid in Violation of Contract.—Violation of a

tional Bank, 101 U. S. 153, 25 L. Ed. 903, in which cases an injunction was granted against the systematic and intentional valuation of national bank shares higher than other moneyed capital, although the state law provided for equality. Followed in *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052. See, also, *Stanley v. Supervisors*, 121 U. S. 535, 30 L. Ed. 1000, followed in *Williams v. Supervisors*, 122 U. S. 154, 30 L. Ed. 1088, and cited in *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 558, 44 L. Ed. 583.

When the overvaluation of property has arisen from the adoption of a rule of appraisalment which conflicts with a constitutional or statutory direction, and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. That decision was rendered upon a disregard by the assessing officers of a rule prescribed by the constitution of the state, but the same principle must apply when their action in assessing the shares of national banks is in disregard of the act of congress. *Stanley v. Supervisors*, 121 U. S. 535, 550, 30 L. Ed. 1000. And see *Norwood v. Baker*, 172 U. S. 269, 292, 43 L. Ed. 443; *Virginia Coupon Cases*, 114 U. 1247; *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 75, 49 L. Ed. 669; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 526, 28 L. Ed. 1098; *Boyer v. Boyer*, 113 U. S. 689, 28 L. Ed. 1089.

And where the agreed statement of facts admits that the assessment in question is illustrative of the action of the assessors in other similar cases, it must be taken to establish a systematic and intentional overvaluation. *San Francisco Nat. Bank v. Dodge*, 197 U. S. 70, 86, 49 L. Ed. 669.

"An apparent exception to the universality of the rule (that neither mere illegality, injustice nor irregularity of a tax is ground for an injunction) is admitted in *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Pelton v. National Bank*, 101 U. S. 143, 25 L. Ed. 901, and *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. It is held in these cases that when the inequality of valuation is the result of a statute of the state designed to discriminate injuriously against any class of persons or any species of property, a court of equity

will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief." *National Bank v. Kimball*, 103 U. S. 732, 735, 26 L. Ed. 469. See *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247.

Injunction against tax on bank shares without deduction of debts.—See ante, "Deduction of Indebtedness," IV, C, 3, a, (1), (c), bb, (bb), fff, (bbb).

53. *Chicago, etc., R. Co. v. Babcock*, 204 U. S. 585, 596, 51 L. Ed. 636. See ante, "Corrections and Additions," VI, F.

54. **Assessment upon unconstitutional principles.**—*Fargo v. Hart*, 193 U. S. 490, 502, 48 L. Ed. 761; *Wilson v. Lambert*, 168 U. S. 611, 42 L. Ed. 599. See *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 39 L. Ed. 759; *Memphis, etc., R. Co. v. Railroad Comm'rs*, 112 U. S. 609, 28 L. Ed. 837; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 695, 27 L. Ed. 584; *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, 48 L. Ed. 180; *Adams Express Co. v. Ohio*, 165 U. S. 194, 41 L. Ed. 683.

"It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of the taxes imposed in contravention of the Constitution of the United States. *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Virginia Coupon Cases*, 114 U. S. 269, 311, 29 L. Ed. 185; *In re Ayers*, 123 U. S. 443, 31 L. Ed. 216; *Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273. Whether or not the particular case is one calling for that measure of relief, it is for the circuit court to determine in the first instance, and its action cannot be treated as a nullity." *In re Tyler*, 149 U. S. 164, 188, 37 L. Ed. 689. See, also, *Virginia Coupon Cases*, 114 U. S. 269, 270, 282, 29 L. Ed. 185.

"It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098; *Pittsburgh, etc., Railway v. Board of Public Works*, 172 U. S. 32, 43 L. Ed. 354." *Fargo v. Hart*, 193 U. S. 490, 503, 48 L. Ed. 761.

Although statute not void on face, but only working a violation of a constitutional right by its operation in the particular case. *Virginia Coupon Cases*, 114 U. S. 269, 270, 295, 29 L. Ed. 185.

contract with the state is an admitted ground for injunction against taxes.^{54a} But there must be no adequate remedy at law, or some other recognized ground of equity jurisdiction must exist, such as multiplicity of suits, irreparable injury, etc.;⁵⁵ although the mere allegation of want of adequate remedy at law, without averring or proving facts supporting it, is a mere matter of inference, and insufficient to confer jurisdiction.⁵⁶ And the jurisdiction exists inde-

54a. "The remedy to restrain by injunction taxes levied upon railroads, in alleged violation of a contract with the state, was administered in *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189, and in numerous other similar cases, where it has been denied, the jurisdiction to grant the relief if the facts had warranted it, has been assumed without question." *Virginia Coupon Cases*, 114 U. S. 269, 296, 311, 316, 29 L. Ed. 185. And see *Litchfield v. County of Webster*, 101 U. S. 773, 25 L. Ed. 925; *Memphis, etc., R. Co. v. Railroad Comm'rs*, 112 U. S. 609, 28 L. Ed. 837; *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465, 28 L. Ed. 1055; *Chesapeake, etc., R. Co. v. Miller*, 114 U. S. 176, 29 L. Ed. 121.

"Power is vested in the circuit court to enjoin the collection of a municipal tax, where it appears that the assessors acted without authority of law, and in violation of a special contract between the municipality imposing the tax and the taxpayer." *County of Calhoun v. American Emigrant Co.*, 93 U. S. 124, 23 L. Ed. 826.

Against distraint.—The remedy by injunction to prevent the collection of taxes by distraint upon the rolling stock, machinery, cars and engines, and other property of railroad corporations, after a tender of payment in tax-receivable coupons, is sanctioned by repeated decisions of this court, and has become common and unquestioned practice, in similar cases, where exemptions have been claimed in virtue of the constitution of the United States; the ground of the jurisdiction being that there is no adequate remedy at law. *Virginia Coupon Cases*, 114 U. S. 269, 311, 29 L. Ed. 185.

Illegal tax on national banks.—In the case of national banks, the assessment and collection of taxes illegally assessed under the authority of state laws, in violation of acts of congress, are habitually restrained by the primitive remedy of injunction. *Virginia Coupon Cases*, 114 U. S. 269, 311, 316, 29 L. Ed. 185; *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247; *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Pelton v. National Bank*, 101 U. S. 143, 25 L. Ed. 901; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. See, also, post, "Parties' Plaintiff," VI, H, 2.

55. *Cruickshank v. Bidwell*, 176 U. S. 73, 80, 44 L. Ed. 377; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 43 L. Ed. 354; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 684, 47 L. Ed.

651. See *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Shelton v. Platt*, 139 U. S. 591, 596, 598, 35 L. Ed. 273; *Allen v. Pullman, etc., Co.*, 139 U. S. 658, 661, 35 L. Ed. 303; *Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 272, 44 L. Ed. 159. See, also, post, "Exhaustion of Other Remedies," VI, H, 1, b.

Inadequacy of other remedy and multiplicity of suits.—The inadequacy of any other remedy for the party seeking such relief, and the prevention of a multiplicity of suits, furnishes ground for equity jurisdiction to enjoin collection of a tax. *Cummings v. National Bank*, 101 U. S. 153, 156, 25 L. Ed. 903; *Ogden City v. Armstrong*, 168 U. S. 224, 237, 42 L. Ed. 444.

So where collection is threatened by distraint, and there is no adequate remedy at law. *Virginia Coupon Cases*, 114 U. S. 269, 311, 29 L. Ed. 185.

Multiplicity of suits and cloud on title.—"*In Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098, in which the Union Pacific Railway Company obtained an injunction against the levy of a tax by the city of Cheyenne, the facts were peculiar. The plaintiff, owning many lots of land in that city, had paid a tax assessed on all its property by a board of equalization under a general statute of the territory of Wyoming, and had also been taxed by the city of Cheyenne under provisions of its charter which had been repealed by that statute; and the bill showed, as stated in the opinion, that the levy complained of 'would involve the plaintiff in a multiplicity of suits as to the title of lots laid out and being sold; would prevent their sale; and would cloud the title to all its real estate.'" *Pittsburgh, etc., Railway v. Board of Public Works*, 172 U. S. 32, 40, 43 L. Ed. 354; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 526, 527, 28 L. Ed. 1098.

But where the remedy provided by the state is in truth but one proceeding, although consisting of several steps looking to corrections on appeal or recovery back after payment, there is no ground to invoke federal equity jurisdiction upon an alleged prevention of a multiplicity of suits. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 689, 47 L. Ed. 651.

56. Allegation of legal conclusion insufficient.—*Shelton v. Platt*, 139 U. S. 591, 596, 35 L. Ed. 273.

Although there is a general averment that to enforce the tax by distraint and sale of complainant's property would result in irreparable injury, but there is no

pendently of statute, although it may be expressly provided for by statute.⁵⁷

Power of Federal Court to Enjoin State Officers.—See the titles INJUNCTIONS, vol. 6, p. 1028; PUBLIC OFFICERS, vol. 10, p. 395; STATES, ante, p. 33.

b. *Exhaustion of Other Remedies.*—But where the complainant, upon his own showing, has not availed himself of the adequate remedies provided by the statute of the state for the review of the assessment complained of, he is not entitled to relief in equity, no fraud being alleged, or that there was any attempt to interfere with plaintiff's real estate.⁵⁸ But the remedy at law must be adequate, as will not be the case where the person illegally taxed would suffer irremediable damage, or be subjected to vexatious litigation, if com-

fact stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute, no such irreparable injury can be inferred. Some averment of specific facts must be made from which the court can see that irreparable injury would be a natural and probable result. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 690, 47 L. Ed. 651.

57. *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *Norwood v. Baker*, 172 U. S. 269, 292, 43 L. Ed. 442. See, also, *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 526, 28 L. Ed. 1098.

"Preventive remedies, however, are accorded in some of the states, and in cases brought here by writ of error under the twenty-fifth section of the judiciary act, if no objection was taken in the court below to the form of the remedy employed, and none is taken in this court, it may safely be assumed that the proceeding adopted was regarded in the court below as an appropriate remedy for the alleged grievance." *State Tonnage Tax Cases*, 12 Wall. 204, 223, 20 L. Ed. 370.

The Louisiana law recognizes the right to an injunction against the collection of an alleged wrongful tax, and regulates the proceedings when issued to stay the collection of taxes. It declares that they shall be treated by the courts as preferred cases, and imposes a double tax upon a dissolution of the injunction. *McMillen v. Anderson*, 95 U. S. 37, 42, 24 L. Ed. 335.

58. *Exhaustion of other remedies.*—*Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 47, 43 L. Ed. 354; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 685, 47 L. Ed. 651, where the complainant had not pursued the course of appeal provided for by the state law, or the procedure by petition for repayment where he lost the appeal and paid the tax. *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 661, 35 L. Ed. 303; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 29 L. Ed. 785; *Albuquerque Bank v. Perea*, 147 U. S. 87, 37 L. Ed. 91, where the principle was applied to a bill by a

national bank in behalf of its stockholders.

Where there is a plain and adequate remedy at law, after paying the tax, to recover it back, in an action or proceeding where the question as to the exemption of this kind of property from taxation can be raised, and if not admitted by the state court, it can be reviewed here on writ of error, and it does not appear that the statute providing it has been repealed, though so alleged, a bill in equity for an injunction will not lie. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 690, 47 L. Ed. 651; *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273.

When a state statute provides a remedy for the recovery of a special tax by a party aggrieved by same, which remedy shall be exclusive, held that this statute applies to cases where there are only errors, irregularities, overvaluations or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities have no application. *Ogden City v. Armstrong*, 168 U. S. 224, 240, 42 L. Ed. 444.

"In *Dows v. Chicago*, 11 Wall. 108, 112, 20 L. Ed. 65, which has been frequently cited with approval, it was said by Mr. Justice Field, speaking for the court: 'The party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. If the tax was illegal, the plaintiff protesting against its enforcement might have had his action, after it was paid, against the officer or the city to recover back the money, or he might have prosecuted either for his damages. No irreparable injury would have followed to him from its collection. Nor would he have been compelled to resort to a multiplicity of suits to determine his rights.'" *Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 272, 44 L. Ed. 159. See, also, *State Tonnage Tax Cases*, 12 Wall. 204,

pelled to resort to his legal remedy alone.⁵⁹

c. *Allowed Only in Extreme Cases.*—And on principle, the interference of the courts of the United States by injunction with the collection of state taxes, or with state administration of matters of internal policy, can only be justified in a plain case not otherwise remediable.⁶⁰

d. *Limitation by Statute.*—**Limitation by State Statute.**—A state cannot by statute limit this jurisdiction so as to bind the courts of the United States.⁶¹ But if such state statute, forbidding injunctions against taxes, provides another and effective remedy at law, that remedy should be held exclusive, and a bar to resort to a federal equity court.⁶²

Limitation by Federal Statute.—By the act of 1866, § 19, as amended, afterwards made § 3224, Rev. Stat., it was provided by congress that “no suit for the purpose of restraining the assessment or collection of any tax shall

223, 20 L. Ed. 370; *Shelton v. Platt*, 139 U. S. 591, 594, 35 L. Ed. 273.

59. *Ogden City v. Armstrong*, 168 U. S. 224, 239, 42 L. Ed. 444; *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 525, 28 L. Ed. 1098; *Lyon v. Alley*, 130 U. S. 177, 187, 32 L. Ed. 899.

“For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer’s lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which a sale could be made would be a grievance which would entitle him to go into a court of equity for relief.” *Ogden City v. Armstrong*, 168 U. S. 224, 239, 42 L. Ed. 444; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 525, 28 L. Ed. 1098; *Lyon v. Alley*, 130 U. S. 177, 187, 32 L. Ed. 899.

“Undoubtedly, for merely irregular assessments, where the authorities have jurisdiction to act, the statutory remedy is also the exclusive remedy. But when the statute, as in this case, leaves open to judicial inquiry all questions of a jurisdictional character, it is well settled that a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.” *Ogden City v. Armstrong*, 168 U. S. 224, 239, 42 L. Ed. 444. See ante, “Corrections and Additions,” VI, F.

60. **Allowed only in extreme cases.**—*Arkansas Bldg., etc., Ass’n v. Madden*, 175 U. S. 269, 273, 44 L. Ed. 159; *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273; *Dows v. Chicago*, 11 Wall. 108, 110, 20 L. Ed. 65; *Hunnewell v. Cass County*, 22 Wall. 464, 22 L. Ed. 752, applying the rule to a bill for an injunction against county officers on the ground that the lands taxed were still public lands, the costs of selecting and conveying not having been paid.

The court said it was the more inclined not to interfere in this case by the extraordinary remedy of injunction, because it is shown that as to all these lands, not

only had all dues to the United States been paid before the final action of the state board of equalization, but patents had issued for all of them before this suit was brought. At the time, therefore, of filing this bill to prevent the collection of taxes on account of the interest of the United States in the lands on which they were levied, the United States had no interest in the lands which would forbid their being taxed; nor is it clear that they had any when the lands were assessed. The costs of surveying were paid before even the precinct assessors assessed these lands, as they then thought they had a right to do, and it is extremely uncertain whether any costs of selecting or conveying the lands within the meaning of the act of congress existed or were unpaid. *Hunnewell v. Cass County*, 22 Wall. 464, 478, 22 L. Ed. 752.

Burden of proof—Federal question.—On a bill for injunction against the collection of back taxes, where the state court has held that the burden rested upon the plaintiff to show the invalidity of the tax, even if erroneous, this decision is not one of a federal nature. It had the chance, at all events, to show the invalidity of the tax in whole or in part. *Security Trust, etc., Co. v. Lexington*, 203 U. S. 323, 334, 51 L. Ed. 204.

61. **Limitation by state statute.**—*Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 46, 43 L. Ed. 354; *In re Tyler*, 149 U. S. 164, 37 L. Ed. 689. See post, “Defenses to Collection,” VII, J.

62. *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273.

It is similar to the act of congress forbidding suit for the purpose of restraining the assessment or collection of taxes under the internal revenue laws, in respect to which the federal court held that the remedy by suit to recover back the tax after payment, provided for by the statute, was exclusive. *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273, citing *Snyder v. Marks*, 109 U. S. 189, 27 L. Ed. 901.

be maintained in any court."⁶³ It was intended to apply alone to taxes levied by the United States.⁶⁴

e. Payment of Tax as Affecting Right to Injunction.—But a party cannot have an injunction as to taxes claimed to be illegal, where he has paid same, although under protest. The equitable ground for the relief prayed ceased with the payment of the taxes, and he is left to his remedy at law to recover back what he has paid.⁶⁵

f. Necessity for Payment of Taxes Admittedly Due.—(1) *General Rule.*—As a general rule, the owner of taxable property, who seeks to enjoin the collection of a tax thereon, which he alleges to be in excess of what is lawful, must first pay or tender so much thereof as is justly due.⁶⁶ And the bill must

63. Limitation by federal statute.—*Snyder v. Marks*, 109 U. S. 189, 192, 27 L. Ed. 901; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 38, 43 L. Ed. 354; *Hornthall v. The Collector*, 9 Wall. 560, 19 L. Ed. 560. See, also, *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 39 L. Ed. 759.

This statute was enacted in 1867, that there might be no misunderstanding of the universality of the principle that the federal government has provided a complete system of corrective justice as to all taxes imposed by it, founded upon the idea of appeals within the executive department, or recovery back after payment, and that there is no place in this system for an application to a court of justice until after the money is paid. *State Railroad Tax Cases*, 92 U. S. 575, 613, 23 L. Ed. 663; *Pittsburg, etc., Railway v. Board of Public Works*, 172 U. S. 32, 38, 43 L. Ed. 354. See *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125.

In the Revised Statutes the amendment of and addition to § 19 of the act of 1866 is made a section by itself, § 3224, separated from that of which it is an amendment and to which it is an addition, and reads thus: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The word "any" was inserted by the revisers. This enactment in § 3224 has a no more restricted meaning than it had when, after the act of 1867, it formed a part of § 19 of the act of 1866, by being added thereto. *Snyder v. Marks*, 109 U. S. 189, 192, 27 L. Ed. 901.

"In *Cheatham v. United States*, 92 U. S. 85, 88, 23 L. Ed. 561, and again in *State Railroad Tax Cases*, 92 U. S. 575, 613, 23 L. Ed. 663, it was said by this court, that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its

revenues. In the exercise of that right, it declares, by § 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid." *Snyder v. Marks*, 109 U. S. 189, 193, 27 L. Ed. 901. See, also, *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125; dissenting opinion in *Pollock v. Farmers' Loan, etc., Co.*, 157 U. S. 429, 609, 39 L. Ed. 759; *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447, 452, 47 L. Ed. 253; *Barnes v. The Railroads*, 17 Wall. 294, 310, 21 L. Ed. 544.

There is no force in the suggestion that § 3224, in speaking of a "tax," means only a legal tax; and that an illegal tax is not a tax, and so does not fall within the inhibition of the statute, and the collection of it may be restrained. *Snyder v. Marks*, 109 U. S. 189, 192, 27 L. Ed. 901.

Where the sole object of the suit is to restrain the collection of a tax which purports to have been assessed under the internal revenue laws, a decree adjudging the tax to be void as against the appellant is sought for only as preliminary to relief by injunction, and would be futile for any purpose of this suit unless followed by an injunction. *Snyder v. Marks*, 109 U. S. 189, 191, 27 L. Ed. 901.

64. State Railroad Tax Cases, 92 U. S. 575, 613, 23 L. Ed. 663; *Pittsburgh, etc., Railway v. Board of Public Works*, 172 U. S. 32, 38, 43 L. Ed. 354. See, also, *Cheatham v. United States*, 92 U. S. 85, 88, 23 L. Ed. 561; *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125. See post, "Power of State to Regulate," VII, A, 1. See, also, the title REVENUE LAWS, vol. 10, p. 975.

65. Payment of tax as affecting right to injunction.—*Singer Mfg. Co. v. Wright*, 141 U. S. 696, 700, 35 L. Ed. 906. See post, "Recovery Back," IX, B.

66. National Bank v. Kimball, 103 U. S. 732, 26 L. Ed. 469; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 527, 28 L. Ed. 1098; *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 272, 38 L. Ed. 706; *Norwood v. Baker*, 172 U. S. 269, 292, 43 L. Ed. 443; *People's Nat. Bank v.*

so aver.⁶⁷ For no injunction, preliminary or final, can be granted to stay collection of taxes until it is shown that all the taxes conceded to be due, or which the court can see from the face of the bill ought to be paid, or which can be shown to be due by affidavits, have been paid or tendered without demanding a receipt in full.⁶⁸ It is not sufficient merely to allege willingness to pay whatever may be found due.⁶⁹

(2) *Exception to Rule.*—The general rule requiring payment or tender of the amount actually due as a condition to equitable relief against the illegal portion of the tax, has no application to a case where the entire tax fails by reason of an illegal assessment. And in such case an injunction is proper without payment or tender of any portion of the tax, since it is impossible for the court to determine what portion is actually due, there being no valid or legal tax assessed.⁷⁰

(3) *Tender.*—If the proper officer refuses to receive a part of the tax, it

Marye, 191 U. S. 272, 282, 48 L. Ed. 180. See, also, *United States Trust Co. v. New Mexico*, 183 U. S. 535, 544, 46 L. Ed. 315.

"Not only is it the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality, but also, as appears by its legislation, congress has attempted to enforce that rule and to require payment of a tax by the party charged therewith before inquiry as to its validity will be permitted. See *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447, 47 L. Ed. 253. Now before a court of equity will in any way help a party to thwart this intent of congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury. No considerations of mere convenience are sufficient." *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 464, 47 L. Ed. 256, followed in *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261.

Illegal tax on national bank shares.—Where the tax upon national bank shares is averred to be too great, because certain deductions provided by law were not made, or because there was no notice given of the assessment, and hence the taxpayer never had an opportunity to be heard, if, after hearing, there would appear something to be equitably due from the taxpayer, he should pay it before seeking relief from the court. *People's Nat. Bank v. Marye*, 191 U. S. 272, 284, 48 L. Ed. 180; *Supervisors v. Stanley*, 105 U. S. 305, 315, 26 L. Ed. 1044; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Pelton v. National Bank*, 101 U. S. 143, 25 L. Ed. 901; *Albuquerque Bank v. Perea*, 147 U. S. 87, 37 L. Ed. 91, a case of alleged excessive valuation.

⁶⁷. *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 38 L. Ed. 706.

⁶⁸. *Northern Pac. R. Co. v. Clark*, 153 U. S. 252, 272, 38 L. Ed. 706; *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. Ed. 663; *People's Nat. Bank v. Marye*, 191 U. S. 272, 280, 48 L. Ed. 180.

The mere fact that a tax was void for

some particular reason was not ground for the interposition of a court of equity by injunction, where it could be seen there was an equitable obligation due from the taxpayer to pay a certain conceded amount, or an amount which could easily be ascertained, and which had not been paid. *People's Nat. Bank v. Marye*, 191 U. S. 272, 284, 48 L. Ed. 180.

⁶⁹. *Albuquerque Bank v. Perea*, 147 U. S. 87, 90, 37 L. Ed. 91; *State Railroad Tax Cases*, 92 U. S. 575, 616, 23 L. Ed. 663.

⁷⁰. *Norwood v. Baker*, 172 U. S. 269, 292, 43 L. Ed. 443.

"If there was no right to assess the particular thing at all, * * * an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction." *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, 48 L. Ed. 180. See, also, *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 30 L. Ed. 118; *California v. Central Pac. R. Co.*, 127 U. S. 1, 32 L. Ed. 150; *Central Pac. R. Co. v. California*, 162 U. S. 91, 112, 40 L. Ed. 903." *Fargo v. Hart*, 193 U. S. 490, 503, 48 L. Ed. 761.

But the bill cannot evade this rule by alleging that the tax is wholly void, and, therefore, none of it ought to be paid, and that by reason of the absence of all uniformity of values, it is impossible for any person to compute or ascertain what the stockholders of the complainant bank ought to pay on the shares of the bank. They ought at least to pay taxes the same as other property. *National Bank v. Kimball*, 103 U. S. 732, 733, 26 L. Ed. 469.

"Where, however, there is a statute which provides for an assessment and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid for want of a notice to the taxpayer, or some other kindred objection, the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property before he can ask the aid of the chancellor to enjoin the collection of the bal-

must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.⁷¹ But this rule does not apply where the period for which the amount is really due has been eliminated from the effect of the injunction and decree.⁷²

g. *Relief against Excessive Rate of Interest on Taxes in Arrear.*—This has been granted.⁷³

h. *Transmission of Assessment for Collection.*—The transmission, of an unconstitutional and void assessment by the state board of tax commissioners, to the auditors of the several counties by the state auditor, may be enjoined.⁷⁴

2. PARTIES PLAINTIFF.—If the party primarily and directly charged with a tax is unable to make a case for the interference of a court of equity, no one subordinately and indirectly affected by the tax should be given relief unless he shows not merely irreparable injury to the tax debtor as well as to himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor.⁷⁵ The jurisdiction of a court of equity at the instance of a stockholder to prevent the misapplication of corporate funds by illegal payment of a tax, is well established.⁷⁶ And where a shareholder made the requisite affidavit and the proper demand for deduction of his debts as provided for by law, and his affidavit shows that no assessment should be made on his shares, and he has not yet paid the money, he is entitled to relief by injunction, equity having jurisdiction.⁷⁷ A national bank

ance. This is the equitable rule, and it is good morals as well." *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, 48 L. Ed. 180.

Because an assessment violated the act of congress in being at a greater rate than is assessed upon other moneyed capital, it is not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, 48 L. Ed. 180.

71. *Tender.*—*Albuquerque Bank v. Perea*, 147 U. S. 87, 90, 37 L. Ed. 91; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 293, 50 L. Ed. 477.

72. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 293, 50 L. Ed. 477.

73. In *Litchfield v. County of Webster*, 101 U. S. 773, 779, 25 L. Ed. 925, it was held that a court of equity might relieve against an excessive rate of interest on taxes in arrear, which was really in the nature of a penalty, and which the state could not fairly and equitably demand, having itself claimed title to the property taxed. *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 526, 28 L. Ed. 1098. See, also, *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928.

74. *Fargo v. Hart*, 193 U. S. 490, 48 L. Ed. 761.

75. *Parties plaintiff.*—*Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 464, 47 L. Ed. 256, followed in *Stewart v. Washington, etc.*, *Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261.

"An injunction cannot be granted to private individuals to avert the sale for taxes of the property of others, whether exempt from taxation or not." *Northern*

Pac. R. Co. v. Patterson, 154 U. S. 130, 134, 38 L. Ed. 934.

76. As in *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury. *Pollock v. Farmers' Loan etc., Co.*, 157 U. S. 429, 554, 39 L. Ed. 759, *White and Harlan, JJ.*, dissenting on ground that this would be doing by indirection what is forbidden by § 3224, i. e., enjoining a tax. See, also, *Virginia Coupon Cases*, 114 U. S. 269, 311, 314, 29 L. Ed. 185.

In *Corbus v. Alaska Treadwell Gold Min. Co.*, 187 U. S. 455, 47 L. Ed. 256, brought by a stockholder to restrain a corporation from paying certain taxes, in which the bill did not show where the directors reside and does not contain any averment of an application to the directors, or to the president and treasurer, to take action to relieve from the burden of the taxes, the bill was properly dismissed. *Stewart v. Washington, etc., Steamship Co.*, 187 U. S. 466, 47 L. Ed. 261. See the title STOCK AND STOCK-HOLDERS, ante, p. 229, et seq.

77. *Hills v. Exchange Bank*, 105 U. S. 319, 321, 26 L. Ed. 1052; *Supervisors v. Stanley*, 105 U. S. 305, 315, 26 L. Ed. 1044.

But where, in a suit by the bank, it is reasonably certain that such affidavits and demands of the other stockholders for a deduction from the assessed value of their respective shares, of their debts, would be disregarded, in view of the fixed

may maintain such a suit on behalf of its stockholders.⁷⁸

3. **PARTIES DEFENDANT.—Public Officers.**—In a suit to invalidate and enjoin a tax voted by a township in aid of a railroad, the township trustees are not nominal parties and their interest is not identical with that of plaintiffs. They are sued in regard to their official position, to restrain them in the threatened exercise of their official authority, to the prejudice of plaintiffs, and are necessary parties, and so of the county treasurer whose duty it was to pay out the money.⁷⁹

Corporation.—And the corporation was a necessary party as well.⁸⁰

Suit to Enjoin Illegal Tax on Bank Shares—Directors Proper Parties.—The directors are proper parties to such a suit by a stockholder, where they have refused to take action.⁸¹

4. **RES JUDICATA.**—See ante, "Application of Doctrine of Res Judicata," IV, A, 5.

VII. Collection of Taxes.

A. General Principles—1. **POWER OF STATE TO REGULATE.**—Possessing, as the states do, the power to tax for the support of their own governments, it follows that they may enact reasonable regulations to provide for the collection of the taxes levied for that purpose, not inconsistent with the power of congress to regulate commerce, nor repugnant to the laws passed by congress upon the same subject. Reasonable regulations for the collection of such taxes may be passed by the states, whether the property taxed belongs to residents or nonresidents.⁸² And before proceedings for the collection of taxes sanctioned by the supreme court of a state are stricken down in the federal

purpose of the assessors to reject every such deduction, such affidavits and demands are waived, and the pleadings may be amended to allow each stockholder to show the amount of the deduction to which he is entitled. *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052.

78. *Hills v. Exchange Bank*, 105 U. S. 319, 26 L. Ed. 1052; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Pelton v. National Bank*, 101 U. S. 143, 25 L. Ed. 901.

Right of national bank to injunctive relief against the collection of taxes assessed upon the shares of its stock without allowing the deduction therefrom of the indebtedness of such holders, maintained. *Lander v. Mercantile Bank*, 186 U. S. 458, 46 L. Ed. 1247. See, also, the titles **BANKS AND BANKING**, vol. 3, p. 98; **STOCK AND STOCKHOLDERS**, ante, p. 229, et seq.

79. **Parties.**—*Sully v. Drennan*, 113 U. S. 287, 291, 28 L. Ed. 1007.

Where it was sought to restrain the collection of taxes already levied, and any further levies by the county judge, and also a decree adjudging the invalidity of the bonds, the sheriff, who was about to enforce the collection, and the county judge, were necessary parties to the bill as framed, as were the bondholders, whose interests were directly affected. *Brown v. Trousdale*, 138 U. S. 389, 394, 34 L. Ed. 987.

Suit against state officers to enjoin tax as suit against state.—See the title

COURTS, vol. 4, pp. 906, 1016; **STATES**, ante, pp. 49, 51, 52, 53, 54.

80. *Sully v. Drennan*, 113 U. S. 287, 291, 28 L. Ed. 1007.

It is especially so in equity, where the matter set up to defeat the tax, as in this case, was the failure of the company to comply with the conditions of the vote, and its false and fraudulent representations by which the vote was secured. In such a suit the company has a right to defend against these allegations, and the plaintiffs have a right that the company shall be bound by the judgment in the case. *Sully v. Drennan*, 113 U. S. 287, 291, 28 L. Ed. 1007. See the title **STOCK AND STOCKHOLDERS**, ante, p. 236.

81. *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401. See the title **STOCK AND STOCKHOLDERS**, ante, p. 236.

82. **Power of state to regulate.**—*Ward v. Maryland*, 12 Wall. 418, 428, 20 L. Ed. 449; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 281, 15 L. Ed. 372; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 554, 31 L. Ed. 790; *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 331, 39 L. Ed. 719; *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 309, 41 L. Ed. 725; *Ballard v. Hunter*, 204 U. S. 241, 257, 51 L. Ed. 461.

"The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collect-

supreme court it must clearly appear that some one of the fundamental guarantees of right contained in the federal constitution has been invaded,⁸³ for there exists in the courts, state and national, no general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation.⁸⁴

Variations in Mode of Collection.—The necessity of classifying the subjects of taxation in order to reach uniform and just results, as far as possible, is not denied; and it is equally true as to the particular means taken to enforce the collection of taxes, one rule may be adopted in respect of the admitted use of one kind of property and another rule in respect of the admitted use of another, in order that all may be compelled to contribute their proper share to the burdens of government;⁸⁵ even though the constitution requires taxation to be uniform, for this does not require uniformity in the manner of collection, only in assessment.⁸⁶ And the same principle applies to all governments, and of course to the United States, and the remedies provided for aggrieved individuals are as a rule exclusive.⁸⁷

Requiring Payment of Taxes as Condition to Suit on Note.—See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 870.

2. **DUE PROCESS OF LAW.**—See the title **DUE PROCESS OF LAW**, vol. 5, pp. 625, 631, et seq. Summary remedies for the collection of taxes are necessary and

ing and disbursing that revenue, unless such means should be forbidden in some other part of the constitution." *King v. Mullins*, 171 U. S. 404, 430, 43 L. Ed. 214; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 281, 15 L. Ed. 372; *United States v. Snyder*, 149 U. S. 210, 215, 37 L. Ed. 705; *Nicol v. Ames*, 173 U. S. 509, 524, 43 L. Ed. 786; *Leigh v. Green*, 193 U. S. 79, 87, 48 L. Ed. 623; *New Jersey v. Anderson*, 203 U. S. 483, 493, 51 L. Ed. 284.

The fact that a state has brought about an administration of land to enforce the collection of delinquent taxes thereon, and has bought in the land by her officer, does not prevent the state from subsequently waiving her title so acquired and enacting that such land be again proceeded against under another statute for the collection of delinquent taxes by judicial proceedings, including therein costs and interest. *League v. Texas*, 184 U. S. 156, 46 L. Ed. 478.

Retrospective statute providing for the collection of back taxes.—See the title **CONSTITUTIONAL LAW**, vol. 4, pp. 437, 438, 439.

Delinquent taxpayer has no vested right in particular remedy for collecting back taxes.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 443.

Imposition of duty on foreign corporation as violation of contract.—*New York, etc., R. v. Pennsylvania*, 153 U. S. 628, 642, 38 L. Ed. 846, followed in *Delaware, etc., Canal Co. v. Pennsylvania*, 156 U. S. 200, 39 L. Ed. 396. See the title **FOREIGN CORPORATIONS**, vol. 5, p. 326.

83. *Bellingham Bay, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 320, 43 L. Ed. 460; *Earnshaw v. United States*, 146 U. S. 60, 69, 36 L. Ed. 887.

84. *Cheatham v. United States*, 92 U.

S. 85, 89, 23 L. Ed. 561; *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65.

Consistency of state statute with state constitution.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 1.

85. **Variations in mode of collection.**—*Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 309, 41 L. Ed. 725. See the title **CONSTITUTIONAL LAW**, vol. 4, pp. 395, 396.

Adoption of new remedies for collection of taxes by state.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 443.

86. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. Ed. 189, applying principle to tax on bank shares at place other than owner's residence.

87. *United States v. Snyder*, 149 U. S. 210, 215, 37 L. Ed. 705; *King v. Mullins*, 171 U. S. 404, 430, 43 L. Ed. 214; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 281, 15 L. Ed. 372; *Nicol v. Ames*, 173 U. S. 509, 524, 43 L. Ed. 786; *Cheatham v. United States*, 92 U. S. 85, 88, 23 L. Ed. 561; *State Railroad Tax Cases*, 92 U. S. 575, 613, 23 L. Ed. 663; *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125. See ante, "Injunction against Taxes," VI. H. See, also, the title **REVENUE LAWS**, vol. 10, p. 976, et seq.

Although the state may have prescribed a special form of remedy, the United States are not bound to pursue it, as they are entirely independent. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80; *United States v. Snyder*, 149 U. S. 210, 214, 37 L. Ed. 705.

Not subject to recording laws of states.—The tax system of the United States is not subject to the recording laws of the states. *United States v. Snyder*, 149 U. S. 210, 213, 37 L. Ed. 705.

Power to exact penalties and forfeit-

lawful, apart from any exercise of the judicial power or the modes of procedure which belong to courts of justice.⁸⁸

3. **JURISDICTION.—Jurisdiction of Territorial Courts.**—The territorial court, as such, had jurisdiction to enforce the territorial law on the subject of the collection of taxes.⁸⁹

4. **ASSIGNMENTS.**—An assignment of a tax voted to aid a railroad did not carry that right to the assignee discharged of the equities between the company and the taxpayers, as if they had been negotiable bonds, if it conveys it at all.⁹⁰

5. **UNDER REPEALED STATUTE.**—Levied only by authority of the legislature, taxes can be altered, postponed, or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. There are some exceptions, where the tax provided constitutes the consideration of contracts or is so connected with a contract, as to constitute the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract.⁹¹

B. Collecting Officers—1. **AUTHORITY AND POWERS.—In General.**—The force and effect to be given to any act of the taxing officers, and the results to follow from the nonpayment of taxes, are subjects which the state has the power to prescribe.⁹²

In Unorganized Country Attached to County.—Where unorganized country is in effect a part of the county to which it was so attached, the collection of taxes on personality of a nonresident may be enforced by the tax collector of the latter county.⁹³

Receiver of Dissolved Municipality.—See note.⁹⁴

Penalties for breach of revenue laws.—See the title **REVENUE LAWS**, vol. 10, p. 863.

Payment of tax.—See the title **REVENUE LAWS**, vol. 10, p. 978.

88. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 282, 15 L. Ed. 372; *Cheat-ham v. United States*, 92 U. S. 85, 23 L. Ed. 561; *State Railroad Tax Cases*, 92 U. S. 575, 613, 23 L. Ed. 663; *Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253; *Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443; *Webster v. Fargo*, 181 U. S. 394, 45 L. Ed. 912; *Wormley v. District of Columbia*, 181 U. S. 402, 45 L. Ed. 921; *Shumate v. Heman*, 181 U. S. 402, 45 L. Ed. 922, reaffirmed in *Schulte v. Heman*, 189 U. S. 507, 47 L. Ed. 922; *Farrell v. West Chicago Park Comm'rs*, 181 U. S. 404, 45 L. Ed. 924; *New Jersey v. Anderson*, 203 U. S. 483, 493, 51 L. Ed. 284.

Contracts for composition of taxes as due process.—See the title **DUE PROCESS OF LAW**, vol. 5, p. 591.

89. **Jurisdiction of territorial courts.**—*Maricopa, etc., R. Co. v. Arizona*, 156 U. S. 347, 352, 39 L. Ed. 447. See the title **COURTS**, vol. 4, p. 1156, et seq. See, also, post, "Jurisdiction," VII, D, 2.

90. **Assignments.**—*Sully v. Drennan*, 113 U. S. 287, 291, 28 L. Ed. 1007.

91. **Under repealed statute.**—*Meriwether v. Garrett*, 102 U. S. 472, 514, 26 L. Ed. 197.

92. **Prescription by state.**—*Bardon v.*

Land, etc., Imp. Co., 157 U. S. 327, 331, 39 L. Ed. 719.

"The state having created its bureau of taxes, is bound to see to it that its officers impart correct information to parties dealing with it and do not mislead them." *Martin v. Barbour*, 140 U. S. 634, 647, 35 L. Ed. 546.

93. *Thomas v. Gay*, 169 U. S. 264, 278, 42 L. Ed. 740.

94. **Receiver of dissolved municipal corporation.**—The receiver and backtax collector for taxing districts established in the place of municipal corporations dissolved, appointed under the authority of the Tennessee act of March 13, 1879, was a public officer, clothed with authority from the legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction could not be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the state charged with the duty of their collection, could be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments, if the bills are framed with a view to such relief. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

Commissioners for Collection of Direct Taxes—Collection Districts.—

As to direct tax on land under act of 1862, see note.⁹⁵

Duty of Federal Collector to Enforce Assessment.—See note.⁹⁶

2. LIABILITIES.—As to bonds, see the titles PUBLIC OFFICERS, vol. 10, p. 363; REVENUE LAWS, vol. 10, p. 994, et seq. See, also, ante, "Lawful Tender Equivalent to Payment for Certain Purposes," VI, C, 2, a.

a. *To Government.*—See the title REVENUE LAWS, vol. 10, p. 1001, et seq. The power of the government has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues. It may be exerted to provide a summary remedy to enforce its payment over by the collecting officers.⁹⁷

b. *To Third Parties.*—See the title EXTORTION, vol. 6, p. 214.

For Disposition of Taxes.—For his disposition of taxes collected by him, a tax collector is liable only to the government and not to third parties,⁹⁸ unless, by the action of the proper authorities, other rights have been acquired.⁹⁹

Receiver for Dissolved Corporation.—See ante, "Authority and Powers," VII, B, 1.

Liability of Officer for Failing to Levy—Nominal Damages.—See the title DAMAGES, vol. 5, p. 161.

95. *Keely v. Sanders*, 99 U. S. 441, 447, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330, construes this act as to the authority of the board of tax commissioners for a district, and, when their powers commenced. Held that their action raised a presumption of its own legality.

96. **Duty of federal collector to enforce assessment.**—*Ersine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745. See the title REVENUE LAWS, vol. 10, p. 1004.

97. *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 281, 15 L. Ed. 372. As to distress against such officers, see the title PUBLIC OFFICERS, vol. 10, p. 431.

Where a tax long past due to the United States has been paid to the collector of internal revenue, and receipted for as taxes, he and his sureties are liable therefor, although the amount so paid had not then been returned to the assessor's office or passed upon by him, nor had a sworn return of the taxpayer been delivered. It is public money. *King v. United States*, 99 U. S. 229, 25 L. Ed. 373. See the title PUBLIC OFFICERS, vol. 10, p. 393.

Failure to give bond immaterial.—The fact that the statute made it the duty of the sheriff before entering upon the duty of collecting to give a bond to the president of the board of police, with sureties to be approved by him, and by which he should bind himself to "keep safely and pay over to the order of the president of the board of police all money collected by him," and that the sheriff did not give a bond in such form at all, does not affect his obligation to pay over taxes collected as ordered by such board. *Bell v. Railroad Co.*, 4 Wall. 598, 18 L. Ed. 338.

See the title PUBLIC OFFICERS, vol. 10, p. 382.

98. **Liability of collecting officer to third parties.**—*Harshman v. Winterbottom*, 123 U. S. 215, 220, 31 L. Ed. 124.

Where a county collector of taxes and his sureties were sued on his bond for failure to pay a county warrant, such failure being alleged to be due to unauthorized payment of other warrants over which plaintiffs had preference, it was held, that the obligation of the defendants was to the state for the collection of the state taxes, and to the county for the collection of the county taxes, and there being no state taxes in the case, the county taxes were collected and paid over to the county treasury in the class of current obligations of the county, which the law recognizes as valid payment of taxes, and the county court, to whom the obligation of accounting for the taxes collected, or for failure to collect taxes, was due, has settled with the collector and accepted its own warrants issued upon the treasurer as a full and satisfactory payment and discharge of that obligation, and this formal accounting and settlement was a full defense to this action. *Harshman v. Winterbottom*, 123 U. S. 215, 220, 31 L. Ed. 124.

99. A sheriff, ex officio collector of taxes, who under the direction properly given of such county police board has collected a tax which such board was authorized by statute, upon certain conditions, to levy for the benefit of another body, a railroad company, has no right to decide whether such municipal body has laid the tax rightly or not, or to settle differences between the taxpayers, the county, and the third body. If the president of the board of police direct him

For Trespass.—Where the collector of the revenue acts under a warrant or other process from the assessor, it may well be doubted whether he can be regarded as a trespasser unless it appears that he exceeds his jurisdiction. Several cases decide that the party taxed must pay the tax and bring assumpsit to recover back the money.¹ Unless he is acting under an unconstitutional statute.²

Recovery Back of Taxes.—See post, "Recovery Back," IX, B.

Denial of Right of Action as Impairment of Contract Obligation.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 788, 862.

Detinue.—See the title DETINUE, vol. 5, p. 345.

C. Levy and Sale.—The levy of a tax warrant, like the levy of fieri facias, sequestrates the property to answer the exigency of the writ.³

D. Collection by Suit or Motion—1. AS DEPENDENT ON LAWFUL ASSESSMENT.—The question whether the taxes laid under authority of the state can be collected in this suit depends upon the question whether they were lawfully assessed.⁴

2. JURISDICTION—*a. At Law.*—The act of congress authorizes suits at law to recover unpaid taxes. 14 Stat. at Large 111, as do the state statutes.⁵

Form of Action.—Under the internal revenue act of July 13th, 1866, "taxes may be sued for and recovered in the name of the United States in any proper form of action."⁶ In some cases the action of debt is given.⁷

to pay it to the third body his duty is to pay it. *Bell v. Railroad Co.*, 4 Wall. 598, 18 L. Ed. 338.

1. **For trespass.**—*Barnes v. The Railroads*, 17 Wall. 294, 307, 21 L. Ed. 544, citing *Philadelphia v. Collector*, 5 Wall. 720, 731, 18 L. Ed. 614; *Assessors v. Osborne*, 9 Wall. 567, 574, 19 L. Ed. 748.

And an illegal assessment of exempt property may protect ministerial officers charged with the duty of actual collection under a regular warrant or authority therefor. *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477. See, also, *Stutsman County v. Wallace*, 142 U. S. 293, 307, 310, 35 L. Ed. 1018, where, following the state decisions, he was held to be protected as long as he acted strictly within the statute. That an extrinsic fact, of which he was not apprised, made the property nontaxable, did not make him liable. *Haffin v. Mason*, 15 Wall. 671, 21 L. Ed. 196; *Erschine v. Hohnbach*, 14 Wall. 613, 20 L. Ed. 745; *Harding v. Woodcock*, 137 U. S. 43, 46, 34 L. Ed. 580. See the titles REVENUE LAWS, vol. 10, p. 1000, et seq.; TRESPASS. See, also, ante, "Nature of Authority and Necessity Therefor," VI, A, 3.

When the government follows the statute its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs. *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477.

2. Where a taxing officer justifies under an unconstitutional enactment, he stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense. *Virginia Coupon Cases*, 114 U.

S. 269, 270, 288, 29 L. Ed. 185. See ante, "Payment," VI, C, 2; post, "Protection of Selling Officer," VIII, E, 5. See the title PUBLIC OFFICERS, vol. 10, p. 426, et seq.

3. **Levy and sale.**—In *re Tyler*, 149 U. S. 164, 183, 37 L. Ed. 689. See ante, "Assessment and Levy," VI; post, "Sale for Taxes," VIII.

4. **Depends on lawful assessment.**—*Van Brocklin v. Tennessee*, 117 U. S. 151, 180, 29 L. Ed. 845; *Clinkenbeard v. United States*, 21 Wall. 65, 70, 22 L. Ed. 477. See, also, *Bailey v. Railroad Co.*, 106 U. S. 109, 112, 27 L. Ed. 81.

Assessment including property not assessable—Railroads—Will not support action.—*Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 416, 30 L. Ed. 118. See ante, "Ministerial Act and Necessity for Legislative Authority," VI, A, 3, a.

Summary remedy by motion against vendee.—See post, "Between Vendor and Vendee," VI, C, 1, f.

5. **At law—United States.**—*Dollar Sav. Bank v. United States*, 19 Wall. 227, 240, 22 L. Ed. 80.

Action for tax and penalty, may be authorized by state in addition to the ordinary remedies by levy, distraint and sale. *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 309, 41 L. Ed. 725.

Minnesota.—"With reference to the collection of taxes it may be remarked generally that the Minnesota statute authorizes such collection by suit in court." *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 535, 40 L. Ed. 247.

6. **Form of action.**—*Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80.

7. **Action of debt.**—*New Jersey v. An-*

Motion.—Where by statute a remedy is given by motion only in the case of “a person or persons holding land within the limits of the said town, and who have no other property within the said town,” taxes could not be recovered by motion, unless in the case of a person holding land, who has no other property in the town.⁸

Mandamus.—See the title *MANDAMUS*, vol. 8, pp. 15, 68, et seq., 95.

Ex Parte Proceedings.—Proceedings instituted under the West Virginia act, for the benefit of the school fund, were, in a judicial sense, *ex parte*, and were neither in rem nor in personam; neither against the land nor against the former owners.⁹

b. *In Equity.*—A court of equity has not the power to direct a tax to be levied for the payment of judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important.¹⁰ Nor can it collect or direct the collection of taxes already assessed, or appoint its own officer to collect them without special authority of law.¹¹

derson, 203 U. S. 483, 493, 51 L. Ed. 284.

By the internal revenue law the United States are not prohibited from adopting the action of debt or any other common-law remedy for collecting what is due to them. This is true on general principles. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80. See *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197.

“In *Dollar Sav. Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80, it was held that the United States could maintain an action of debt for taxes due by a state bank in a circuit court of the United States, in disregard of a state statute prescribing a special form of remedy for the assessment and collection of taxes due by banks.” *United States v. Snyder*, 149 U. S. 210, 215, 37 L. Ed. 705.

8. *Alexander v. Alexander*, 5 Cranch 1, 3 L. Ed. 19.

9. *Rich v. Braxton*, 158 U. S. 375, 401, 39 L. Ed. 1022.

10. *In equity.*—*Rees v. Watertown*, 19 Wall. 107, 116, 22 L. Ed. 72; *Walkley v. Muscatine*, 6 Wall. 481, 18 L. Ed. 930; *Supervisors v. Rogers*, 7 Wall. 175, 19 L. Ed. 162; *Heine v. Levee Comm’rs*, 19 Wall. 655, 22 L. Ed. 223; *Meriwether v. Garrett*, 102 U. S. 472, 516, 26 L. Ed. 197; *Thompson v. Allen County*, 115 U. S. 550, 29 L. Ed. 472.

The fact that the remedy at law by mandamus for levying and collecting taxes has proved ineffectual, and that no officers can be found to perform the duty of levying and collecting them, is no sufficient ground of equity jurisdiction. *Thompson v. Allen County*, 115 U. S. 550, 29 L. Ed. 472; *Heine v. Levee Comm’rs*, 19 Wall. 655, 22 L. Ed. 223, citing *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72.

The principle is the same where the proper officers of the county or town

have levied the tax and no one can be found to accept the office of collector of taxes. This gives no jurisdiction to a court of equity to fill that office or to appoint a receiver to perform its functions. *Thompson v. Allen County*, 115 U. S. 550, 29 L. Ed. 472. See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 241, et seq.; *MANDAMUS*, vol. 8, pp. 15, 68, et seq., 95; *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 782.

Federal judiciary.—“If the state will not levy a tax, or provide for one, the Federal judiciary cannot assume the legislative power of the state and proceed to levy the tax. If the state has provided incompetent officers of collection, the federal judiciary cannot remove them and put others more competent in their place. If the state appoints no officers of collection, the federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of state legislation.” *Meriwether v. Garrett*, 102 U. S. 472, 521, 26 L. Ed. 197. See the title *CONSTITUTIONAL LAW*, vol. 4, pp. 208, 255, et seq.

11. *Thompson v. Allen County*, 115 U. S. 550, 558, 29 L. Ed. 472.

A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear, and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax. *Thompson v. Allen County*, 115 U. S. 550, 558, 29 L. Ed. 472.

Taxes levied according to law before the repeal of the charter of a city, other than such as were levied in obedience to

Enforcement of Contract.—See note.¹²

Injunction against Delinquent.—The right of prohibition of the exercise of corporate franchises by injunction, for failure to pay, may be given as a means of collection.¹³

c. *Suit for Taxes Maintainable against Claim of Charter Exemption.*—See note.¹⁴

3. **INTERVENTION.**—Where, while the description, in the intervening petition in a receivership proceeding filed by a territory to enforce a lien for taxes on the property involved, of the property sought to be subjected to the taxes, may be indefinite, the property is sufficiently described in the decree, it must be assumed that the testimony warranted the description.¹⁵

4. **AFTER DISSOLUTION OF PUBLIC CORPORATION.**—A party having a judgment against an extinct public corporation is forced to rely on the public faith of the legislature to supply him a proper remedy. The ordinary means of legal redress have failed by the lapse of time and the operation of unavoidable contingencies. It is to be presumed that the legislature will do what is equitable and just; and in this case legislative action seems to be absolutely requisite.¹⁶

5. **COLLECTION BY SET-OFF.**—See ante, "Internal Revenue Taxes," VI, C, 1, h.

6. **LIMITATION.**—See post, "Defenses to Collection," VII, J.

7. **NOTICE AND SERVICE OF PROCESS.**—Personal notice to property owners of the suit to collect the taxes on their lands or that taxes had been levied, or

the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

12. **A municipal contract** under which taxes were to be collected and paid over to a creditor of the municipality, will not be rescinded for failure to pay over such taxes. The more appropriate relief is to make provision for the payment of the balance that remains due out of the future collections of taxes levied or to be levied in that behalf. *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923.

13. **Injunction against corporation in arrears.**—*New Jersey v. Anderson*, 203 U. S. 483, 493, 51 L. Ed. 284. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 204, as to telegraph company enjoying federal franchise.

14. **Suit for taxes against claim of exemption.**—A suit filed by a state to recover taxes alleged to be due from a cor-

poration claiming a special limitation of its taxes under its charter, is not such an attack upon the charter by denying an immunity from taxation given by it, and therefore calling in question its existence as a corporation, as that an action of that kind can only be maintained by the state by means of a quo warranto, either against the corporation itself for the exercise of power not granted it, or against the individuals for assuming to exercise the corporate powers. *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 197, 40 L. Ed. 667.

15. **Intervention.**—*United States Trust Co. v. New Mexico*, 183 U. S. 535, 542, 46 L. Ed. 315. See the title **RECEIVERS**, vol. 10, pp. 565, 570.

16. *Barkley v. Levee Comm'rs*, 93 U. S. 258, 265, 23 L. Ed. 893. See *Thompson v. Allen County*, 115 U. S. 550, 557, 29 L. Ed. 472. See the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 851; **MANDAMUS**, vol. 8, pp. 74, 76.

"Ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected—being mere imposts of the government, created and continuing only by the will of the legislature—have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation." *Meriwether v. Garrett*, 102 U. S. 472, 514, 26 L. Ed. 197.

knowledge of the law under which the taxes had been levied, is not essential.¹⁷

Due Process of Law.—See ante, "Due Process of Law," VI, A, 4. Not being defendants who were entitled to personal service, they cannot urge against the decree that they were not given personal service or complain that the complaint was insufficient as an affidavit for service by publication, because it did not deny the existence of conditions which there is no pretense existed.¹⁸ When the statute opens to the property owner full opportunity for defense, so that he can raise every objection to which in law he is entitled,¹⁹ it is sufficient; but the notice prescribed by the statute to be given must be given, or there can be no jurisdiction.²⁰

8. **JUDGMENT AND AMOUNT OF RECOVERY.—Penalties, Interest and Costs.**—See, also, post, "Penalties, Interest and Costs," VII, G. If the plaintiffs are not entitled to judgment for the taxes arising out of the assessments in question, no liability for penalties, interest, or attorney's fees, could result from a refusal or failure to pay such taxes.²¹

Burden of Proof.—Where there has been no assessment of a tax, but the United States have sued to recover such sum as, upon an investigation of the accounts of the company, it shall appear ought to have been paid, the burden of proof is upon the government. No more can be recovered than is shown to be due.²²

9. **RES JUDICATA.**—See ante, "Application of Doctrine of Res Judicata," IV, A, 5.

E. Collection by Distraint.—Distraint, as a method of collecting taxes, is one of the most ancient known to the law, and has frequently received the sanction of the courts.²³ And property exempt from taxation, such as govern-

17. *Ballard v. Hunter*, 204 U. S. 241, 262, 51 L. Ed. 461.

Equal protection of laws.—See the title CONSTITUTIONAL LAW, vol. 4, p. 384.

18. *Ballard v. Hunter*, 204 U. S. 241, 265, 51 L. Ed. 461, holding that, the statute not requiring any warning order to be entered on the record or the complaint, it was not necessary, and if it had, the proceedings could not be attacked collaterally, unless such entry was made jurisdictional. The recital in the decree, of constructive service by publication and proof thereof, was sufficient against such attack. See, also, *Castillo v. McConnico*, 168 U. S. 674, 42 L. Ed. 622. See, also, the titles DUE PROCESS OF LAW, vol. 5, p. 660; SUMMONS AND PROCESS, ante, p. 299.

Foreclosure of lien acquired of tax sale.—See the title DUE PROCESS OF LAW, vol. 5, p. 654.

19. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 536, 40 L. Ed. 247.

20. In a statutory proceeding to declare taxes a lien and enforce same by sale, without the prescribed statutory notice, there can be no jurisdiction. If the clerk makes the warning order, as the second section of the act requires, but fails to publish or post it, and that fact appears in the judgment record, there could be no justifiable pretense of jurisdiction. *Dick v. Foraker*, 155 U. S. 404, 412, 39 L. Ed. 201. See, also, *Parker v. Rule*, 9 Cranch 64, 70, 3 L. Ed. 658.

And the appearance of the state as a party to the proceedings did not cure this defect or render the sale valid, on ground that defendant derived his title from the state subsequent to complainant's purchase. *Dick v. Foraker*, 155 U. S. 404, 415, 39 L. Ed. 201.

21. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 417, 30 L. Ed. 118; *San Bernardino County v. Southern Pac. R. Co.*, 118 U. S. 417, 420, 422, 30 L. Ed. 125, where it was held that a stipulation, after judgment for defendants in a suit for taxes, that judgment might be entered for portions of the sums claimed, as a voluntary concession, gave the plaintiff no right to judgment for penalty, interest or attorneys' fees.

22. **Burden of proof.**—*Little Miami, etc., R. Co. v. United States*, 108 U. S. 277, 280, 27 L. Ed. 724.

23. **Collection by distraint.**—*Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 632, 49 L. Ed. 619; *Murray v. Hoboken Land, etc., Co.*, 18 How. 272, 276, 15 L. Ed. 372; *Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253; *Palmer v. McMahon*, 133 U. S. 660, 33 L. Ed. 772; *Parker v. Rule*, 9 Cranch 64, 70, 3 L. Ed. 658; *Chapin v. Streeter*, 124 U. S. 360, 362, 31 L. Ed. 475; *Thompson v. Carroll*, 22 How. 422, 433, 16 L. Ed. 387; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 331, 45 L. Ed. 879. See the title CONSTITUTIONAL LAW, vol. 4, pp. 631, 632. As to distraint against officer for

ment bonds, may be distrained for the taxes on other property.²⁴

F. Forfeiture or Purchase by State for Taxes.—For violation of internal revenue laws, see the title *REVENUE LAWS*, vol. 10, pp. 981, et seq., 989.

Forfeiture for Nonentry on Land Books.—Held constitutional and not inconsistent with due process of law, and that if the statutes of the state, in connection with the constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law.²⁵

Enurement of Forfeiture to Persons in Possession.—See note.²⁶ As to operation to vest title in holder of inclusive junior grant, see note.²⁷

taxes collected, see the title *PUBLIC OFFICERS*, vol. 10, p. 431.

Distrain for taxes on undivided half of personalty of firm.—The unpaid half of taxes for which the distraint was made was, notwithstanding the payment of one-half of the original amount by one partner, a joint liability upon the property of the firm. So much of the property as was necessary to pay the taxes should have been sold, being personal property, the proceedings under distraint contemplated a seizure by the treasurer, and when a sale was made a delivery by him to the purchaser. *Chapin v. Streeter*, 124 U. S. 360, 362, 31 L. Ed. 475. See ante, "Of Owner Generally," VI, C, 1, c.

24. Distrain of exempt property.—*Scottish Union, etc., Ins. Co. v. Bowland*, 196 U. S. 611, 632, 49 L. Ed. 614.

25. *King v. Mullins*, 171 U. S. 404, 428, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

The system established by West Virginia, under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed or caused to be placed, during five consecutive years, on the proper land books for taxation, and caused himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the state in the proper circuit court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the constitution of the United States or the constitution of the state. *King v. Mullins*, 171 U. S. 404, 436, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

There is no merit in the contention that the landowner would be without remedy if the commissioner of the school fund should fail to institute such proceedings, in which landowner may intervene. Neither is the statute to be held unconstitutional upon the theory that although the owner may direct his lands to be entered on the proper land books, and that

he be charged with the taxes due thereon, the custodian of such books may neglect to perform his duty. *King v. Mullins*, 171 U. S. 404, 434, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227. See post, "Sale of Forfeited Lands," VIII, A, 5.

The provision of the constitution of Virginia exempting tracts of less than one thousand acres from forfeiture is not a discrimination against the owners of tracts containing one thousand acres or more, which amounts to a denial to citizens or landowners of the latter class of the equal protection of the laws. *King v. Mullins*, 171 U. S. 404, 435, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

Sale.—See post, "Sale for Taxes," VIII.

Purchase for state at sale.—See post, "Bidding Off to Government," VIII, F, 3.

26. By § 3 of article 13 of the West Virginia state constitution, set out in opinion, the title to lands forfeited or purchased for the state at tax sales, which were not redeemed, released or otherwise disposed of, and which was vested in and remained in the state, was transferred to and vested in three classes of persons in possession, adverse, for certain lengths of time with payment of taxes, or a regularly derived title coupled with payment of taxes. It was held that the defendants' case cannot be deemed to belong to the first or third of these classes, for the reason, if there were no other, that the evidence fails to show actual, continuous possession for ten years, or for five successive years after 1865, under color or claim of title. The possession attempted to be set up was of such a transitory character as to be utterly unreliable. It was not the actual, continuous possession for five consecutive years contemplated by the constitution. *Rich v. Braxton*, 158 U. S. 375, 403, 39 L. Ed. 1022.

Nor could the defendants bring themselves within the second of the above classes. In cases of that class possession is not required; but title, regularly derived, was required. *Rich v. Braxton*, 158 U. S. 375, 405, 39 L. Ed. 1022.

27. Where a tract of land in Virginia known as the Gallatin tract, whose survey was prior to another survey and pat-

Divestiture of Title without the Equivalent of Office Found.—*Quære* whether, in any case, the title of a citizen to his land can be divested by forfeiture and vested absolutely in the United States, without any inquisition of record or some public transaction equivalent to office found.²⁸ But the state could provide a mode by which the attempted forfeiture or liability to forfeiture could be removed, and so remove that objection.²⁹

Presumption.—"If it appears that the title has been forfeited to the Commonwealth for the nonpayment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or regranted by the commonwealth, the presumption is that the title is still outstanding in the commonwealth."³⁰

Burden of Proof.—For case holding proof of forfeiture for nonlisting for taxation or for nonpayment of taxes, at the time when the patents were issued under which the defendants claim title, to be insufficient, see note.³¹

ent, and was, partially at least, within the exterior limits of the latter grant, was subsequently, and before the year 1842, forfeited to the commonwealth of Virginia in consequence of the nonpayment of taxes, it did not result from the act of March 22, 1842, of the general assembly of Virginia, relating to the right, title and interest, which shall be vested in the commonwealth, in any lands or lots lying west of the Allegheny Mountains, by reason of the nonpayment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, etc., that by virtue of this statute and the prior forfeiture of the Gallatin lands, the title to so much of the latter as is within the exterior limits of the latter survey was perfected in the owner thereof. *Halsted v. Buster*, 140 U. S. 273, 275, 35 L. Ed. 484.

28. *Bennett v. Hunter*, 9 Wall. 326, 336, 19 L. Ed. 672; *King v. Mullins*, 171 U. S. 404, 416, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

The revenue acts of August 5th, 1861, and June 7th, 1862, did not attempt to make the forfeiture operate *proprio vigore*, to vest the title of the land in the United States upon nonpayment of the tax; but only upon the sale therein provided for, which was the public act, the equivalent of office found. *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672. See, also, *United States v. Taylor*, 104 U. S. 216, 219, 26 L. Ed. 721.

"What preceded the sale was merely preliminary, and, independently of the sale, worked no divestiture of title. * * * It follows that in the case before us the title remained in the tenant for life with remainder to the defendant in error, at least until sale; though forfeited, in the sense just stated, to the United States." *Bennett v. Hunter*, 9 Wall. 326, 336, 19 L. Ed. 672.

29. *King v. Mullins*, 171 U. S. 404, 428, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227.

30. **Presumption.**—*King v. Mullins*, 171 U. S. 404, 437, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227, and holding that a plaintiff setting up such a forfeited title cannot recover in ejectment.

31. Where the forfeiture of the lands in controversy is alleged to have occurred by virtue of the provisions of the second section of the Virginia act of February 27, 1835, by which two classes of lands were declared subject to forfeiture by this act, the first being lands which had never been entered upon the books of the commissioners of revenue for the county in which the lands lay, it must be affirmatively shown that the lands in question had never been so listed for taxation. And the fact that the certificate of the auditor of public accounts, states that the records of the county prior to 1827 are missing, is not sufficient. An essential fact may not be inferred from the inability to prove it. And where the same certificate shows that the lands of the owner as whose property it was alleged to be forfeited were placed on the books of the commissioners of the county for six years, namely, from 1827 to 1832 inclusive, and that the taxes on the same lands had been paid up to and including the year 1832, upon the showing of the defendants themselves, it appears that the lands in question do not belong to the class which had never been entered upon the books of the commissioners of revenue. *Fulkerson v. Holmes*, 117 U. S. 389, 399, 29 L. Ed. 915.

"Nor are the defendants any more successful in showing that the lands in controversy fell within the second class liable to forfeiture, namely, those which for many years previous to February 27, 1835, the date of the act declaring the forfeiture, had not been entered upon the books of the commissioners of revenue. For, referring to the second section of the act of March 10, 1832 (Laws of Virginia, 1832, ch. 73, p. 67), it appears that only those tracts of land on which the

G. Penalties, Interest and Costs.—Not Favored in Equity.—Penalties are not favored in equity.³²

Determination and Power to Impose.—The amount of the penalty was a matter for the legislature to determine in its discretion.³³ And the infliction of penalties in delinquency is a usual and legitimate mode of compelling the prompt payment of taxes.³⁴ And a penalty for the nonpayment of a municipal tax may be provided for by an ordinance.³⁵

Demand.—The penalty must be demanded, and if required by the statute to be assessed, there must have been an assessment thereof.³⁶

Necessity for Default.—See ante, "Judgment and Amount of Recovery," VII, D, 8. For a liability to statutory interest as a penalty to attach, the owner must be in default in not paying taxes legally due and demanded.³⁷ Such

unpaid taxes exceeded \$10 were liable to forfeiture under the act of February 27, 1835. There is no proof that the taxes and damages on the lands in question exceeded that amount." Fulkerson v. Holmes, 117 U. S. 389, 400, 29 L. Ed. 915.

And where it is shown that the state never claimed any forfeiture, but for a subsequent period of more than thirty-three years, had assessed and collected taxes therefor from the plaintiffs and those under whom they claim; it follows that the failure to show a forfeiture of the lands under the act of February 27, 1835, was complete. It would, therefore, have been the duty of the court, if it gave any instruction upon this branch of the defense, to say to the jury that the defendants had failed to maintain it. Fulkerson v. Holmes, 117 U. S. 389, 400, 29 L. Ed. 915.

32. Not favored in equity.—United States Trust Co. v. New Mexico, 183 U. S. 535, 543, 46 L. Ed. 315; Elliott v. Railroad Co., 99 U. S. 573, 25 L. Ed. 292.

A penalty of \$1,000 was the only liability incurred by a railroad company for failing to comply with the provisions of § 122 of the internal revenue act of June 30, 1864 (13 Stat. 284), as amended by the act of July 13, 1866 (14 Id. 138). It was not increased by the act of July 14, 1870 (16 Stat. 260). Erskine v. Milwaukee, etc., R. Co., 94 U. S. 619, 24 L. Ed. 133; Elliott v. Railroad Co., 99 U. S. 573, 25 L. Ed. 292. See the title PENALTIES AND FORFEITURES, vol. 9, p. 360.

Distinguished from tax.—See the title PENALTIES AND FORFEITURES, vol. 9, p. 365.

33. Western Union Tel. Co. v. Indiana, 165 U. S. 304, 310, 41 L. Ed. 725.

34. Western Union Tel. Co. v. Indiana, 165 U. S. 304, 307, 41 L. Ed. 725; Murray v. Hoboken Land, etc., Co., 18 How. 272, 281, 15 L. Ed. 372; DeTreville v. Smalls, 98 U. S. 517, 25 L. Ed. 174 (direct tax act of 1862), followed in Sherry v. McKinley, 99 U. S. 496, 25 L. Ed. 330.

And, as applied to a telegraph company, is not open to the constitutional objection that it makes an arbitrary discretion and is therefore invalid as

amounting to a denial of the equal protection of the laws and a deprivation of property without due process of law. Western Union Tel. Co. v. Indiana, 165 U. S. 304, 307, 41 L. Ed. 725.

35. New Orleans v. Fisher, 180 U. S. 185, 45 L. Ed. 485, in which a statute was held applicable to school taxes.

De minimis not curat lex.—See the title MAXIMS, vol. 8, p. 323.

Accounting for penalty collected.—See post, "Accountability of Municipality for Taxes Collected under Trust," X, B.

36. Penalty must be demanded and assessed.—United States Trust Co. v. New Mexico, 183 U. S. 535, 543, 46 L. Ed. 315.

37. Litchfield v. County of Webster, 101 U. S. 773, 779, 25 L. Ed. 925, followed in Litchfield v. County of Hamilton, 101 U. S. 781, 25 L. Ed. 928.

Where the state claimed adversely to the true owner a part of certain public lands, and there was a controversy whether the title to the remainder had passed from the United States, and, on that account, the proper authorities of the state gave notice to the parties in interest that no legal steps would be taken to enforce the collection of the taxes until the title should be adjusted, held, that the statutory interest, which is in the nature of a penalty, cannot be exacted for nonpayment of them within the time prescribed by law, where the owner, on the adjustment of the title, offered to pay so much of them as was actually due, with interest thereon at the rate allowed by law for delay in the payment of ordinary debts, and his offer was refused. Litchfield v. County of Webster, 101 U. S. 773, 25 L. Ed. 925, followed in Litchfield v. County of Hamilton, 101 U. S. 781, 25 L. Ed. 928.

There must be an identification of the property subject to taxation, and a determination of the amount of taxes due, or it would be inequitable to charge penalties for nonpayment. United States Trust Co. v. New Mexico, 183 U. S. 535, 544, 46 L. Ed. 315; Litchfield v. County of Webster, 101 U. S. 773, 778, 25 L. Ed. 925, followed in Litchfield v. County of Hamilton, 101 U. S. 781, 25 L. Ed. 928.

Quære, as to the legality of imposing

statutory interest is in the nature of a penalty, to secure promptness in payment, and where the state recedes from its demand, cannot be recovered.³⁸

Relief in Equity.—A court of equity has, under such circumstances, the power to grant relief by enjoining the collection of such statutory interest.³⁹

H. Commitment or Sequestration.—Commitment.—It has been held that a law authorizing the commitment of a recalcitrant property owner, after due notice and opportunity for hearing, after other means of collection have failed, or upon a showing of ability to pay, did not deprive him of life, liberty or property without due process of law, or the equal protection of the laws, he having the right to release on payment.⁴⁰

By Sequestration or Imprisonment.—The power in the state to enforce the payment of taxes by coercion extends to the sequestration of the goods, and the imprisonment of the delinquent.⁴¹

I. Exoneration.—Exoneration and Force of Judgment.—When jurisdiction of a matter, such as power to declare a redemption of land from forfeiture for taxes (in regard to which the court could act only "by particular statute") is given to a county court of general jurisdiction—parties, a subject matter for consideration, a judgment to be given, etc., being all in view and provided for by the particular statute—the general rule about the indulgence of presumptions not inconsistent with the record in favor of the jurisdiction, prevails in regard to proceedings under the statute. At any rate, a judgment under it, declaring lands redeemed, cannot be questioned collaterally.⁴²

Prospective Construction.—So construed.⁴³

Jurisdiction.—Under the said sections, land is rightly exonerated by the county court of the county in which alone it was always taxed; even though a part of the land lay of later times in another county, a new one, made out of such former county.⁴⁴

J. Defenses to Collection.—Discrimination in Valuation and Overvaluation.—See ante, "Boards of Revision or Equalization, etc.," VI, F, 4.⁴⁵

Erroneous Assessment or Illegality.—See note.⁴⁶

Defense to Tax to Pay Interest on Bonds of County.—See note.⁴⁷

a penalty where no fraud was intended. As a general thing, the imposition of a penalty implies delinquency in the party on whom it is imposed. *Savings Bank v. Archbold*, 104 U. S. 708, 710, 26 L. Ed. 901.

38. *Litchfield v. County of Webster*, 101 U. S. 773, 779, 25 L. Ed. 925, followed in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928.

39. **Relief in equity.**—*Litchfield v. County of Webster*, 101 U. S. 773, 25 L. Ed. 925, followed in *Litchfield v. County of Hamilton*, 101 U. S. 781, 25 L. Ed. 928.

40. **Commitment.**—*Palmer v. McMahon*, 133 U. S. 660, 670, 33 L. Ed. 772, construing the laws of New York, 1859, ch. 302, § 10, p. 681, and 1843, ch. 230, art. 2, §§ 12, 13.

41. **By sequestration or imprisonment.**—*Dobbins v. Erie County*, 16 Pet. 435, 446, 10 L. Ed. 1022.

42. **Exoneration and force of judgment.**—*Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871.

Where the transcripts of the judgments of exoneration produced in this case, show that there were proper parties before the court, that the subject matter

of the exoneration of the land from delinquent taxes was before it, and that it rendered judgments exonerating it from all delinquent taxes, it cannot be required to give validity to these judgments, that the record shall show that every fact was proved, upon which the judgment of the court must be supposed to rest. *Harvey v. Tyler*, 2 Wall. 328, 345, 17 L. Ed. 871.

43. *Harvey v. Tyler*, 2 Wall. 328, 346, 17 L. Ed. 871. See the title **STATUTES**, ante, p. 128.

44. **Jurisdiction.**—*Harvey v. Tyler*, 2 Wall. 328, 347, 17 L. Ed. 871.

45. See, also, ante, "Conclusiveness of Assessment," VI, A, 5; "Conclusiveness of Action of Assessors," VI, B, 4.

46. **Erroneous assessment or illegality may be set up.**—*Clinkenbeard v. United States*, 21 Wall. 65, 22 L. Ed. 477. See the title **REVENUE LAWS**, vol. 10, p. 980.

47. **Defense to tax to pay interest on bonds of county.**—In a suit to recover delinquent taxes, an objection that a levy of fifty cents on the hundred dollars included in these taxes was made solely for the purpose of raising money to pay interest on bonds, and it is insisted that the bonds for which the levy was made

Necessity for Payment of Tax.—A statute providing that the only remedy against illegal taxes shall be by suing to recover same after payment under protest, does not leave the taxpayer without adequate legal remedy. And the United States adopts the rule so prescribed by the state statute.⁴⁸

Limitations.—No statutes of limitation run against the state, and it is discretionary with it to determine how far into the past it will reach to compel the performance of this obligation to pay taxes.⁴⁹ Unless made applicable in express words, in which case the limitation upon "a liability created by statute" applies.⁵⁰

VIII. Sale for Taxes.

A. General Principles and Preliminary Steps—1. **PURPOSE OF SALE AND AUTHORITY TO SELL**—a. *In General.*—The sale of land for taxes is an exercise of the sovereign authority in whose jurisdiction it is done,⁵¹ but there must be express statutory authority for selling lands for taxes, as it is in the nature of an ex parte proceeding, and the validity of the sale depends thereon,⁵² and it is incumbent on the vendee, under a sale by a collector of taxes, to prove the authority to sell.⁵³

Nonexistence of Leviable Personalty.—Where the power of the court to render judgment in such cases for the sale of land for taxes thereon, is founded on there being no personal property from which the tax might be made, the jurisdiction of the court depends on that fact, which should appear in the judgment of the court.⁵⁴

Necessity for Legal Assessment.—A legal assessment is the foundation of the authority to sell; and if this objection be sustained, it is fatal to the deed.⁵⁵ The first important step is to show that the land was listed for taxation.

were void under an act which prohibits a county from becoming indebted to an amount exceeding four per cent of the value of the taxable property within the county, where the bonds, which were in excess of the four per cent, were issued on June 30, 1887, and subsequently to the passage of the act, but, as is shown in the testimony, they were funding bonds, and for aught that appears, the real indebtedness of the county had been created long before the passage of the act, and these funding bonds may have been, and probably were, nothing but simply a change in the form of the indebtedness, is not sustainable. *Maish v. Arizona*, 164 U. S. 599, 610, 41 L. Ed. 567.

48. Necessity for payment of tax.—*Tennessee v. Sneed*, 96 U. S. 69, 75, 24 L. Ed. 610. See ante, "Limitation by Statute," VI, H, 1, d; "Necessity for Payment of Taxes Admittedly Due," VI, H, 1, f; post, "Recovery Back," IX, B. See, also, the title REVENUE LAWS, vol. 10, p. 975, et seq.

49. Limitations.—*Florida Cent., etc., R. Co. v. Reynolds*, 183 U. S. 471, 475, 46 L. Ed. 283. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 917.

50. Bristol v. Washington County, 177 U. S. 133, 148, 44 L. Ed. 701.

A suit, so far as it seeks to have a tax imposed by the county court to pay claims is barred by lapse of time, where an action at law for the enforcement of

said claims would have been barred. *Meath v. Phillips County*, 108 U. S. 553, 556, 27 L. Ed. 819.

State statutes inapplicable to United States.—The states cannot set up a limitation of time within which federal taxes must be collected. *United States v. Snyder*, 149 U. S. 210, 214, 37 L. Ed. 705.

51. Northern Pac. R. Co. v. Traill County, 115 U. S. 600, 610, 29 L. Ed. 477; *Leigh v. Green*, 193 U. S. 79, 89, 48 L. Ed. 623.

52. Marx v. Hanthorn, 148 U. S. 172, 180, 37 L. Ed. 410; *Thatcher v. Powell*, 6 Wheat. 119, 125, 5 L. Ed. 221; *Beaty v. Knowler*, 4 Pet. 152, 170, 7 L. Ed. 813; *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882; *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *Stead v. Course*, 4 Cranch 403, 413, 2 L. Ed. 660. See, also, *Moore v. Brown*, 11 How. 414, 425, 13 L. Ed. 751.

53. Stead v. Course, 4 Cranch 403, 2 L. Ed. 660; *Williams v. Peyton*, 4 Wheat. 77, 82, 4 L. Ed. 518.

54. McClung v. Ross, 5 Wheat. 116, 119, 5 L. Ed. 46; *Thatcher v. Powell*, 6 Wheat. 119, 125, 5 L. Ed. 221, where the sheriff had been ordered to distrain before selling lands. See post, "Federal Authority," VIII, A, 1, b.

So in Georgia.—*Stead v. Course*, 4 Cranch 403, 2 L. Ed. 660.

55. Parker v. Overman, 18 How. 137, 142, 15 L. Ed. 318, when the assessor's office had been vacated, and he had failed to give the required notice of the filing of the assessment. *Washington v.*

On this depends the validity of the subsequent proceedings, and it must be shown by the record.⁵⁶ And a sale for taxes is void if a portion of the tax for which it was made was excessive and invalid.⁵⁷

Public Lands and Property.—A state may sell for taxes any public lands that it has the right to tax, but only such,⁵⁸ but not public or other exempt property.⁵⁹

b. *Federal Authority.*—Congress, in the exercise of its power “to lay and collect taxes, duties, imposts, and excises,” may, to enforce their payment, authorize the distraint and sale of either real or personal property. The owner of the property so distrained and sold is not thereby deprived of it without due process of law.⁶⁰

c. *Municipal Corporation.*—A municipal corporation has power to sell lots of individual proprietors for taxes due on their property.⁶¹

2. STRICT CONSTRUCTION AND NECESSARY SHOWING AS TO ESSENTIAL STEPS—*a. General Statement of Rule.*—In an ex parte proceeding, as a sale of land for taxes, under a special authority, great strictness is required; to divest an individual of his property, against his consent, every substantial requisite of the law must be complied with; no presumption can be raised in behalf of a

Pratt, 8 Wheat. 681, 5 L. Ed. 714. See ante, “Assessment and Levy,” VI.

56. *Games v. Dunn*, 14 Pet. 322, 330, 10 L. Ed. 476.

57. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 335, 32 L. Ed. 134.

58. *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339; *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545.

Subject to claims of the United States.—*Central Pac. R. Co. v. Nevada*, 162 U. S. 512, 526, 40 L. Ed. 1057, construing the act making public lands taxable although costs of survey, etc., had not been paid, but preserving all rights of the United States. See ante, “Public Lands of the United States,” IV, H, 2.

59. Streets and other public grounds cannot be sold for nonpayment of assessments for local improvements or other taxes. *Peake v. New Orleans*, 139 U. S. 342, 356, 35 L. Ed. 131.

Sale of exempt property void.—Where there could be no legal taxes on property, the sale thereof was therefore void, and the offer to prove a tax title was properly rejected. *Mackall v. Chesapeake, etc., Canal Co.*, 94 U. S. 308, 309, 24 L. Ed. 161. See, also, ante, “Public Property,” V, G, 2.

60. **Federal authority.**—*Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253.

Property subject to direct tax under the act of July 14, 1798, might be sold for nonpayment of the tax, but only after all the other prescribed means of collection had been tried in vain. *Williams v. Pevton*, 4 Wheat. 77, 82, 4 L. Ed. 518; *Parker v. Rule*, 9 Cranch 64, 70, 3 L. Ed. 658.

Property in custodia legis.—A sale for direct taxes may be valid, although, when it and the assessment were made, the lands belonged to a nonresident and were in custodia legis, the state court in which

the lis was pending having enjoined all creditors from interfering with or selling them, and they were sold as an entirety, notwithstanding the fact that the tax bore but a small proportion to their value. It did not disturb any possession the state court had and could not be stopped by injunction. *Keely v. Sanders*, 99 U. S. 441, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330.

61. *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125; *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882.

Proof of the regular appointment of the assessors is not necessary when they acted under the authority of the corporation, and the highest evidence of this fact is the sanction given to their returns which had been examined and corrected by the board of appeal, and then handed over to the register. *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882.

Washington City.—The ordinances of the corporation cannot increase or vary the power given by the acts of congress to sell lands in Washington City, nor impose any terms or conditions which can affect the validity of a sale for taxes made within the authority conferred by the statute. *Thompson v. Carroll*, 22 How. 422, 16 L. Ed. 387.

Legal assessment essential.—Under the 8th section of the act of 1812, to amend the act of the incorporation of the city of Washington, a sale of unimproved squares or lots in the city, for the payment of taxes, is illegal, unless such squares and lots have been assessed to the true and lawful proprietors thereof. *Washington v. Pratt*, 8 Wheat. 681, 5 L. Ed. 714.

Exhaustion of personality.—Under the act to incorporate the city of Washington, passed on the 15th of May, 1820, amended by the act of 1824, it is not a condition to the validity of the sale of

collector who sells real estate for taxes, to cure any radical defect in his proceedings, and the proof of regularity devolves upon the person who claims under the collector's sale.⁶² Although it is true, that full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts, it is possible that others may be presumed, and less than positive testimony may establish facts. In this case, as in all others depending on testimony, a sound discretion, regulated by the law of evidence, will be exercised.⁶³ And those facts, especially, which give jurisdiction, ought to appear, in order to show that its proceedings are *coram iudice*.⁶⁴

b. *Due Process of Law*.—It may well be doubted whether due process of law, within the meaning of the fourteenth amendment, requires a punctilious conformity with the statutory procedure preceding and accompanying the sale. Whether all the steps required by law were actually taken in a particular case, and whether the failure to take such steps would invalidate the sale, would seem to be a matter for the state courts, rather than for the federal supreme court, to decide. The fourteenth amendment would be satisfied by showing that the usual course prescribed by the state laws required notice to the taxpayer and was in conformity with natural justice.⁶⁵ And they need not be made a matter of record.⁶⁶

c. *Sale for Municipal Taxes*.—Where land is sold for municipal taxes, the requirements of the law authorizing such sale must be strictly complied with, as to notice, time and conditions of sale, etc.⁶⁷

d. *Allegation of Noncompliance*.—Where a state statute (West Virginia) governing sales of land for unpaid taxes required certain steps to be taken by the sheriff and state auditor, but does not require the sheriff to show in his re-

unimproved lands for taxes, that the personal estate of the owner should have been exhausted by distress, that remedy being coordinate or cumulative. *Thompson v. Carroll*, 22 How. 422, 16 L. Ed. 387.

62. *General statement of rule*.—*Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882; *Stead v. Course*, 4 Cranch 403, 2 L. Ed. 660; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221; *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079; *Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796; *Games v. Dunn*, 14 Pet. 322, 10 L. Ed. 476; *Marx v. Hanthorn*, 148 U. S. 172, 180, 37 L. Ed. 410; *Moore v. Brown*, 11 How. 414, 425, 13 L. Ed. 751. See, also, *Raymond v. Longworth*, 14 How. 76, 14 L. Ed. 333.

"This court said, in *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518, that the authority given to a collector to sell land for the nonpayment of the direct tax, 'is a naked power not coupled with an interest.' In all such cases the law requires that every prerequisite to the exercise of that power must precede its exercise, that the agent must pursue the power or his act will not be sustained by it." *Early v. Doe*, 16 How. 610, 613, 14 L. Ed. 1079.

Where the statutory requisitions prescribed for the guide of officers in the conduct of business devolved upon them are intended for the protection of the citizen, and to prevent a sacrifice of his property, as by a tax sale, by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done

will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise. *Lyon v. Alley*, 130 U. S. 177, 185, 32 L. Ed. 899; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702; *Moore v. Brown*, 11 How. 414, 425, 13 L. Ed. 751; *Marx v. Hanthorn*, 148 U. S. 172, 180, 37 L. Ed. 410, where it said that other provisions may be directory.

So where the statute makes the time within which certain acts were to be performed material. *Parker v. Overman*, 18 How. 137, 143, 15 L. Ed. 318.

Illinois.—*Gage v. Bani*, 141 U. S. 344, 351, 35 L. Ed. 776.

Sale for direct tax of 1798.—*Williams v. Peyton*, 4 Wheat. 77, 79, 4 L. Ed. 518.

63. *Stead v. Course*, 4 Cranch 403, 413, 2 L. Ed. 660.

64. *Thatcher v. Powell*, 6 Wheat. 119, 126, 5 L. Ed. 221; *McClung v. Ross*, 5 Wheat. 116, 119, 5 L. Ed. 46.

Report by sheriff.—Where the act under which a sale for taxes is made, gives the power only on a report to be made by the sheriff, this report gives the court jurisdiction; and without it, the court is as powerless as if the act had never passed. *Thatcher v. Powell*, 6 Wheat. 119, 127, 5 L. Ed. 221.

65. *Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70, following *Hagar v. Reclamation District*, No. 108, 111 U. S. 701, 28 L. Ed. 569.

66. *Turpin v. Lemon*, 187 U. S. 51, 52, 60, 47 L. Ed. 70.

67. *Ronkendorff v. Taylor*, 4 Pet. 349,

turn of sale that he has complied with these requirements, or any of them, or even to state in general terms that the sale was made in accordance with the statutes, a mere allegation in a bill to impeach a tax sale and deed that the return of the sale failed to set forth a compliance with these requirements, without alleging that they were not actually followed, fails to show that complainant has suffered any actual injury, or that the forms of law were not literally observed.⁶⁸

e. *Burden of Proof*.—And it is the rule, when not modified by statute, that the burden of proof is on the holder of a tax deed to maintain his title by affirmatively showing that the provisions of the law have been complied with.⁶⁹

f. *Evidence*.—A mere historical statement of the facts as they occurred, and not a copy from the record, is not enough. There must be an exemplification from the record, where the rule has not been changed by statute.⁷⁰

g. *Force and Effect of Deed*.—See post, "Tax Deed or Certificate and Title Passing Thereunder," VIII, I.

3. *INFORMALTY IN JUDGMENT*.—A judgment in Illinois for taxes is fatally defective if it does not in terms or by some mark indicating money, such as \$ or cts., show the amount, in money, of the tax for which it was rendered. Numerals merely, that is to say, numerals without some mark indicating that they stand for money, are insufficient.⁷¹

4. *FRAUD*.—Where the authority of the officer to sell is shown, the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged.⁷²

5. *SALE OF FORFEITED LANDS*.—The steps necessary, under the statute governing a sale of forfeited lands, must be strictly observed.⁷³

B-C. Advertisement and Notice—1. *NECESSITY AND PURPOSE*.—Acts providing for sale of lots for unpaid taxes usually provide that there must

7 L. Ed. 882; *Washington v. Pratt*, 8 Wheat. 681, 5 L. Ed. 714, where it is said that they must be construed strictly.

68. *Allegation of noncompliance*.—*Turpin v. Lemon*, 187 U. S. 51, 53, 47 L. Ed. 70.

69. *Marx v. Hanthorn*, 148 U. S. 172, 180, 37 L. Ed. 410, holding this the rule in Oregon. *Boardman v. Reed*, 6 Pet. 328, 342, 8 L. Ed. 415; *Early v. Doe*, 16 How. 610, 613, 14 L. Ed. 1079; *Stead v. Course*, 4 Cranch 403, 2 L. Ed. 660; *Williams v. Peyton*, 4 Wheat. 77, 78, 4 L. Ed. 518.

"One who claims title to the property of another under summary proceedings where a special power has been executed, as in case of lands sold for taxes, is bound to show every fact necessary to give jurisdiction and authority to the officer, and a strict compliance with all things required by the statute." *Parker v. Overman*, 18 How. 137, 142, 15 L. Ed. 318.

"In the language of some of the cases, it must be done 'strictly,' 'exactly,' 'with great strictness.'" *Mason v. Fearson*, 9 How. 248, 260, 13 L. Ed. 125, citing *Thatcher v. Powell*, 6 Wheat. 119, 127, 5 L. Ed. 221; *Washington v. Pratt*, 8 Wheat. 681, 683, 5 L. Ed. 714; *Ronkendorff v. Taylor*, 4 Pet. 349, 359, 7 L. Ed. 882.

Ohio.—*Games v. Dunn*, 14 Pet. 322, 10 L. Ed. 476.

70. *Games v. Dunn*, 14 Pet. 322, 330, 10 L. Ed. 476.

71. *Informality in judgment*.—*Woods v. Freeman*, 1 Wall. 398, 17 L. Ed. 543.

72. *Fraud*.—*Stead v. Course*, 4 Cranch 403, 413, 2 L. Ed. 660. See post, "Grounds of Relief," VIII, J, 2.

73. *Sale or forfeited lands*.—"Any sale had under the statute providing for a sale, under the order of court, for the benefit of the school fund, of lands alleged to be forfeited by reason of their not having been charged on the land books for five consecutive years with the state tax due thereon, would be absolutely void, if the landowner was not before the court, or had not been duly notified of the proceedings, but had done all that he could reasonably do to have his lands entered on the proper books and to cause himself to be charged with the taxes due thereon. If the state was not entitled to treat them as forfeited lands, that fact could be shown in the proceeding instituted for their sale as lands of that character, and the rights of the owner fully protected." *King v. Mullins*, 171 U. S. 404, 434, 43 L. Ed. 214, followed in *King v. Panther Lumber Co.*, 171 U. S. 437, 43 L. Ed. 227. See ante, "Forfeiture and Purchase by State for Taxes," VII, F; post, "Lands Previously Forfeited or Sold to State," VIII, H, 2.

be public sale; that public notice be given of time and place of sale, by advertisement in some paper published in place of sale, for a certain time before hand; notice to contain the number of the lot or lots, number of square or squares, the name of the person or persons to whom the same may have been assessed; the amount of taxes due thereon; and that the proprietor may within a certain time redeem.⁷⁴ And the publications which are required by law to be made, subsequent to the sheriff's return, and previous to the order of sale, are indispensable preliminaries to a valid order of sale,⁷⁵ or deed.⁷⁶

Proceeding in Rem and Due Process.—Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are "so minded," to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the fourteenth amendment to the constitution, when executed according to customary forms and usages, or the principles underlying them.⁷⁷

2. TIME OF PUBLICATION.—"Once a Week" Construed.—A statute requiring the advertisement of the sale to be published "once a week," is satisfied by its publication once in each successive period of seven days, although not

74. Necessity and purpose.—*Washington v. Pratt*, 8 Wheat. 681, 5 L. Ed. 714; *Early v. Doe*, 16 How. 610, 617, 14 L. Ed. 1079.

75. *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221. See, also, *Atwood v. Weems*, 99 U. S. 183, 187, 25 L. Ed. 471; *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518; *Martin v. Barbour*, 140 U. S. 634, 644, 35 L. Ed. 546, holding that the terms prescribed must be strictly pursued.

76. It is as firmly settled that the giving of the particular notice required is an indispensable condition precedent to the right to make a deed to the purchaser or assignee. *Gage v. Bani*, 141 U. S. 344, 351, 35 L. Ed. 776.

And they must appear by evidence to have been made. *Parker v. Rule*, 9 Cranch 64, 3 L. Ed. 658; *Williams v. Peyton*, 4 Wheat. 77, 83, 4 L. Ed. 518. In *Thatcher v. Powell*, 6 Wheat. 119, 5 L. Ed. 221, it was held, under the Tennessee law, that it must appear on the record of the court.

Ex parte affidavits insufficient.—*Martin v. Barbour*, 140 U. S. 634, 644, 35 L. Ed. 546.

Affidavit as to service of notice.—It must appear that the purchaser at the tax sale or his assignee made the affidavit required as to the service of notice of the tax sale. And when the notice is produced, the question is necessarily open as to whether it was such as was prescribed, before the purchaser is entitled to a deed from the county clerk. *Gage v. Bani*, 141 U. S. 344, 351, 35 L. Ed. 776.

77. Proceeding in rem and due process.—*Leigh v. Green*, 193 U. S. 79, 90, 92, 48 L. Ed. 623, construing Nebraska statute, permitting holder of a tax lien to foreclose same by proceeding in rem, with

no notice except by publication, to be due process of law as to persons holding liens on the land. See, also, *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 40 L. Ed. 247.

Where the law charged the tax upon the land, the proceeding to collect it was a proceeding in rem, of all stages of which the owners had legal notice. It was their duty to pay the tax when it was due. The commissioners were not bound to hunt them up. *Keely v. Sanders*, 99 U. S. 441, 445, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330; *Turner v. Smith*, 14 Wall. 553, 20 L. Ed. 724.

"The proceedings in the action for delinquent taxes are, as against absent or unknown owners, generally ex parte, and judgments usually follow upon the production of the delinquent list of the county showing an unpaid tax against the property described. Constructive service of the process in such actions by posting or publication is all that is required to give the court jurisdiction; and the delinquent list certified by the county auditor is made prima facie evidence to prove the assessment upon the property, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. When the owner of the property is absent and no appearance is made for him, this prima facie evidence is conclusive, and judgment follows as a matter of course. From the sale which ensues no redemption is permitted unless made within six months afterwards, except in the case of minors and persons laboring under some legal disability." *French v. Edwards*, 13 Wall. 506, 512, 20 L. Ed. 702.

Publication for thirty days sufficient.—

on the same day of each week, and therefore with a longer interval than six days between,⁷⁸ but the full statutory period must elapse.⁷⁹

Must Not Begin before Liability to Sale Attaches.—The whole period should have elapsed which was necessary to render the lot liable to be sold for the tax, before the advertisement was published.⁸⁰

3. **AMOUNT DUE.**—The advertisement must contain a particular statement of the amount of taxes due on each lot separately, and an increase of the sum demanded necessarily required the extension of the time for the full period.⁸¹

4. **NAME OF OWNER.**—Where the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption, and the present case shows that such was the construction adopted by the officials, as they did name, though incorrectly, an owner in the notice.⁸² And a misleading mistake will vitiate the sale.⁸³

5. **DESCRIPTION OF PROPERTY.**—Undoubtedly the advertisement must have been such as to inform persons who read it what property was intended to be exposed for sale. Any description that gave such information was sufficient. Whether the advertisement gave it or not depended not alone upon its contents. It was necessary to compare the description with the property described.⁸⁴ A description of the lands in the notice of sale, which identifies them so that the owner may have information of the claim thereon, is all that the law requires.⁸⁵

Castillo v. McConnico, 168 U. S. 674, 680, 42 L. Ed. 622. See ante, "Due Process of Law," VI, A, 4.

78. *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882.

79. Where the language of the statute was, "once in each week for at least twelve successive weeks," it must be advertised for twelve full weeks, or eighty-four days. Therefore, where property was sold after being advertised for only eighty-two days, the sale was illegal, and conveyed no title. *Early v. Doe*, 16 How. 610, 14 L. Ed. 1079.

80. *Ronkendorff v. Taylor*, 4 Pet. 349, 350, 7 L. Ed. 882.

81. **Amount due.**—*Washington v. Pratt*, 8 Wheat. 681, 688, 5 L. Ed. 714.

Where the advertisement states that the lot was offered for sale, "for taxes due thereon up to the year 1821," this was sufficient; for if the taxes were due, and the property was liable to be sold for them, it can be of no importance to the purchaser to have a more technical description of the tax than the notice contained. *Ronkendorff v. Taylor*, 4 Pet. 349, 365, 7 L. Ed. 882.

82. **Name of owner.**—*Marx v. Hanthorn*, 148 U. S. 172, 184, 37 L. Ed. 410, construing Oregon statute.

83. By no reasonable application of the rule of idem sonans, can the name of *Ida J. Hawthorne* be deemed equivalent to that of *Ida J. Hanthorn* in the advertisement of the sale of property for taxes against such owner. The mistake vitiated the sale. *Marx v. Hanthorn*, 148 U. S. 172, 184, 37 L. Ed. 410.

And an advertisement as the property of the "heirs of *James Thomas*," whereas the assessment was to "*James Thomas*," did not express the name of the person

to whom the lot was assessed at the time, as required by law. *Holroyd v. Pumphrey*, 18 How. 69, 70, 15 L. Ed. 264.

Feminine affix to man's name.—But the mere fact that there was affixed to the name inserted in the advertisement of a tax sale the words "or her estate and heirs" did not destroy the efficacy of the advertisement of property belonging to a male and did not cause it to be, in legal contemplation, no notice whatever, and therefore insufficient to constitute due process of law. *Castillo v. McConnico*, 168 U. S. 674, 680, 42 L. Ed. 622.

84. **Description of property.**—*Cocley v. O'Connor*, 12 Wall. 391, 400, 20 L. Ed. 446.

85. *Keely v. Sanders*, 99 U. S. 441, 443, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330. See, also, *Ronkendorff v. Taylor*, 4 Pet. 349, 362, 7 L. Ed. 882.

It is not sufficient, that in an advertisement of land for sale for unpaid taxes, such a description is given, as would enable the person desirous of purchasing to ascertain the situation of the property by inquiry; nor if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, would the sale be valid, unless the same information had been communicated to the public in the notice. *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882.

Undivided interest.—Where the advertisement purported to sell "half of lot No. 4, in square No. 491," and the other half was advertised in the same manner, as belonging to the other tenant in common and it was the undivided half that was to be sold, this was not a sufficient

Obvious Mistake Misleading No One.—Where an obvious mistake was made in the description that could have misled no one, for there was no such tract, and the remaining portion of the description clearly identified the property, it was good.⁸⁶

Incurability.—Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to bidders, on the day of sale by the auctioneer.⁸⁷

6. **IN WHAT NEWSPAPERS TO BE MADE.**—This depends on the statute, which must be complied with.⁸⁸

7. **SUFFICIENCY AS MIXED QUESTION OF LAW AND FACT.**—Whether the advertisement of sale was such as the law required is a mixed question of law and fact, and it must be submitted to the jury.⁸⁹

D. Time of Sale.—The judgment in a statutory proceeding for the sale of property for taxes may be for a sale on a day after that set in the notice published by the tax collector, when the court took time to consider.⁹⁰

E. Conduct of Sale.—1. **CONFORMITY TO LAW.**—A collector, selling land for taxes, must act in conformity with the law from which his power is derived; and the purchaser is bound to inquire, whether he has so acted.⁹¹

2. **AMOUNT TO BE SOLD AND DIVISION.**—**Limited to Amount Necessary to Pay Tax.**—The general rule, often enacted in the form of a statute, is that the officer who was authorized to sell land only on a deficiency of personal estate, can sell only so much as is necessary to pay the taxes in arrear against the same owner.⁹²

Limited to Subject of the Lien.—Mere general words of description are

advertisement; and a sale made under the same was void. *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882.

86. **Obvious mistake misleading no one.**—*Sherry v. McKinley*, 99 U. S. 496, 498, 25 L. Ed. 330.

87. *Ronkendorff v. Taylor*, 4 Pet. 349, 362, 7 L. Ed. 882.

88. **In what newspapers to be made.**—*Parker v. Rule*, 9 Cranch 64, 3 L. Ed. 658.

89. *Cooley v. O'Connor*, 12 Wall. 391, 20 L. Ed. 446.

90. **Time of sale.**—*Maish v. Arizona*, 164 U. S. 599, 603, 41 L. Ed. 567.

It was held, that as the purposes and intention of the act are the collection of taxes, but only of such taxes as ought to be collected, and judicial determination is invoked to determine what taxes are justly due, the fact that the court took time for the examination and consideration of this question did not oust it of jurisdiction. *Maish v. Arizona*, 164 U. S. 599, 603, 604, 41 L. Ed. 567.

91. *Stead v. Course*, 4 Cranch 403, 2 L. Ed. 660; *Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796. See ante, "General Statement of Rule," VIII, A, 2, a.

92. **Limited to amount necessary to pay tax.**—*Mason v. Fearson*, 9 How. 248, 260, 13 L. Ed. 125; *Stead v. Course*, 4 Cranch 403, 2 L. Ed. 660; *Williams v. Peyton*, 4 Wheat. 77, 81, 4 L. Ed. 518; *Washington v. Pratt*, 8 Wheat. 681, 5 L. Ed. 714; *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702.

If a whole tract of land was sold, when a small part of it would have been sufficient for the taxes, the collector un-

questionably exceeded his authority, and the plea of a tax title cannot be sustained. *Stead v. Course*, 4 Cranch 403, 413, 2 L. Ed. 660.

Should it be true, that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it. Had this fact been established, the court is inclined to think, that the circumstances of the case, as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed on the question, whether the sale was fraudulent or not. *Stead v. Course*, 4 Cranch 403, 413, 2 L. Ed. 660.

Where an act provides for the sale of so "much," not so "many," of lots on which taxes are unpaid, "as may be necessary to pay such taxes" for the payment of the same, if taxes be due by one and the same individual, in small sums, upon many lots, and one lot being set out for sale, produces a sum adequate to the payment of all, the whole arrears become paid off, and on excuse can then exist for making further sales. *Washington v. Pratt*, 8 Wheat. 681, 685, 5 L. Ed. 714. See, also, *Mason v. Fearson*, 9 How. 248, 13 L. Ed. 125.

A statute embodying this principle is mandatory.—*French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702.

not sufficient to extend a sale beyond the subject matter of the lien, as defined by the statute which lies at the foundation of the entire proceeding.⁹³

Sale of Undivided Interest.—No doubt can exist that a part of a lot may be sold for taxes, where they have accrued on such part, although, by the law, not less than a lot may be sold for the taxes accrued on the whole lot.⁹⁴

Sale of Entire Tract.—An entire tract need not be subdivided for sale, unless the statute requires it to be done.⁹⁵

Sale as a Whole of Several Distinct Tracts.—Where a tract of land sold for taxes consists of several distinct parcels, the sale of the entire tract in one body does not vitiate the proceeding if bids could not have been obtained upon an offer of a part of the property.⁹⁶

Identification.—Where a whole fractional quarter section was taxed and one acre off of the east side sold, this sale was irregular, because the part sold is not identified with the certainty necessary to make the sale valid, there being nothing on the face of the deed, or the proceedings previous to the sale, to supply the defect.⁹⁷

Sale of Included Tract Not Taxed Therewith.—Where a patent was issued for a fractional quarter of land which included certain lots, and both the certificate and patent reserved the rights of the claimant of said lots, these lots are not liable to be sold for taxes assessed on the section including them under the acts of congress relating to the Peoria claims.⁹⁸

3. FRAUD AND UNFAIR PRACTICES.—See post, "Grounds of Relief," VIII, J, 2.

4. CONTINUANCE.—It is to be presumed that the sales were adjourned from day to day until the day of sale. At most, there was but an irregularity which could be cured by legislative act.⁹⁹

5. PROTECTION OF SELLING OFFICER.—See ante, "Collecting Officers," VII, B. The law furnishes his authority for selling the property for delinquent taxes; the warrant with the tax list attached gave him the subjects upon which to exercise such authority; the statute which required the treasurer to "sell all lands liable for taxes of any description for the preceding year or years," meant all lands liable to taxation as shown by the process in his hands, and he could not refuse to sell lands on his list nor could he sell lands not on his list, being purely a ministerial officer.¹

93. *Wilson v. Gaines*, 103 U. S. 417, 422, 26 L. Ed. 401.

94. *Ronkendorff v. Taylor*, 4 Pet. 349, 7 L. Ed. 882.

95. *Keely v. Sanders*, 99 U. S. 441, 445, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330.

96. *Sale as a whole of several distinct tracts.*—*Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796.

Levy and sale for nonpayment of income tax.—Where the collector acted in good faith in distraining and selling land for nonpayment of income tax of 1864, it was not improper for him, in the exercise of his discretion, to sell as an entirety the lands, consisting of two town lots which were enclosed and occupied as a single homestead, a dwelling house being upon one of them and a barn on the other. The state statute under which they were separately assessed has no application to his proceedings. *Springer v. United States*, 102 U. S. 586, 26 L. Ed. 253.

97. *Ballance v. Forsyth*, 13 How. 18,

14 L. Ed. 32. See post, "Description of Property," VIII, I, 6.

98. *Ballance v. Forsyth*, 13 How. 18, 14 L. Ed. 32.

99. *Continuance.*—*Sherry v. McKinley*, 99 U. S. 496, 498, 25 L. Ed. 330.

1. **Protection of selling officer.**—*Stutsman County v. Wallace*, 142 U. S. 293, 307, 35 L. Ed. 1018, construing the Dakota laws.

If such process was fair on its face and contained nothing that would apprise the treasurer of any defects or infirmities, and it did not appear that the treasurer had any knowledge of any defect or infirmities, such treasurer was fully protected from personal liability in collecting the taxes upon all property contained in his list, so long as he acted strictly within the statute. *Stutsman County v. Wallace*, 142 U. S. 293, 307, 35 L. Ed. 1018. See, also, *Buck v. Colbath*, 3 Wall. 334, 343, 18 L. Ed. 257.

Where a statute makes the selling officer as well as the county liable to a purchaser for his "mistake or wrongful

F. Who May Purchase—1. **ONE UNDER OBLIGATION TO PAY TAX.**—This principle is that one whose duty it is to keep the taxes paid cannot, as against those who had a right to rely on his performance of such duty, successfully assert a title originating in his dereliction of duty; it operates as payment only.² A purchase of an outstanding title or interest in property, such as a tax title, by a person sustaining fiduciary relations to others interested in the same property, should, at the option of the latter, enure to their benefit.³

2. **ESTOPPEL TO PURCHASE.**—See the title *ESTOPPEL*, vol. 5, p. 970. See note.⁴

3. **BIDDING OFF TO GOVERNMENT.**—The commissioners of taxes, under the act for the collection of direct taxes in insurrectionary districts, etc., approved June 7th, 1862, though "authorized" to bid off property to the United States "at a sum not exceeding two-thirds of its assessed value," were not bound so to bid it up so as to make it bring in all cases that much.⁵

Under State Laws.—See note.⁶

act" in selling land on which no tax was due at the time, the liability does not arise under that section, save where he is himself in fault in selling the land. *Stutsman County v. Wallace*, 142 U. S. 293, 307, 35 L. Ed. 1018.

An erroneous decision of an assessor in the matter of exemptions does not deprive the tax proceedings of jurisdiction, but until such erroneous decision is modified or set aside by the proper tribunal all officers with subsequent functions may safely act thereon, and the rule of caveat emptor applies to a purchaser, who had no right of recovery at common law. *Stutsman County v. Wallace*, 142 U. S. 293, 307, 35 L. Ed. 1018.

2. **One under obligation to pay tax.**—*United States v. Elliott*, 164 U. S. 373, 379, 41 L. Ed. 474; *Lamborn v. County Comm'rs*, 97 U. S. 181, 184, 24 L. Ed. 926; *Noonan v. Lee*, 2 Black 499, 17 L. Ed. 278, applying rule to one in possession under obligation to pay the taxes, with right of recovery back from party benefited by the payment.

So where the purchaser was the owner's son, and he received a fraudulent transfer thereof. *Woodfolk v. Seddon*, 154 U. S., appx., 658, 31 L. Ed. 598.

One who is liable for the tax cannot permit his own land to be sold, and purchase one of the lots, or a part of it, to pay the taxes on the larger tract. *Ballance v. Forsyth*, 13 How. 18, 24, 14 L. Ed. 32.

3. *Rothwell v. Dewees*, 2 Black 613, 617, 17 L. Ed. 309.

Life tenant.—"A tenant for life cannot purchase for himself at a tax sale or acquire an interest adverse to the reversioner or remainderman by obtaining an assignment of the tax title." *United States v. Elliott*, 164 U. S. 373, 379, 41 L. Ed. 474.

Purchase by agent of assignee of surviving partner of insolvent firm under obligation to pay taxes.—*Rothwell v. Dewees*, 2 Black 613, 614, 617, 17 L. Ed. 309.

The purchaser from the successor of

the assignee in the assignment, is to be treated as having a common interest with them in the title derived from such agent and his purchase of the outstanding equity of such assignee must enure to the common benefit of the cotenants of that title. *Rothwell v. Dewees*, 2 Black 613, 618, 17 L. Ed. 309.

4. Where land was assessed for taxes at the same time in the names of the real owner and of his grantors who had sold and conveyed to him, and was sold as different tracts at the same sale, the real owner and another party becoming the purchasers, the former is to be considered as becoming the purchaser of his own title and the latter as the purchaser of the title of the former owners, which was inferior, and the fact that the real owner or his agent stood by and permitted the other party to bid on and buy the other title, creates no estoppel against him where there is no evidence that either he or his agent possessed any knowledge of the identity of the lands, and the circumstances are not such as to justify its being presumed. The other purchaser gets no title by his purchase. *McClung v. Ross*, 5 Wheat. 116, 120, 5 L. Ed. 46.

5. **Bidding off to government.**—*Turner v. Smith*, 14 Wall. 553, 20 L. Ed. 724.

Where a private person bid a sum sufficient to pay the tax, interest, and costs, and the commissioner let him have it, there is nothing in the statute which forbids it. *Turner v. Smith*, 14 Wall. 553, 562, 20 L. Ed. 724.

6. **By the law of Virginia**, in force prior to the creation of the state of West Virginia, it was the duty of the sheriff or collector, when lands were sold for taxes, to purchase them on behalf of the commonwealth for the amount of the taxes, unless some person bid that amount; and any lands so purchased and certified to the first auditor vested in the commonwealth without any deed for that purpose; but such lands could have been redeemed in the mode prescribed by the statute.

4. PURCHASER NAMED BY OWNER.—See note.⁷

G. Confirmation of Sale.—A state law may allow the purchaser of a tax title to file a petition on the chancery side of the state court, whose judgment, or decree, confirming the sale, shall operate as a bar against all persons who may claim the land in consequence of informality or illegality in the proceedings which led to the sale.⁸

H. Title Acquired by Purchaser—1. **VALID SALE PASSES ABSOLUTE TITLE.**—Where taxes on lands are assessed against the lands themselves, a tax sale (when valid) confers an absolute title,⁹ regardless of inadequacy of price.¹⁰ But where the statute says that only the right, title and interest of the delinquent shall pass, of course the rule is different.¹¹ And the state may tax different interests in land and sell only the interest of the party in default.¹²

Rule of Caveat Emptor.—It is familiar law that a purchaser of a tax title

Whatever title Virginia had to lands so purchased and not redeemed, and which were within the territory now constituting West Virginia, passed to the latter state upon its admission into the Union. *Rich v. Braxton*, 158 U. S. 375, 393, 39 L. Ed. 1022. See, also, ante, "Forfeiture or Purchase by State for Taxes," VII, F.

7. Purchaser named by owner—Purchase by government for taxes.—"In *Turner v. Smith*, 14 Wall. 553, 20 L. Ed. 724, this court, in construing the change in the language of the seventh section (of the direct tax act of June 7, 1862, authorizing bidding off to the United States), held that its object was to authorize the United States, by its commissioners, to bid more than the tax and costs, which they could not do before, and to limit them to two-thirds of the assessed value of the land, and that after the amount of costs and taxes had been bid, the United States could not bid against a purchaser named by the owner. It was probably in reference to this that the act required the personal presence of the owner before the commissioners to name a purchaser, against whom the United States should not compete after it was secured by a bid which covered the tax, interest, and costs." *United States v. Lee*, 106 U. S. 196, 203, 27 L. Ed. 171.

8. Confirmation of sale.—*Thomas v. Lawson*, 21 How. 331, 332, 16 L. Ed. 82; *Parker v. Overman*, 18 How. 137, 140, 15 L. Ed. 318.

"In the case of *Parker v. Overman*, in 18 How. 137, 140, 15 L. Ed. 318, this court, commenting upon the statute of Arkansas, has said: 'In case no one appears to contest the regularity of the sale, the court is required to confirm it on finding certain facts to exist; but if opposition is made, and it should appear that the sale was made contrary to law, it became the duty of the court to annul it. * * * The jurisdiction of the court over the controversy is founded on the presence of the property, and like a proceeding in rem it becomes conclusive against the absent claimant as well as the present contestant.'" *Thomas v.*

Lawson, 21 How. 331, 342, 16 L. Ed. 82. See, also, post, "Recovery of Possession by Purchaser," VIII, K.

9. Valid sale passes absolute title.—*Lamborn v. County Comm'rs*, 97 U. S. 181, 184, 24 L. Ed. 926; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 610, 29 L. Ed. 477.

"But if the tax deed is valid, then from the time of its delivery it clothes the purchaser, not merely with the title of the person who had been assessed for the taxes and had neglected to pay them, but with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all prior titles and incumbrances of private persons, and all equities arising out of them. *Crum v. Cotting*, 22 Iowa, 411; *Turner v. Smith*, 14 Wall. 553, 20 L. Ed. 724." *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 751, 31 L. Ed. 309. See, also, *Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 381, 49 L. Ed. 242; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 29 L. Ed. 477; *Carroll v. Safford*, 3 How. 441, 462, 11 L. Ed. 671, where obiter dicta to the contrary will be found.

Sale for direct tax.—The rule is the same here, and a rent charge is cut off and destroyed by a valid sale. *Turner v. Smith*, 14 Wall. 553, 20 L. Ed. 724.

Burden of proof and effect of tax deed.—See post, "Tax Deed or Certificate and Title Passing Thereunder," VIII, I.

Title set up in partition suit.—See the title *PARTITION*, vol. 9, p. 67.

10. Inadequacy of price.—Where land is sold for taxes the inadequacy of the price given is not a valid objection to the sale. *Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796.

11. Mansfield v. Excelsior Ref. Co., 135 U. S. 326, 339, 34 L. Ed. 162.

Sale for delinquent federal tax.—*Mansfield v. Excelsior Ref. Co.*, 135 U. S. 326, 339, 34 L. Ed. 162. See, also, the title *REVENUE LAWS*, vol. 10, p. 975.

12. Distinct interest taxed and sold.—*Baltimore Shipbuilding, etc., Co. v. Baltimore*, 195 U. S. 375, 381, 49 L. Ed. 242.

takes all the chances. There is no warranty on the part of the state.¹³ But the purchaser of a tax title is not bound to inquire further than to know that the sale has been made according to the provisions of the statute which authorized it.¹⁴

2. **LANDS PREVIOUSLY FORFEITED OR SOLD TO STATE.**—Such lands cannot afterwards be assessed with taxes and sold therefor so as to convey any title to a purchaser.¹⁵ But the state may waive her rights.¹⁶

3. **EFFECT OF FORMER INVALID SALE.**—A sale for taxes due a municipal corporation was not invalid upon the ground that the corporation had, in a prior year, sold the property as belonging to the heirs of the deceased owner, which sale was not carried out to completion.¹⁷

4. **UNDER SALE FOR TAXES WHICH HAD BEEN PAID.**—Where the sale must be regarded in law as having been made after the payment of the tax, it is insufficient to vest the title to the land in the purchaser.¹⁸

5. **UNDER TAX SALE OF PUBLIC LANDS.**—The sale of public lands for taxes is made on the presumption that the purchase from the government has been bona fide, and if not so made, the purchaser at the tax sale acquires no title, and

13. **Rule of caveat emptor.**—Hussman v. Durham, 165 U. S. 144, 150, 41 L. Ed. 664; Carroll v. Safford, 3 How. 441, 461, 11 L. Ed. 671. But this seems to mean as to the power to sell and the regularity of the sale merely. Northern Pac. R. Co. v. Traill County, 115 U. S. 600, 610, 29 L. Ed. 477.

14. Thompson v. Carroll, 22 How. 422, 435, 16 L. Ed. 387.

"The instructions or directions given by the corporation to their officers may be right and proper, and may justly be presumed to have been followed; but the observance or nonobservance of them cannot have the effect of conditions to affect the validity of the title." Thompson v. Carroll, 22 How. 422, 435, 16 L. Ed. 387.

But if tax deed is invalid, the tax lien is the only interest the purchaser gets. Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 750, 31 L. Ed. 309.

Estoppel of owner.—"Under such a tax law as exists in Iowa there is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from but is antagonistic to the former. The holder of the latter is not a privy in estate with the holder of the former. Neither owes any duty to the other, nor is estopped from making any claim as against the other. Hefner v. Northwestern Life Ins. Co., 123 U. S. 747, 751, 31 L. Ed. 309; Turner v. Smith, 14 Wall. 553, 20 L. Ed. 724." Hussman v. Durham, 165 U. S. 144, 147, 41 L. Ed. 664.

15. Rich v. Braxton, 158 U. S. 375, 394, 39 L. Ed. 1022, construing the West Virginia statute. Martin v. Barbour, 140 U. S. 634, 646, 35 L. Ed. 546, construing Arkansas statute.

16. Martin v. Barbour, 140 U. S. 634, 646, 35 L. Ed. 546.

Whether the title which passed by a tax sale was conditional or absolute, the state may waive the rights obtained

by such sale and prescribe the terms upon which it will waive them. In the one view it waives the right to a forfeiture; in the other, the title acquired by the sale; and in either case the state may fix the conditions of its waiver. League v. Texas, 184 U. S. 156, 160, 46 L. Ed. 478. See, also, ante, "Sale of Forfeited Lands," VIII, A, 5.

17. **Effect of former invalid sale.**—Holroyd v. Pumphrey, 18 How. 69, 15 L. Ed. 264.

18. **Under sale for taxes which had been paid.**—Bennett v. Hunter, 9 Wall. 326, 338, 19 L. Ed. 672; Tacey v. Irwin, 18 Wall. 549, 551, 21 L. Ed. 786; Atwood v. Weems, 99 U. S. 183, 187, 25 L. Ed. 471, construing direct tax act of 1862.

Mistake.—Where lands were designated by numbers of the different tracts, referring to a map, and, after the taxes had been paid for some time on assessments made accordingly, a new map was made which subdivided the lands differently, and without the owner's knowledge the assignor, in making up the assessment roll changed the description to conform to the new map, and the owner in possession paid according to the old, and in ignorance of the new, intending to pay on all the land that he owned, but by the new map and description the number of lots in the section had been increased, and the tract described by the added number was sold for nonpayment of taxes, the lot thus numbered and sold being a part of the land belonging to him, and upon which he was intending and attempting to pay all the taxes, it was held that the owner was not bound, as matter of law, to take notice of the new map is shown by that decision, and if he was not bound to know, and did not in fact know, and paid under a mistake, relying upon the ancient description and the old map, and intended in good faith to pay all taxes, then clearly, within the scope of that decision, the sale was in-

consequently no embarrassment can arise in the future disposition of the same land by the government.¹⁹

6. **CURATIVE ACTS.**—See ante, "Curative Acts," VI, A, 9. A statute requiring proceedings to test the validity of proceedings for the collection of taxes, or to avoid a sale therefor for irregularity or neglect of any officer, to be brought within a limited time, and not afterwards, will not cut off irregularities depriving the owners of a substantial right and not technical objections to the sale, although it did cut off technical objections to the sale, not actually prejudicial to the former owner, if not brought forward in that time.²⁰

I. Tax Deed or Certificate and Title Passing Thereunder—1. **FORM, NECESSITY AND RIGHT THERETO.—Regulation by State.**—The form of the tax deed is within the state's power to prescribe.²¹

Certificate of Sale.—The act of congress of 1862, for collecting the direct tax of 1861, contemplates a certificate of sale, though the United States becomes the purchaser.²²

Limitation of Purchaser's Right to Deed or Lease.—See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 881.

2. **COMPLIANCE WITH REQUISITIONS OF STATUTE.—In General.**—A deed purporting to be a deed from an officer authorized to sell for taxes, when the deed upon its face showed that the officer had not complied with the requisitions of the statute, was a void deed, made in violation of law.²³ And when the statute says that the deed "shall be substantially in the following or other equivalent form," giving a form, there is no doubt that the form must be substantially pursued, or the deed will be invalid. But when everything required by the statute as to form is found in the deed, with added facts as to the as-

valid, and the tax deed fails. *Lewis v. Monson*, 151 U. S. 545, 549, 550, 38 L. Ed. 265.

19. *Carroll v. Safford*, 3 How. 441, 462, 11 L. Ed. 671.

"It follows that, if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it." *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 610, 29 L. Ed. 477. See, also, *Carroll v. Safford*, 3 How. 441, 461, 11 L. Ed. 671.

After certificate issue, but before payment.—Where, though a formal certificate of location was issued in 1858, there was then in fact no payment for the land and the government received nothing until 1888, during these intervening years whatever might have appeared upon the face of the record the legal and the equitable title both remained in the government. The land was, therefore, not subject to state taxation. Tax sales and tax deeds issued during that time were void. The defendant took nothing by such deeds. No estoppel can be invoked against the plaintiff. His title dates from the time of payment in 1888. The defendant does not hold under him and has no tax title arising subsequently thereto. *Hussman v. Durham*, 165 U. S. 144, 149, 41 L. Ed.

664. See ante, "Public Lands of the United States," IV, H, 2.

20. *Martin v. Barbour*, 140 U. S. 634, 642, 35 L. Ed. 546, construing Arkansas statute.

Invalid assessment.—Where it was proved that the sale was made contrary to law, because no valid assessment for the year 1884 was made, in that the assessor did not take and subscribe the required oath or affirmation, this was an irregularity depriving the plaintiff of a substantial right, and was not cured by the statute. *Martin v. Barbour*, 140 U. S. 634, 643, 35 L. Ed. 546.

Non proof of publication.—So of a failure to prove the publication required by the statute by record proof as the law prescribed. *Martin v. Barbour*, 140 U. S. 634, 644, 35 L. Ed. 546.

Irregular listing and assessment misleading owner through disregard of the law's requirements, and preventing redemption.—*Martin v. Barbour*, 140 U. S. 634, 646, 35 L. Ed. 546.

21. **Form of tax deed.**—*Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 331, 39 L. Ed. 719.

22. **Certificate of sale.**—*Cooley v. O'Connor*, 12 Wall. 391, 20 L. Ed. 446.

23. *Moore v. Brown*, 11 How. 414, 13 L. Ed. 751; *Redfield v. Parks*, 132 U. S. 239, 251, 33 L. Ed. 327. See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 960.

A tax deed to be valid must not only substantially conform to the requirements

signment (the purchaser having assigned his purchase as provided for in the statute), it complies with the statute.²⁴

Notice of Application for Deed.—When a state statute provides for the execution of a tax deed upon the application of the purchaser at the tax sale, and provides for notice to be first given in a particular way to certain persons, and the statute plainly intends such notice to be an essential prerequisite, and it is settled by the state decisions, that the giving of the particular notice required is an indispensable condition precedent to the right to make a deed to the purchaser or assignee, this rule will be enforced in the federal courts.²⁵ And when the right to personal notice of the fact of sale is fundamental, the evidence should be clear and convincing that it was given according to law.²⁶

3. **SURVEY CONFIRMED AND RECORDED.**—Where by statute two years were allowed for redemption, and after they had expired, the purchaser was required to have a survey made and reported to the court of the proper county, which, if approved, the court might order to be recorded, and after all this had been done, the clerk was required to make a deed to the purchaser, in conformity with the survey, no sale could be consummated, and no deed could be made, prior to the return, confirmation, and record of such survey. And if the statute were repealed there was no authority for making them afterwards, and deed was invalid.²⁷

4. **UNDER REPEALED STATUTE.**—No tax title can be perfected after the repeal of the statute on which the tax proceedings are based.²⁸

5. **EXECUTION.—By Majority of Board.**—Where the tax commissioners were public agents, clothed with public authority, and were created a board to perform a governmental function, it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their

of the statute, but must correspond with the proceedings upon which it is based in all essential particulars. *Stout v. Mastin*, 139 U. S. 151, 154, 35 L. Ed. 121.

24. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 385, 386, 27 L. Ed. 157.

It clearly enough appeared, taking the whole deed together, for what sum in dollars and cents the land was sold in the whole, as required by the statute. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 385, 27 L. Ed. 157.

Premature sale.—Where it is disclosed upon the face of the deed, that the auditor sold the land short of the time prescribed by the act, it was not, then, a sale according to law. *Moore v. Brown*, 11 How. 414, 425, 13 L. Ed. 751; *Redfield v. Parks*, 132 U. S. 239, 250, 33 L. Ed. 327.

25. **Notice of application for deed.**—*Gage v. Bani*, 141 U. S. 344, 349, 35 L. Ed. 776, construing the Illinois statute.

Must specify whether for taxes or special assessments.—The notice is radically defective in that it did not show whether the sale was for taxes or special assessments. *Gage v. Bani*, 141 U. S. 344, 349, 35 L. Ed. 776.

26. *Gage v. Bani*, 141 U. S. 344, 357, 35 L. Ed. 776.

"Ex parte affidavits, filed to procure a deed, would not be conclusive evidence in a suit between the owner of the land

and the holder of the tax title in respect to the notice of the tax sale." *Gage v. Bani*, 141 U. S. 344, 356, 35 L. Ed. 776.

Notice by publication.—The right of the purchaser or his assignee to give notice, by publication under the Illinois statute of the tax sale, existed only when no person was in actual possession or occupancy of the property sold, and the person in whose name it was taxed or specially assessed could not, upon diligent inquiry, be found in the country. *Gage v. Bani*, 141 U. S. 344, 354, 35 L. Ed. 776.

Notice served upon wife.—Where the statute provides for service upon every person in actual possession or occupancy of the land, and also upon the persons in whose name it is taxed, if it be proper or necessary, under any circumstances, to serve notice of the sale upon the wife where the husband owns and occupies the land, and it is taxed in his name, no such circumstances are disclosed in the present case. It certainly must be stated to have been handed her in the presence of her husband. *Gage v. Bani*, 141 U. S. 344, 354, 35 L. Ed. 776.

27. **Survey confirmed and recorded.**—*Shutte v. Thompson*, 15 Wall. 151, 163, 21 L. Ed. 123.

28. **Under repealed statute.**—*Shutte v. Thompson*, 15 Wall. 151, 21 L. Ed. 123, construing West Virginia laws.

number, and a certificate so executed is valid.²⁹

By Successor in Office.—Where the state statute provides that if the officer selling die, or be removed from office, or his term of service expire, after selling any land for taxes, and before making and executing a deed for the same, his successor in office shall make and execute a deed to the purchaser of such lands, in the same manner, and with the like effect, as the officer making such sale would have done, a deed executed by such successor is valid.³⁰

State or County.—Under the laws of Wisconsin a tax deed containing the name of the county as grantor, but omitting the name of the state as grantor, is void upon its face, but indexing in county's name only does invalidate recordation.³¹

Necessity for Seal.—Under the decisions of the supreme court of Nebraska, tax deeds not executed by the county treasurer under his seal of office, were void for want of a seal.³²

Alteration.—See the title ALTERATION OF INSTRUMENTS, vol. 1, pp. 261, 270.

6. DESCRIPTION OF PROPERTY.—**Certainty.**—The description must have sufficient certainty to identify the subject matter.³³

Construction.—Tax deeds are not liberally construed in the purchaser's favor.³⁴

Conformity to That Contained in Tax Proceedings.—While it is sufficient to describe lands in all proceedings relative to assessing, advertising or selling the same for taxes, by initial letters, abbreviations and figures to designate the township, range, section or parts of section, and also the number of lots and blocks, and while it is competent for the county clerk, instead of using such initial letters, abbreviations, etc., to write out the full words they represent, yet he is not to make any material or substantial variance in the descrip-

29. **By majority of board.**—*Cooley v. O'Connor*, 12 Wall. 391, 20 L. Ed. 446, construing direct tax act of 1862.

30. *Thomas v. Lawson*, 21 How. 331, 339, 16 L. Ed. 82.

31. **State or county.**—*Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 337, 39 L. Ed. 719.

32. **Necessity for seal.**—*Deputron v. Young*, 134 U. S. 241, 253, 33 L. Ed. 923.

33. *Ballance v. Forsyth*, 13 How. 18, 23, 14 L. Ed. 32; *Stout v. Mastin*, 139 U. S. 151, 35 L. Ed. 121.

"One acre of land was sold by the sheriff, 'off of the east side of the southwest and southeast fractional quarters of section number nine,' etc. In these two fractional quarters there appear to have been about one hundred and fifty acres. It is not said in what form the acre was to be surveyed. Certainty, in such a case, it is necessary to make the sale valid, for on the form of the acre its value may chiefly depend. And there is nothing on the face of the deed or in the proceeding previous to the sale which supplies this defect." *Ballance v. Forsyth*, 13 How. 18, 23, 14 L. Ed. 32.

Where a sale for taxes and the tax deed describes the land with reference to a recorded plat, and it does not appear in the case that any street was ever improved, that any lot was ever enclosed, or that any house was ever built with reference to the boundaries of any street or lot, and is comes out incidentally in the evidence touching possession, that there is but one

house on the plat, and that it is in a ruinous condition and unoccupied, nothing being proved in pais, recognizing the existence of the plat—under these circumstances it may well be doubted whether the sales of lots for taxes were not illegal and void. *Noonan v. Lee*, 2 Black 499, 507, 17 L. Ed. 278.

And it has been held that a deed which bounded the land correctly on two sides, on the third by land on which it was in fact bounded only in part, and on the fourth by land from which it was separated by the land of another person, was void for uncertainty. *Stout v. Mastin*, 139 U. S. 151, 152, 35 L. Ed. 121.

Where the deed is not required to contain recitals, all that is necessary is to describe the property sold, and the consideration, and to convey to the purchaser all the right, title, interest, and estate, of the former owner, as well as all the right, title, interest, and claim, of the state, to the land. *Thomas v. Lawson*, 21 How. 331, 340, 16 L. Ed. 82.

34. **Construction.**—The tax purchaser rests on the letter of his bond, and he has a legal right to do so; but under such circumstances he must rest alone on his letter. He has no overpowering equity to justify a large and liberal interpretation of statutory proceedings. Surrounding circumstances may sometimes sustain an imperfect description in a voluntary deed by a grantor, but seldom one made in hostile tax proceedings. *Stout v. Mastin*, 139 U. S. 151, 152, 35 L. Ed. 121.

tion of the property inserted in the deed from that set forth in the prior tax proceedings upon which it is based. Each act of the tax proceedings must substantially correspond with its immediate antecedent.³⁵

7. **RECITALS.—Misrecital.**—A misrecital in the tax deed of one of the acts of congress to which it refers, in the same year, comes within the rule *falsa demonstratio non nocet*.³⁶

As to Time of Sale, Nonredemption, and Effect as Evidence.—See note.³⁷

8. **REGISTRY.**—What can impair registry of a tax deed impairs the registry of any deed.³⁸

9. **EFFICACY OF TAX DEED TO PASS TITLE**—a. *Regulated by State.*—The efficacy of the tax deed is a subject which the state has power to prescribe, as peculiarly and vitally affecting its well-being.³⁹

b. *Burden of Proof Independent of Statute.*—The common-law rule, as stated by the elementary writers upon taxation, is that the purchaser at a tax sale is bound to take upon himself the burden of showing the regularity of all proceedings prior thereto.⁴⁰ And the party who sets up a tax title, must furnish

35. Conformity to that contained in tax proceedings.—*Stout v. Mastin*, 139 U. S. 151, 154, 35 L. Ed. 121, construing Kansas statutes. See *Bird v. Benlisa*, 142 U. S. 664, 35 L. Ed. 1151, construing Florida laws. See, also, *Blackwell on Tax Titles*, 434.

Where the tax deed is regular in form, but there is no connection between the description in it and any to be found in the assessment roll, it has been held by the supreme court of Florida, that the limitation section does not prevent a suit by the owner to recover lands after the lapse of a year, when "the calls in the deed of the clerk are materially different from the lands described on the assessment roll, and sold by the collector." *Bird v. Benlisa*, 142 U. S. 664, 666, 35 L. Ed. 1151.

36. Misrecital.—*Springer v. United States*, 102 U. S. 586, 593, 26 L. Ed. 253.

37. Necessity.—The direct tax act of 1863, did not require a recital of the proceedings on which it was founded, in the certificate of sale. *DeTreville v. Smalls*, 98 U. S. 517, 521, 25 L. Ed. 174.

As to time of sale.—In a case where a tax deed, regular in form, recited that the land was sold January 4, and where the treasurer certified that the sales of land for delinquent taxes in the county began on that day, and were continued from day to day until January 18, and that he entered all the sales as made on the 4th, it was held, that a sale of land at any time during the period from the 4th to the 18th was valid, and that recording such sale as made on the first day, though actually made later, did not impair the title. *Callanan v. Hurley*, 93 U. S. 387, 23 L. Ed. 931.

As to nonredemption.—Where the recital as to redemption was: "And whereas it further appears, as the fact is, that the owner or owners or claimant or claimants of said lands has or have not redeemed from said sale the lands which

were sold as aforesaid, and said lands are now unredeemed from such sale, * * *" the meaning is clear that there had been no redemption by the owner or owners or claimant or claimants. *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 334, 39 L. Ed. 719.

As evidence.—The recitals in a deed of a sheriff as to the manner in which he executed a judgment directing the sale of property are evidence against the grantee and parties claiming under him. Accordingly a deed of this officer reciting a sale of property under a judgment for taxes to the highest bidder, when he was authorized by the statute only to sell the smallest quantity of the property which any one would take and pay the judgment and costs, was held to be void on its face. *French v. Edwards*, 13 Wall. 506, 20 L. Ed. 702.

Quære, whether in any case of a sale on a judgment for taxes under the special provision of the statute of California, any presumption can be indulged that the officer had complied with its directions when the fact does not affirmatively appear. It is sufficient that the recitals in his deed of what he did with respect to the sale under consideration show that these directions were disregarded by him in that case. It may also be added that the return of the officer corresponds with these recitals. *French v. Edwards*, 13 Wall. 506, 516, 20 L. Ed. 702. See the titles **DEEDS**, vol. 5, p. 275; **DOCUMENTARY EVIDENCE**, vol. 5, p. 451.

38. Registry.—*Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 340, 39 L. Ed. 719. See the title **RECORDING ACTS**, vol. 10, p. 587.

39. Regulated by state.—*Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 331, 39 L. Ed. 719.

40. Burden of proof independent of statute.—*Turpin v. Lemon*, 187 U. S. 51, 59, 47 L. Ed. 70.

the evidence necessary to support it; if the validity of a tax deed depend on an act in pais, the party claiming under it is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which the validity of the deed might depend.⁴¹

c. *As Prima Facie Evidence of Title under Statutes.*—**Power of Legislature to So Provide.**—It is competent for the legislature to declare that a tax deed shall be prima facie evidence not only of the regularity of the sale, but of all prior proceedings, and of title in the purchaser, but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land.⁴² Although as observed by Judge Cooley in his work upon Taxation, chapter 10, such de-

41. *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518; *Thomas v. Lawson*, 21 How. 331, 340, 18 L. Ed. 82.

In the case of lands sold for the nonpayment of taxes, the marshal's deed is not even prima facie evidence, that the prerequisites required by law have been complied with; but the party claiming under it must show positively that they have been complied with. *Williams v. Peyton*, 4 Wheat. 77, 4 L. Ed. 518; *Games v. Dunn*, 14 Pet. 322, 10 L. Ed. 476.

And a statute which merely provides, that "all deeds of land sold for taxes, shall convey to the purchaser all the right, title and interest of the former proprietor, in and to the land so sold; and shall be received in all courts as good and sufficient evidence of title in such purchaser," does not make the deed on a tax sale admissible as evidence of title, unaccompanied by proof that the substantial requisites of the law, in the previous steps, had been complied with. *Games v. Dunn*, 14 Pet. 322, 10 L. Ed. 476.

42. *Marx v. Hanthorn*, 148 U. S. 172, 182, 37 L. Ed. 410; *Turpin v. Lemon*, 187 U. S. 51, 59, 47 L. Ed. 70; *Williams v. Kirtland*, 13 Wall. 306, 20 L. Ed. 683; *Pillow v. Roberts*, 13 How. 472, 476, 14 L. Ed. 228. See *Barrett v. Holmes*, 102 U. S. 651, 656, 26 L. Ed. 291; *Ballard v. Hunter*, 204 U. S. 241, 256, 51 L. Ed. 461.

"Mr. Cooley sums up his examination of the cases on this subject in the following statement: 'That a tax deed can be made conclusive evidence of title in the grantee we think is more than doubtful. The attempt is a plain violation of the great principle of Magna Charta, which has been incorporated in our bill of rights, and, if successful, would in many cases deprive the citizen of his property by proceedings absolutely without warrant of law or of justice; it is not in the power of any American legislature to deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity. It cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land, or of the possible jurisdictional facts which would make out title. But the legislature might doubtless make

the deed conclusive evidence of * * * everything except the essentials.' Cooley on Taxation, 521, 5th ed. 1886." *Marx v. Hanthorn*, 148 U. S. 172, 182, 37 L. Ed. 410.

And an amendment, changing that feature of an act which made a tax deed conclusive evidence of the regularity of the levy, assessment, collection of taxes, and sale of the property, did not impair the obligation of contracts as to purchases made prior to the amendment, but simply changed the rule of evidence. *Marx v. Hanthorn*, 148 U. S. 172, 184, 37 L. Ed. 410.

Due process of law.—Where a certain procedure is prescribed for the sheriff in making sales of land for unpaid taxes; but it is not required that he incorporate the various steps of such procedure in his report of sales—merely that he shall swear that the list of lands to which his affidavit is appended contains a true account of all the real estate within the county sold by him during the current year for the nonpayment of taxes, and that he is not directly or indirectly interested in the purchase of any such real estate, and a year is then allowed for redemption, after the expiration of which, a deed of the land is executed to the purchaser at the sheriff's sale by the clerk of the county court, which deed, the statute provides, shall not be invalidated by reason of any irregularity in the proceedings under which the land was sold, unless such irregularities appear upon the face of such proceedings of record in the office of the clerk, and be such as to materially prejudice and mislead the owner, due process of law is provided for. *Turpin v. Lemon*, 187 U. S. 51, 55, 47 L. Ed. 70. See, also, *Ballard v. Hunter*, 204 U. S. 241, 256, 51 L. Ed. 461, citing and quoting from *Castillo v. McConico*, 168 U. S. 674, 42 L. Ed. 622. See the title DUE PROCESS OF LAW, vol. 5, p. 660.

Collateral attack.—The corporate standing of a town cannot be questioned collaterally by contesting a tax deed, by virtue of a tax laid by it, for want of jurisdiction in the taxing officers, after the years of corporate action shown by the

fective proceedings cannot be cured where there is a lack of jurisdiction to take them.⁴³ But it can be made conclusive after a reasonable lapse of time, like any other statute of limitation.⁴⁴

Effect of Statute.—The intention and scope of such a statute were to

evidence. *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 336, 39 L. Ed. 719.

43. Want of jurisdiction not cured.—*Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70. See *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 384, 27 L. Ed. 157.

As where land was not assessed to the owner or occupant, or to an unknown owner, and so it was not assessed by any official or accurate description. *Bird v. Benlisa*, 142 U. S. 664, 670, 35 L. Ed. 1151.

"It may not be altogether easy in a particular case to determine whether the defect be jurisdictional or not, but certainly irregularities in the personal conduct of the officer making the sale would not be so regarded; and it is at least exceedingly doubtful whether the failure to preserve the auditor's list of delinquent lands or the evidence of the publication and posting of the statutory notices would vitiate a deed made by the clerk, after a lapse of twelve years." *Turpin v. Lemon*, 187 U. S. 51, 57, 47 L. Ed. 70.

The statutory provisions of Michigan that no sale for delinquent taxes shall be held invalid unless it be made to appear that all legal taxes were paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown (Comp. L., § 1129), are unconstitutional so far as they sustain sales for taxes which are in part illegal. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 336, 32 L. Ed. 134.

44. Where a statute declares that a tax deed shall, after two years, be conclusive evidence of the regularity of the assessment of the taxes for which the land was sold, it cures defects and irregularities in the proceedings, even if they are to be deemed jurisdictional, such as a several ownership of the lands at the time of the assessment or sale, for the aggregate unpaid taxes for several years. It does not seem that the defects were jurisdictional, and certainly of all other defects the law is not curative only—it is one of limitation. It matters not, therefore, what the rights of any predecessor of the plaintiff might have been if seasonably asserted. They were not seasonably asserted, and they are, therefore, now precluded. The law is like any other statute of limitations. It is not affected by what the rights of former owner were. Whatever they were their remedy is gone, and the title and possession of the state, whatever may have been the defects in the proceedings of which they are the consummation, cannot now be disturbed. *Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 327, 44 L. Ed. 786.

The sale of the whole tract of land in

question for the aggregate unpaid taxes of several years when, during one or more of those years, a part of the tract sold was not assessed or taxed at all, or the sale as one tract of two or more parcels separately assessed, are cured by the statute as to a claimant who sues as owner of the whole tract, and if there was a several ownership of it, or of parts of it, such ownership should have been shown if anything can be claimed from it. *Saranac Land, etc., Co. v. Comptroller*, 177 U. S. 318, 326, 44 L. Ed. 786. See ante, "Amount to Be Sold, and Division," VIII, E, 2. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 447.

Many of the states of the Union have enacted what are called short statutes of limitation, the object of which is to protect rights acquired under sales of real estate for taxes. The general purpose of these statutes is to fix a period of time running in favor of the holder under such tax titles, after which the validity of that title shall not be questioned for any irregularity in the proceedings under which the land was sold. This object was generally attained by the enactment of short statutes of limitations, by means of which the party in possession under such defective titles can, by pleading this statute, make his title good. *Redfield v. Parks*, 132 U. S. 239, 250, 33 L. Ed. 327; *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 383, 27 L. Ed. 157. See post, "Lapse of Time and Estoppel," VIII, J, 3.

Under an exception to such a statute, held that the land in this case cannot be said not to have been sold for nonpayment of taxes, because in the \$12.20 for which it was sold was included twenty-five cents for the five stamps, in addition to \$11.95 for taxes proper. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 383, 27 L. Ed. 157.

The exceptions do not apply to this case, although an improper item was included in the amount for which the sale was had. The statute applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed the statute puts at rest all objections raised, after the time specified, against the validity of the tax proceeding, from and including the assessment of the land to and including the execution of the deed. There was jurisdiction and all error was conclusively barred by the statute. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 384, 27 L. Ed. 157.

Statute making tax deed conclusive evidence of regularity as statute of limita-

change this rule so far as to cast the onus probandi on the assailant of the tax title, by making the deed evidence of the title of the purchaser, subject to be overthrown by proof of noncompliance with the substantial requisites of the law. Proof, then, that any of the substantial requisites of the law had been disregarded, or that the taxes have been paid, no matter by whom, would be sufficient to destroy the tax title, whether emanating from the auditor or the collector.⁴⁵ Where the statute makes the deed sufficient evidence of the au-

tions.—See the title CONSTITUTIONAL LAW, vol. 4, p. 447.

45. *Thomas v. Lawson*, 21 How. 331, 340, 16 L. Ed. 82; *Parker v. Overman*, 18 How. 137, 141, 15 L. Ed. 318; *Williams v. Kirtland*, 13 Wall. 306, 20 L. Ed. 683; *Turpin v. Lemon*, 187 U. S. 51, 59, 47 L. Ed. 70.

The deed, then, from the sheriff and collector, was clearly prima facie evidence of the assessment, taxation, and forfeiture of the land; of the regularity of every proceeding previously to the sale of the land forfeited; of the competency of the officer making the sale and conveyance; of the legal validity of the sale; and cast upon the assailant of any of these prerequisites the burden of showing the absence or defectiveness of any of them. And without such a showing, that which was prima facie proof will be taken as conclusive. *Thomas v. Lawson*, 21 How. 331, 340, 16 L. Ed. 82.

Where the effect of the statute was to make the deed prima facie evidence of title in the purchaser, and to relieve the grantee and those holding under him from making proof, until evidence was introduced showing or tending to show that the deed conveyed no title, the deed does not prevent the plaintiffs in a cross bill in a proceeding in equity under the state statute to confirm a tax title to land, who owned the land before the sale, from showing that they have been deprived of substantial rights by reason of the failure of the officers of the state to observe requirements of the law in respect to listing or assessing the property for taxation, or selling it as delinquent, or in respect to the redemption of it after its sale. *Martin v. Barbour*, 140 U. S. 634, 641, 35 L. Ed. 546.

So under Arkansas statutes and decisions.—*Thomas v. Lawson*, 21 How. 331, 332, 16 L. Ed. 82; *Parker v. Overman*, 18 How. 137, 141, 15 L. Ed. 318; *Pillow v. Roberts*, 13 How. 472, 476, 14 L. Ed. 228.

Wisconsin statute requiring action within three years after record of deed.—“If the deed is valid on its face, and purports to convey the land on a sale for the nonpayment of taxes, it is, during the three years, prima facie evidence of the regularity of the tax proceeding, and after the statute has run in favor of the grantee, the deed becomes conclusive to the same extent.” *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 384, 27 L. Ed. 157. See, also, *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 332, 39 L. Ed. 719.

“Before the deed was recorded the owner might tender the redemption money and defeat the tax title, and at any time within three years after record he might bring suit to impeach the tax deed, or make defense to suit against him, by proof of defects in the proceedings upon which it was based. But after the expiration of three years, the statute purged the tax proceedings of all defects, and the deed could only be attacked on the ground of want of power to levy and sell by reason of payment of taxes, lack of jurisdiction in the taxing officers, or the like.” *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 333, 39 L. Ed. 719. See, also, ante, “Curative Acts,” VI, A, 9; and post, “Curative Acts,” VIII, H, 6.

West Virginia.—*Rich v. Braxton*, 158 U. S. 375, 406, 39 L. Ed. 1022.

Ohio.—*Games v. Dunn*, 14 Pet. 322, 332, 10 L. Ed. 476.

Illinois.—*Gage v. Kaufman*, 133 U. S. 471, 472, 33 L. Ed. 725.

Under the laws and decisions of Illinois, as has been repeatedly held, if any portion of the tax is illegal, or the judgment is too large, only to the extent of a few cents, the sale and tax deed will be void. This being so, the tax deed conveyed no title, and hence there could be no recovery under it, as the plaintiff in ejectment must, as in other cases, establish his right to recover. *Gage v. Pumphelly*, 115 U. S. 454, 460, 29 L. Ed. 449.

And a default judgment is not conclusive, but may be impeached collaterally. *Gage v. Pumphelly*, 115 U. S. 454, 462, 29 L. Ed. 449.

Iowa.—*Callanan v. Hurley*, 93 U. S. 387, 23 L. Ed. 931; *Barrett v. Holmes*, 102 U. S. 651, 656, 26 L. Ed. 291.

“If it be conceded that, under the statute, the deeds containing these recitals are only presumptive evidence that the sales were actually made as recited, the burden is still on the complainant to rebut this presumption.” *Callanan v. Hurley*, 93 U. S. 387, 391, 23 L. Ed. 931.

But the title, subject to the lien, remains in the former owner until the execution of the tax deed; and if that deed is for any reason invalid, the lien is only interest that the purchaser has in the land. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 750, 31 L. Ed. 309.

Minnesota.—A tax deed executed by a county auditor under a statute of Minnesota of 1866, declaring that where lands sold for taxes were not redeemed within

thority, the description, and the price, the term "sufficient," is equivalent to prima facie and not to "conclusive."⁴⁶

Waiver of Right to Rely Thereon.—See note.⁴⁷

Evidence of Preceding Judgment.—A defendant, claiming under an Illinois tax deed, who would avail himself of the statute of Illinois, setting forth what facts may be shown to establish the invalidity of such a deed, and precluding, except upon certain conditions a question of it for any other cause, must show not only a tax deed in proper form, but show also a valid judgment under which the tax sale was made.⁴⁸

Nature of Title Passing by Certificate.—Where lands have been sold for an unpaid direct tax, the tax sale certificate is, under the act of Feb. 6, 1863 (12 Stat. 640) prima facie evidence not only of a regular sale, but of all the antecedent facts which are essential to its validity and to that of the purchaser's title, and they need not be recited therein. It can only be affected by establishing that the lands were not subject to the tax, or that it had been paid previously to the sale, or that they had been redeemed according to the provisions of the act;⁴⁹ although the United States were the purchasers.⁵⁰ A statute which requires the holder of a tax certificate made before its passage to give notice to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate.⁵¹

Property Redeemed by Owner.—See note.⁵²

the time allowed by law, such deed should be prima facie evidence of a good and valid title in the grantee, his heirs, and assigns, did not dispense with the performance of all the requirements prescribed by law for the sale of the land. It only shifted the burden of proof of such performance from the party claiming under the deed to the party attacking it. *Williams v. Kirtland*, 13 Wall. 306, 20 L. Ed. 683.

Nebraska.—*Holland v. Challen*, 110 U. S. 15, 25, 28 L. Ed. 52.

Oregon—Void assessment.—Under the laws of Oregon and its decisions, in an action to determine the title to land claimed under a tax deed, evidence can be received to show that the assessment claimed to have been made was void, in that the property in dispute had been assessed with other property not owned by the defendants, and the value of all fixed at a gross sum, and it was error to exclude such evidence, even under a statute making a tax deed evidence of the regularity of an assessment. *Marx v. Hanthorn*, 148 U. S. 172, 184, 37 L. Ed. 410.

Tax deed as cloud on title.—See the title QUIETING TITLE, vol. 10, p. 437.

Tax deed as color of title.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 956, et seq., 960.

46. *Parker v. Overman*, 18 How. 137, 15 L. Ed. 318.

47. Held that the tax title claimant by the introduction of certain evidence adduced in rebuttal or in support of his general equities, did not waive its right to reply on the statute of limitations and the conclusive effect of the tax deed, and no such contention can be sustained.

Bardon v. Land, etc., Imp. Co., 157 U. S. 327, 334, 39 L. Ed. 719.

48. *Little v. Herndon*, 10 Wall. 26, 19 L. Ed. 878; *Gage v. Bani*, 141 U. S. 344, 350, 35 L. Ed. 776. See, also, ante, "Application of Doctrine of Res Judicata," IV, A, 5.

49. **Nature of title passing by certificate.**—*De Treville v. Smalls*, 98 U. S. 517, 25 L. Ed. 174, reaffirmed in *Keely v. Sanders*, 99 U. S. 441, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330.

Due advertisement.—Held prima facie evidence thereof, and not rebutted by the evidence. *Keely v. Sanders*, 99 U. S. 441, 443, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330.

Payment or its equivalent may be shown.—Where the commissioners refused to receive such taxes, their action in thus preventing payment was the equivalent of payment in its effect upon the certificate of sale. This was the famous Arlington tax case. *United States v. Lee*, 106 U. S. 196, 200, 27 L. Ed. 171, citing *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 21 L. Ed. 786; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

50. *Cooley v. O'Connor*, 12 Wall. 391, 20 L. Ed. 446; *United States v. Lee*, 106 U. S. 196, 204, 27 L. Ed. 171. See, also, *De Treville v. Smalls*, 98 U. S. 517, 25 L. Ed. 174.

51. *Curtis v. Whitney*, 13 Wall. 68, 71, 20 L. Ed. 513.

52. **Property redeemed by owner.**—Whatever prima facie evidence of title the deeds might have been by themselves, was overcome by the fact that the grantee was, at the time of the tax sales, the

J. Relief against Invalid Sale and Deed.—See ante, "Application of Doctrine of Res Judicata," IV, A, 5.

1. **JURISDICTION.**—When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action of ejectment. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief.⁵³ But a plaintiff cannot test the constitutionality of the law without showing that he has been injured by its application.⁵⁴

Suit to Quiet Title.—According to settled principles, the plaintiffs were entitled to invoke the aid of a court of equity to set aside an illegal or void tax deed, and such is the law in West Virginia.⁵⁵

Determination of Validity in Suit to Foreclose Prior Mortgage.—On principle, it was within the jurisdiction and authority of the court, upon a bill in equity for the foreclosure of the plaintiff's mortgage, to determine the validity or invalidity of a tax title acquired subsequently to the mortgage, and the tax purchaser was a proper, if not a necessary, party to such a bill, and bound by the decree rendered after due service, although he did not appear or defend.⁵⁶

owner of the property, and, as such, had practically redeemed it from the sales. A tax deed executed after redemption from the sale, or, what is in legal effect the same thing, after the lien of the tax has been transferred to the owner of the property before the sale has become absolute, confers no title. *Gould v. Day*, 94 U. S. 405, 414, 24 L. Ed. 232.

53. **Jurisdiction.**—*Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796.

"In some instances equity will interpose in cases of this kind, as where the deed is by statute made evidence of title in the purchaser, or the preliminary proceedings are regular upon their face, and extrinsic evidence is required to show their invalidity." *Slater v. Maxwell*, 6 Wall. 268, 276, 18 L. Ed. 796.

54. *Turpin v. Lemon*, 187 U. S. 51, 60, 47 L. Ed. 70, following *Tyler v. Judges of Registration*, 179 U. S. 405, 45 L. Ed. 252.

55. *Rich v. Braxton*, 158 U. S. 375, 405, 39 L. Ed. 1022. See the title **QUIETING TITLE**, vol. 10, p. 441.

As to suit against state official after retirement from office, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 27. As to state as necessary party, and suits against state, see the title **STATES**, ante, p. 33.

56. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 755, 31 L. Ed. 309.

In the absence of any statute or rule of court, restricting the natural meaning of the words, the allegation in the bill to foreclose, that a third party "claims some interest in and to a portion of the mortgaged premises, the exact nature of which your orator is unable to set out," is sufficient to include the interest of a claimant under a tax deed, whether it was a mere lien for the amount of the taxes, as it

would have been if the right of redemption from the sale for taxes had not expired, or if the treasurer's deed was void for any reason, or was a perfect title in fee, as it would be if that right had expired and there was no defect in the tax deed. *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747, 756, 31 L. Ed. 309.

Where mortgaged property was claimed by H. in virtue of a tax sale, while the mortgagee might have proceeded against H. alone for the purpose of determining whether his right to the land was not subordinate to the mortgage lien, it was competent, under the practice in equity prevailing in the courts of the United States, and in order that full and adequate relief might be had, to unite in the same suit both the mortgagor and the party claiming the property adversely to the lien of the mortgage, by virtue of proceedings had subsequently to its execution, and the latter was a necessary party. And he need not tender the amount of the tax for which it was sold. *Mendenhall v. Hall*, 134 U. S. 559, 568, 33 L. Ed. 1012.

The constitutional provision that "all deeds of sale made, or that may be made, by the collector of taxes, shall be received by the courts in evidence as prima facie valid sales," and that "no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with ten per cent interest, be tendered to the purchaser," have no application to a case of a proceeding to set aside a tax sale, upon the ground that a mortgagor who had agreed "not to sell, mortgage or in anywise encumber the property," to the prejudice of the mortgage, had fraudulently combined with his brother to defeat the mortgage lien by means of a sale for taxes due from the

2. **GROUND OF RELIEF.—For Invalidity of Tax.**—In Michigan a tax deed is void if a portion of the tax for which it was given was excessive and invalid.⁵⁷ But while any illegality in the tax for which the sale is made invalidates the deed, as where a part of the sum was 20 cents to pay for revenue stamps, yet the state may limit the time in which it may be availed of by a statute of limitation.⁵⁸

Fraud and Collusion.—See ante, "Fraud," VIII, A, 4. Fraud, collusion, or unfair practices to the prejudice of the owner, are ground for relief against the sale.⁵⁹

3. **LAPSE OF TIME AND ESTOPPEL.**—Where the owners of the tax title have had the possession, paid the taxes, built and made valuable improvements on the lot, in the presence of the former owners, for near twenty years, and that which was of comparatively small value at first, has now become valuable, under such circumstances, a court of justice should be unwilling to exercise any judicial ingenuity to forfeit even a tax title, where the former owners have been so slow to question its validity.⁶⁰

Estoppel of County to Set Up Title against Officer's Deed.—See the title *ESTOPPEL*, vol. 5, p. 989.

Limitations to Attack.—See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 960. And see ante, "As Prima Facie Evidence of Title under Statutes," VIII, I, 9, c.

When Statute Begins to Run.—A statute limiting the time within which suits for the recovery of lands sold for taxes must be brought, begins to run from the time of the recording of the tax deed, whether possession has or has

mortgagor, at which sale the brother was to bid in the property, in his own name, and for the protection of the mortgagor, assert his absolute ownership of it, and the evidence was held to support the allegations. *Mendenhall v. Hall*, 134 U. S. 559, 568, 33 L. Ed. 1012. See, also, the title *MORTGAGES AND DEEDS OF TRUST*, vol. 8, pp. 501, 503, 517.

57. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 335, 32 L. Ed. 134.

If the tax levy under which lands were sold included an illegal allowance for extra compensation to judges of the state court which included within its jurisdiction the county levying the tax, which the supervisors of that county allowed and paid to them, out of the tax levies, in excess of their salary, by the law of Michigan, if this sum was included in the assessment and levy of taxes, on account of which the sales were made that these deeds represent, the title based upon them is void. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 335, 32 L. Ed. 134.

There was enough in the bill of exceptions which is not parol, but matter found in the records of the boards of supervisors who made the tax levy, to establish the fact, without any parol testimony, that the tax levy did include the illegal item. But parol evidence of the receipt of the money by the judges was competent. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 336, 32 L. Ed. 134.

58. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 384, 27 L. Ed. 157. See ante, "As Prima Facie Evidence of Title under Statutes," VIII, I, 9, c.

Discrimination by assessor.—See ante, "Assessment and Levy," VI.

59. **Fraud and collusion.**—*Slater v. Maxwell*, 6 Wall. 268, 18 L. Ed. 796; *Mendenhall v. Hall*, 134 U. S. 559, 571, 33 L. Ed. 1012.

The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness should be set aside, or the purchaser be required to hold the title in trust for the owner. So when the purchaser stated at the sale that the owner would redeem, and so put down competition as to depress the price. *Slater v. Maxwell*, 6 Wall. 268, 276, 18 L. Ed. 796. See, also, *Stead v. Course*, 4 Cranch 403, 413, 2 L. Ed. 660.

Where the subsequent conduct of the purchaser at tax sale, in bidding in a portion of same land at a second sale for taxes in former owner's name, is inexplicable except upon the hypothesis that the action of the defendant in bidding in the property in 1845 was taken for the benefit of the complainant, or that the sale then made was so far subject to objection for unfairness that he desired its concealment until, from lapse of time, it should become impossible to impeach it successfully, held that, such being the case, there is no doubt that relief should be granted the complainant by a release of all rights acquired under such sale. *Slater v. Maxwell*, 6 Wall. 268, 276, 18 L. Ed. 796.

60. *Thompson v. Carroll*, 22 How. 422, 435, 16 L. Ed. 387.

not been taken by the purchaser, and whether the sale and deed be void or valid.⁶¹

4. **SUFFICIENCY OF ANSWER.**—See the title *EQUITY*, vol. 5, p. 867.

5. **BURDEN OF PROOF.**—The burden of proving the facts excusing nonredemption and invalidating a tax deed, is upon the plaintiff. So as to a general rule made by tax commissioners before sale, not to receive taxes except from the owner in person after advertisement and before sale.⁶²

6. **REIMBURSEMENT OF PURCHASER.**—It was held in a proceeding in equity to set aside a tax sale as invalid in Illinois, that, as a condition of granting the relief asked, the taxpayer was bound to do equity, and, therefore, should reimburse the purchaser to the extent of all taxes paid by him, whether those for which the property was sold, or those subsequently levied thereon and paid by him, with interest on each sum.⁶³

K. Recovery of Possession by Purchaser.—See ante, "Confirmation of Sale." VIII. G. A statutory provision limiting the time in which an action may be brought for the recovery of the land by the tax purchaser, is not in conflict with the constitution of the United States.⁶⁴

L. Costs.—Where there is no pretense that any separate charge is exorbitant or unreasonable, if the state is compelled to resort to forfeiture and sale proceedings for the collection of its taxes, it may provide reasonable compensation for the officials charged with any duty in connection therewith, and incorporate the charges therefor as costs in the case.⁶⁵

M. Redemption—1. **REGULATION OF RIGHT.**—The authority of the legislature to frame rules by which the right of redemption from tax sales may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute to the owners of the time when the right to redeem will expire.⁶⁶ The right to redeem the title of lands sold for taxes is one commonly reserved, and the right is favored by the policy of the law.⁶⁷

2. **CONSTRUCTION.**—Statutes authorizing redemption from sales for taxes, are to be construed favorably to the owners of the land, and particularly when such statutes provide full indemnity to the purchaser and impose a penalty on the delinquent.⁶⁸

61. *Leffingwell v. Warren*, 2 Black 599, 17 L. Ed. 261; *Barrett v. Holmes*, 102 U. S. 651, 655, 26 L. Ed. 291. See, also, the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, pp. 957, 1018.

The only exceptions made in the statute of Wisconsin, which prevent its application, are where the taxes are paid before the sale, and where the land is redeemed within the time prescribed by law after the sale, within neither of which this case falls. *Leffingwell v. Warren*, 2 Black 599, 604, 17 L. Ed. 261. See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 1018.

62. *United States v. Lee*, 106 U. S. 196, 201, 27 L. Ed. 171.

63. **Reimbursement of purchaser.**—*Gage v. Pumpelly*, 115 U. S. 454, 463, 29 L. Ed. 449.

64. **Recovery of possession by purchaser.**—*Barrett v. Holmes*, 102 U. S. 651, 26 L. Ed. 291. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, pp. 881, 882.

Iowa.—The right of entry of a party

who claims under the treasurer's deed lands in Iowa sold for the nonpayment of taxes is barred, if, within five years after the deed has been executed and recorded, he neither sues for nor takes possession of the lands. He must do the one or the other. It is immaterial whether the former owner remained in possession, or took such possession during the five years. *Barrett v. Holmes*, 102 U. S. 651, 26 L. Ed. 291.

65. **Costs.**—*League v. Texas*, 184 U. S. 156, 160, 46 L. Ed. 478. See, generally, the title *COSTS*, vol. 4, p. 802.

66. **Regulation of right.**—*Curtis v. Whitney*, 13 Wall. 68, 71, 20 L. Ed. 513. See, also, *Gage v. Pumpelly*, 115 U. S. 454, 458, 29 L. Ed. 449.

67. *Barrett v. Holmes*, 102 U. S. 651, 657, 26 L. Ed. 291, citing *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325; *Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976; *Curtis v. Whitney*, 13 Wall. 68, 20 L. Ed. 513. See, also, *Gage v. Pumpelly*, 115 U. S. 454, 458, 29 L. Ed. 449, construing Illinois Constitution which allows two years.

68. *Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976; *Dubois v. Hepburn*, 10 Pet. 1, 9

3. WHO MAY REDEEM.—**Owner.**—It comports with the words and spirit of the law, to consider any person who has an interest in lands sold for taxes, as the owner thereof, for the purposes of redemption.⁶⁹

Agent of Owner.—The redemption may be made by an agent of the owner or by any person willing to act for him, upon the ground that such act is valid if ratified either expressly or by implication, and such ratification will be presumed in furtherance of justice.⁷⁰

De Facto Trustee.—A trustee of lands appointed by a court without jurisdiction being thus clothed apparently with the legal title, and acting under his appointment with the consent of the cestuis que trust, was a person "having charge" of their estate, and was thus entitled to make redemption for them of the lands sold for taxes within the meaning of the act for the collection of the direct tax of 1862.⁷¹

4. TENDER.—The law does not require a payment or tender to redeem land sold for taxes; an offer and refusal is made equivalent to a receipt of the money by the treasurer; and authorizes a recovery of the land by suit, as if no sale had been made.⁷² If the tax officers established, announced, and uniformly followed a general rule under which they refused to receive on property which had been advertised for sale from any one but the owner, or a party in interest, in person, when offered, the amount chargeable upon said property by virtue of the said acts of congress, then said rule dispensed with the necessity of a tender, and in the absence of proof to the contrary the law presumes that said amount would have been paid.⁷³

5. TEST OATH.—The test oath prescribed by the act of 1865, for the redemp-

L. Ed. 325; *Barrett v. Holmes*, 102 U. S. 651, 657, 26 L. Ed. 291.

"While it may be admitted that statutory right of redemption is to be favorably regarded, it is nevertheless true that it is a statutory right exclusively, and can only be claimed in the cases and under the circumstances prescribed. Courts cannot extend the time, or make any exceptions not made in the statute." *Keely v. Sanders*, 99 U. S. 441, 445, 25 L. Ed. 327, followed in *Sherry v. McKinley*, 99 U. S. 496, 25 L. Ed. 330.

69. *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325; *Barrett v. Holmes*, 102 U. S. 651, 657, 26 L. Ed. 291; *Rich v. Braxton*, 158 U. S. 375, 400, 402, 39 L. Ed. 1022.

Any right, which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem. *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325.

"Under the laws of Wisconsin the owner of land sold for taxes might, at any time within three years from date of the certificate of sale, redeem the same in the manner prescribed, and in like manner redeem at any time before the tax deed executed upon such sale was recorded. Gen. Laws Wis. 1859, c. 22, §§ 18, 19; Rev. Statutes of 1878, § 1165." *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327, 332, 39 L. Ed. 719.

Under the act of June 7, 1862, for the collection of direct taxes in insurrectionary districts, persons entitled to make re-

demption were divided into two classes. The first class embraced persons who were residents in the country, and not laboring under any legal disability. The second class embraced loyal citizens beyond the seas, nonresident aliens, and persons laboring under some legal disability, to whom the reason for the limitation prescribed to the first class was not applicable. *Corbett v. Nutt*, 10 Wall. 464, 474, 19 L. Ed. 976.

Bankrupt before appointment of assignee.—*Hampton v. Rouse*, 22 Wall. 263, 22 L. Ed. 755.

Former owner.—See FORMER OWNER, vol. 6, p. 386.

70. **Agent of owner.**—*Bennett v. Hunter*, 9 Wall. 326, 338, 19 L. Ed. 672; *Tacey v. Irwin*, 18 Wall. 549, 550, 21 L. Ed. 786; *Hampton v. Rouse*, 22 Wall. 263, 274, 22 L. Ed. 755; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, construing direct tax act of 1861-2. See post, "Tender," VIII, M, 4.

71. *Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976.

72. *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325.

73. *United States v. Lee*, 106 U. S. 196, 201, 27 L. Ed. 171. See, also, *Swift Co. v. United States*, 111 U. S. 22, 30, 28 L. Ed. 341; *Tacey v. Irwin*, 18 Wall. 549, 550, 21 L. Ed. 786; *Bennett v. Hunter*, 9 Wall. 326, 338, 19 L. Ed. 672; *Hampton v. Rouse*, 22 Wall. 263, 274, 22 L. Ed. 755; *Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

Burden of proof.—See post, "Burden of Proof," VIII, J, 5.

tion of land from delinquent direct taxes, applied only to owners seeking in person to redeem, not trustees, agents, etc.⁷⁴

6. NOTICE OF TIME.—See ante, "Regulation of Right," VIII, M.

7. LANDS FORFEITED OR PURCHASED FOR THE STATE.—Such lands are redeemable in the mode prescribed by the statute. The time given by the constitution and laws of West Virginia to redeem lands that had become the property of Virginia by forfeiture or by purchase at sheriffs' sale for delinquent taxes, and which had not been released or exonerated in conformity to law, expired June 20th, 1868.⁷⁵

Waiver of Forfeiture.—"The state is bound by the acts of her officers in placing the lot on the tax-books for the years 1885 and 1886, and receiving from the appellees the taxes for those years. Equity will treat the transaction as a waiver of the prior supposed forfeiture, and will regard the tax paid for 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest."⁷⁶

8. EXCUSES FOR NONREDEMPTION.—**Incapacity of Party Entitled to Redeem.**—If any part of the land had been sold by the state, in which minors had an interest, under the law, they had a right to redeem it, within a certain time after they became of age.⁷⁷

Dereliction of Duty of State Officers.—The right to redeem is a substantial right, and where it was prevented from being exercised within the statutory period of two years by the dereliction of duty on the part of the officers of the state, the sale was made contrary to law, and it was the duty of the circuit court, under the statute, to annul it, in order to allow the redemption to take place. No more manifest case for the interposition of a court of equity can be imagined.⁷⁸

9. ENTRY OF REDEMPTION AND DEED OF RECONVEYANCE.—Where a statute provides that upon the redemption the county commissioners shall reconvey all the county's title to the owner, it has been held that the entry of "redemption" in the tax books is received as evidence of the fact, and that the redemption is good and revests the title without a deed from the commissioners.⁷⁹

10. REMEDY AND RECOVERY FROM PURCHASER.—The right to redeem is a legal one and to be asserted in a court of law, if denied.⁸⁰

74. *Test oath.*—Corbett v. Nutt, 10 Wall. 464, 19 L. Ed. 976.

75. *Rich v. Braxton*, 158 U. S. 375, 393, 39 L. Ed. 1022.

Purchase of state bid.—Certain lands in Michigan, sold for taxes, were, for want of other purchasers, bid in by the state. Before the sale became absolute, the owner of the property, having a complete title thereto at the time the sale was made, purchased the state bids. Held, that a redemption of the property from the sale was practically effected by the purchase. *Gould v. Day*, 94 U. S. 405, 24 L. Ed. 232.

76. The purchaser from the state took his deed for the land in the same condition in which the state held it, and subject to the same equities and defenses, and it was redeemed as to him. *Martin v. Barbour*, 140 U. S. 634, 646, 35 L. Ed. 546.

77. *Beaty v. Knowler*, 4 Pet. 152, 170, 7 L. Ed. 813, where period was one year after coming of age. *Martin v. Barbour*, 140 U. S. 634, 35 L. Ed. 546, construing Arkansas laws, which gave two years.

78. **Dereliction of duty of state officers.**

—*Martin v. Barbour*, 140 U. S. 634, 646, 35 L. Ed. 546, construing the law of Arkansas.

79. **Entry of redemption and deed of reconveyance.**—*Murphy v. Packer*, 152 U. S. 398, 404, 38 L. Ed. 489. See, also, *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325.

It is a fair presumption, after a lapse of forty years, that an entry of redemption in the book of the treasurer was properly made. *Murphy v. Packer*, 152 U. S. 398, 404, 38 L. Ed. 489.

Tax deeds, subsequently executed to the owner by the state, were only evidence that the taxes were satisfied, the lien of the state discharged, and the estate restored from the sale: they transferred no new title to the grantee. *Gould v. Day*, 94 U. S. 405, 24 L. Ed. 232.

80. One claiming the right to redeem land sold for taxes, as the heir of a part owner, cannot have himself made a party plaintiff in a suit to set aside the tax deed, as his was a legal title, and no obstruction is seen to the assertion of that legal title against the defendants, in a court of law. That court is the appropriate one to settle the conflict growing out of the

Recovery.—Where land sold under the said act of June 7, 1862, has been redeemed, the owner is entitled to recover it from the purchaser at the tax sale, without showing that the certificate of redemption has been forwarded to the secretary of the treasury, and that the purchaser has been paid his purchase money by draft drawn on the treasury of the United States.⁸¹

11. **SALE OF REDEEMED PROPERTY.**—See ante, "Under Sale for Taxes Which Had Been Paid," VIII, H, 4; "As Prima Facie Evidence of Title under Statutes," VIII, I, 9, c: Where land has been redeemed, or there is a valid excuse for its nonredemption, the sale of the property was unauthorized, and conferred no title on the purchaser.⁸²

IX. Refunding and Recovery Back of Taxes.

A. Refunding—1. **POWER OF STATE.**—Unless restrained by provisions of its constitution, the legislature of a state may direct a restitution of municipal taxes.⁸³

2. **POWER OF UNITED STATES AND CONSTRUCTION OF ACTS.**—As to refund of duties and internal revenue taxes, see the title **REVENUE LAWS**, vol. 10, pp. 951, 980. Under the act of congress of July 29, 1882, 22 Stat. 723, ch. 359, providing for the refunding to the persons therein named of the amount of taxes assessed upon and collected from them contrary to the provisions of the regulations therein mentioned, "that is to say, to" each of such persons the sum set opposite his name, each of them is entitled to be paid the whole of that sum, and no discretion is vested in the secretary of the treasury, or in any court, to determine whether the sum specified was or was not the amount of a tax assessed contrary to the provisions of such regulations. Only the identity of the claimants was open to question.⁸⁴

Refund of Direct Tax.—In interpreting the act of 1891 the supreme court must be guided not by any mere technicality, but must read its provisions by

legal title derived by such heir from his ancestor, and the title claimed by defendants under the tax deed. If he had any right to redeem from the sale for taxes it must be a legal right, which he can exercise without the aid of a court of chancery. *Rothwell v. Dewees*, 2 Black 613, 616, 17 L. Ed. 309.

81. **Recovery.**—*Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976.

Limitation.—See ante, "Lapse of Time and Estoppel," VIII, J, 3.

82. **Redeemed property.**—*Gould v. Day*, 94 U. S. 405, 414, 24 L. Ed. 232; *United States v. Lee*, 106 U. S. 196, 201, 27 L. Ed. 171.

83. **Power of state.**—*Board of Comm'rs v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Essex, etc., Board v. Skinkle*, 140 U. S. 334, 343, 35 L. Ed. 446. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 413.

The statutes of Iowa contemplate a return of taxes when it is disclosed that the land was not subject to taxation. 1 *McClain's Rev. Stat.* 1888, § 1387, p. 353. *Hussman v. Durham*, 165 U. S. 144, 150, 41 L. Ed. 664.

84. **Power of United States and construction of acts.**—*United States v. Jordan*, 113 U. S. 418, 28 L. Ed. 1013.

"It is not an improper inference, from the language of the statute, that congress intended to refund the taxes covered by

the recommendation of the secretary of the treasury, in his letter of June 19, 1873. That letter covers taxes described as those which, under the circular, 'should not have been collected,' though collected before it was issued. Congress may, therefore, have included some taxes collected before the circular was issued, but which it thought should not have been, or ought not to have been, collected, in the sense intended by the secretary." *United States v. Jordan*, 113 U. S. 418, 423, 28 L. Ed. 1013.

Right to refund of brewer's tax.—A brewer paid to the collector of internal revenue \$100 for special tax on his business from May 1, 1873, to April 30, 1874, for which a special tax stamp was given him. At the close of the year, it was found that he had manufactured less than five hundred barrels, and the commissioner of internal revenue allowed his claim for the excess paid by him. Upon proper application to the treasury, payment of the amount so allowed was refused. Held, that the allowance made by the commissioner, unless it be impeached in some appropriate form by the United States, is conclusive, and he was entitled to a refund of \$50. *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792. See the title **REVENUE LAWS**, vol. 10, pp. 978, 1015.

the light of the cardinal rule, commanding that the words must be apprehended, not in a forced and purely technical way, but in their general acceptance, and that the law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby.⁸⁵ One who was a mortgage creditor at the time of the sale of the property, to enforce the direct tax of 1861, is not the legal owner contemplated by congress when it enacted the law of 1891 for the refund of said tax to the legal owner of such land.⁸⁶

B. Recovery Back.—As to recovery back of internal revenue taxes, duties and stamp taxes, see the title REVENUE LAWS, vol. 10, pp. 976, et seq., 936, et seq., and 1016.

1. **ILLEGALITY OF ASSESSMENT OR OVERVALUATION.**—It is only where the assessment is wholly void, or void with respect to separate portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board.⁸⁷

2. **EXHAUSTION OF REMEDIES BEFORE PAYMENT.**—Taxes paid upon an assessment alleged to be excessive and irregular cannot be recovered back in an action at law, where the party so assessed neither pursued the remedy provided for by the statute for correcting such assessment nor, if for any reason that was unavailable, resorted to a court of equity to enjoin the collection of the illegal excess, upon payment or tender of what would be due upon the conceded valuation.⁸⁸

3. **PAYMENT MUST NOT BE VOLUNTARY.**—Where a party pays an illegal demand for taxes with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And the fact that the party at the time of making the payment

85. Refund of direct tax.—*Glover v. United States*, 164 U. S. 294, 297, 41 L. Ed. 440; *Maillard v. Lawrence*, 16 How. 251, 14 L. Ed. 925; *Smythe v. Fiske*, 23 Wall. 374, 23 L. Ed. 47.

It follows that the aim proposed by the act of 1891 was the return of the tax assessed under the act of 1861 and the repayment, in certain cases, to the owners of a named sum for lands which were assessed and sold under that act. *Glover v. United States*, 164 U. S. 294, 298, 41 L. Ed. 440.

Construction of act refunding direct tax of 1861.—Where land in South Carolina was sold in 1863 under the direct tax law of 1861 and bid in by the United States, and subsequently the United States sold at public auction that portion of its land described as lot A to the tenant for life of said land, and during his lifetime the land was seized under execution as his property and sold, and never afterwards came into his possession or that of the remainderman; held, that the latter had never repurchased or redeemed any part of said land; and this suit being brought by the appellees in the court of claims to assert their claim as the owners in fee simple in remainder under the act of 1891,

and they being admittedly the "owners," they are entitled to the reimbursement provided for by that act. *United States v. Elliott*, 164 U. S. 373, 377, 378, 41 L. Ed. 474.

The life tenant was not so far a trustee or representative of the remaindermen that, when he purchased at the public sale in 1866, he acted as well for those in remainder as for himself. *United States v. Elliott*, 164 U. S. 373, 379, 41 L. Ed. 474.

86. *Glover v. United States*, 164 U. S. 294, 295, 41 L. Ed. 440.

87. Illegality of assessment or overvaluation.—*Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 427, 47 L. Ed. 1116, quoting from *Stanley v. Supervisors*, 121 U. S. 535, 549, 30 L. Ed. 1000. See, also, ante, "Corrections and Additions," VI, F.

More irregularities in the assessment are insufficient to authorize a recovery. *Bailey v. Railroad Co.*, 22 Wall. 604, 638, 22 L. Ed. 840.

88. *Stanley v. Supervisors*, 121 U. S. 535, 552, 30 L. Ed. 1000, followed in *Williams v. Supervisors*, 122 U. S. 154, 30 L. Ed. 1088. See ante, "Boards of Revision or Equalization," VI, F, 4.

files a written protest does not make the payment involuntary.⁸⁹ But if the pay-

89. Payment must not be voluntary.—*Railroad Co. v. Commissioners*, 98 U. S. 541, 543, 25 L. Ed. 196; *Lamborn v. County Comm'rs*, 97 U. S. 181, 187, 24 L. Ed. 926; *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1061. See, also, *Philadelphia v. Collector*, 5 Wall. 720, 732, 18 L. Ed. 614; *State Tonnage Tax Cases*, 12 Wall. 204, 209, 20 L. Ed. 370; *Dooley v. United States*, 182 U. S. 222, 45 L. Ed. 1074; *Patton v. Brady*, 184 U. S. 608, 614, 46 L. Ed. 713; *Chesebrough v. United States*, 192 U. S. 253, 259, 48 L. Ed. 432; *United States v. New York, etc., Mail Steamship Co.*, 200 U. S. 488, 50 L. Ed. 569.

Although, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had. *Chesebrough v. United States*, 192 U. S. 253, 259, 48 L. Ed. 432; *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1061; *Railroad Co. v. Commissioners*, 98 U. S. 541, 544, 25 L. Ed. 196.

"There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Elliott v. Swartwout* (10 Pet. 137, 9 L. Ed. 373) and *Bend v. Hoyt* (13 Pet. 263, 266, 10 L. Ed. 154), which were customs cases, the payments were made to release goods held for duties on imports; and the protest became necessary, in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia v. Collector* (5 Wall. 720, 730, 18 L. Ed. 614) and *The Collector v. Hubbard* (12 Wall. 1, 13, 20 L. Ed. 272), which were internal revenue tax cases, the actions were sustained 'upon the ground that the several provisions in the internal revenue acts referred to warranted the conclusion as a necessary implication that congress intended to give the taxpayer such remedy.' It is so expressly stated in the last case. Page 14. As the case of *Erskine v. Van Arsdale* (15 Wall. 75, 21 L. Ed. 63) followed these, and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part it does in customs cases, and gives notice that the payment is not to be considered as admitting the right

to make the demand." *Railroad Co. v. Commissioners*, 98 U. S. 541, 544, 25 L. Ed. 196, quoted approvingly in *Chesebrough v. United States*, 192 U. S. 253, 260, 48 L. Ed. 432.

As to recovery of stamp taxes paid without protest, see the title **REVENUE LAWS**, vol. 10, p. 1016.

Examples of voluntary payments.—So held as to state taxes paid, under written protest, on public lands granted a railroad company but exempt from taxation, when the company brought this action to recover the amount so paid. It was held, that there being no statute giving the right to recover in such cases, the action could not be maintained. *Railroad Co. v. Commissioners*, 98 U. S. 541, 25 L. Ed. 196.

Where there was no question as to the seizure of goods at all, but the lands which had been assessed were still in the possession and under the control of the owner, and no warrant had been issued against them, and no active steps had been taken to enforce the collection of the taxes assessed, nor could any such proceedings have been resorted to for at least several months thereafter, and, moreover, the question of the validity of the taxes was involved in pending litigation, the payment was voluntary. *Little v. Bowers*, 134 U. S. 547, 556, 33 L. Ed. 1016.

Where there is nothing in the record to show that the payment of the taxes in dispute was imposed by the court as a condition precedent to the owner's right to bring suit to test their legality, and, in fact, no such condition was imposed, or could have been imposed, when the suit was brought, for there was no statute of the state at that time giving any such power to the court, such payment was voluntary. *Little v. Bowers*, 134 U. S. 547, 554, 33 L. Ed. 1016.

It cannot be claimed that they were also paid involuntarily, because, under a readjustment act, the readjustment made by the commissioners was "final and conclusive upon all persons, became immediately due, was collectible by the comptroller without interest, if paid within sixty days, and if not paid within six months, it was made the comptroller's mandatory duty to sell the lands assessed, at public auction, to the highest bidder, and the purchaser at such sale obtained title by fee simple absolute." *Little v. Bowers*, 134 U. S. 547, 553, 33 L. Ed. 1016.

Informality in proceedings for collection.—Where a corporation had failed to make a return of dividends in scrip as required by law, and its property was levied on for the tax, which it paid under protest, where it had had a full hearing before the officers of internal revenue, and obtained a large reduction of the tax

ment be compulsory and not voluntary, it may be recovered back.⁹⁰

4. **RECOVERY BACK AS EXCLUSIVE REMEDY AGAINST ILLEGAL TAXES.**—Although, in a revenue system, a provision of law which gives to a party complaining of an illegal exaction of taxes, the right to recover back the amount in dispute only after previous payment under protest, as the sole remedy, against either the officer or the government, is a just and reasonable rule, sufficiently securing private rights, and convenient, if not necessary, to the interests of the public, this rule does not apply where the state by a contract which the constitution of the

as originally assessed, the federal supreme court would not suffer a recovery back by the company against the collector in assumpsit, because, in compelling payment of the tax, he had not conformed with certain proceedings of form intended to secure a full hearing to taxpayers, which the act made it lawful and perhaps proper for the assessor to do before resorting to the ulterior measure of levy on the company's property. *Bailey v. Railroad Co.*, 22 Wall. 604, 22 L. Ed. 840.

Payment under compromise.—In no sense was the payment of the taxes in suit made under duress, where the payment was in the nature of a compromise, by which the city agreed to take, and the company agreed to pay, a less sum than was originally assessed. The effect of this act was to extinguish the controversy between the parties of this suit. *Little v. Bowers*, 134 U. S. 547, 556, 33 L. Ed. 1016. See the title **APPEAL AND ERROR**, vol. 2, p. 291.

Payment under mistake of law.—A contract for the purchase by A. from B. of certain lands in Kansas provided that A. should pay all taxes lawfully assessed on them, and that B. would convey them upon the payment of the purchase money. The taxes assessed for the year 1870, held by the supreme court of the state to be valid, not having been paid, the county treasurer advertised, and, in May, 1871, sold the lands therefor, the county bidding them in. In 1872, C., a trustee and representative of A., relying upon the validity of the tax, paid without protest into the county treasury, out of moneys belonging to A., a sum sufficient to redeem the lands so sold, and received the tax certificate therefor, which he took in his own name. He also paid a portion of the taxes for 1871 and 1872. The statute provides that, on the nonredemption of lands within three years from the day of the sale thereof for taxes, the treasurer may, on the presentation of the certificate, execute a deed to the purchaser, or refund the amount paid therefor, if he discovers that, by reason of error or irregularity, the lands ought not to be conveyed. The federal supreme court having decided that the lands were not taxable, C., in 1874, offered to return the tax certificate to the county treasurer, and demanded that the moneys paid by him be refunded. That demand having been refused, he brought this action to

recover them. Held, that C. cannot be regarded as a purchaser of the lands, and that the payments by him so made, there having been neither fraud, mistake of fact, nor duress, were voluntary, in such a sense as to defeat the action, and the statute of Kansas, authorizing a refund on return of tax certificate, did not entitle him to recover. *Lamborn v. County Comm'rs*, 97 U. S. 181, 24 L. Ed. 926.

Payment to prevent threatened sale.—But it has been questioned whether a sale or threatened sale of land for an illegal tax is within the rule permitting a recovery back of taxes paid under duress, there being no seizure of the property, and nothing supervening upon the sale except a cloud on the title. This view has been adopted in Kansas. *Lamborn v. County Comm'rs*, 97 U. S. 181, 186, 24 L. Ed. 926.

Although it has undoubtedly been held in other states (though perhaps not directly adjudged) that a payment of illegal taxes on lands, to avoid or remove a cloud upon the title arising from a tax sale, is a compulsory payment. *Lamborn v. County Comm'rs*, 97 U. S. 181, 187, 24 L. Ed. 926.

Where a legal tax was combined with an illegal assessment, and perhaps a sale would have conferred a valid title upon the purchaser, it cannot be doubted that a payment of the tax, made to prevent it, should be regarded as compulsory and not voluntary. The threatened divestiture of a man's title to land is certainly as stringent a duress as the threatened seizure of his goods; and if imminent, and he has no other adequate remedy to prevent it, justice requires that he should be permitted to pay the tax, and test its legality by an action to recover back the money. But as, in general, an illegal tax cannot furnish the basis of a legal sale, the case supposed cannot often arise. *Lamborn v. County Comm'rs*, 97 U. S. 181, 187, 24 L. Ed. 926.

90. **Compulsory payments recoverable.**—*Arkansas Bldg., etc., Ass'n v. Madden*, 175 U. S. 269, 273, 44 L. Ed. 159; *Lamborn v. County Comm'rs*, 97 U. S. 181, 188, 24 L. Ed. 926.

Taxes illegally exacted under the revenue laws of the United States may be recovered back, if paid under protest, in an action of assumption against the collector. *Barnes v. The Railroads*, 17 Wall

United States disables her from impairing, has bound herself that it shall be otherwise.⁹¹

5. ACTION TO RECOVER—*a. Must Be at Law.*—Where payment of the taxes was made under protest, the complainant declaring at the time that they were illegal, and that it was not liable for them; that the payment was made under compulsion of the writs; and that it intended to demand, sue for and recover back the amounts paid, if this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action at law.⁹²

b. Assumpsit.—Moneys involuntarily paid for internal revenue taxes illegally exacted may be recovered back from the collector in an action of assumpsit.⁹³

c. Vested Right in Remedy to Recover Illegally Assessed Taxes.—See the title CONSTITUTIONAL LAW, vol. 4, p. 446.

6. STATUTORY PROVISIONS.—But the right may be given by statute expressly or impliedly, without being dependent alone upon an implied promise, as at common law.⁹⁴

294, 310, 21 L. Ed. 544; *Improvement Co. v. Slack*, 100 U. S. 648, 654, 25 L. Ed. 609, followed in *Railway Co. v. Slack*, 100 U. S. 659, 25 L. Ed. 611; *Patton v. Brady*, 184 U. S. 608, 614, 46 L. Ed. 713; *Assessors v. Osbornes*, 9 Wall. 567, 571, 19 L. Ed. 748; *Philadelphia v. Collector*, 5 Wall. 720, 731, 18 L. Ed. 614. See, also, the title REVENUE LAWS, vol. 10, pp. 976, 977. See, generally, as to recovery of payments, the title PAYMENT, vol. 9, p. 344, et seq.

Examples of involuntary payment.—The payment of the tax was not voluntary, but compulsory, when to prevent the sale of property. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596, 600, 15 L. Ed. 254.

"It is settled by many authorities that money paid by a person to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same, or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory, or by duress or extortion. Under this rule, illegal taxes or other public exactions, paid to prevent such seizure or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary." *Lamborn v. County Comm'rs*, 97 U. S. 181, 185, 24 L. Ed. 926; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373. See *Patton v. Brady*, 184 U. S. 608, 614, 46 L. Ed. 713.

Where the only alternative of a party, of whom an illegal tax was demanded, was to submit to the illegal exaction, or discontinue his business, he was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*. *Swift Co.*

v. United States, 111 U. S. 22, 29, 28 L. Ed. 341. See, also, *Maxwell v. Griswold*, 10 How. 242, 256, 13 L. Ed. 405. See the titles PAYMENT, vol. 9, pp. 344, 346; REVENUE LAWS, vol. 10, pp. 941, 977, 1016.

91. Recovery back as exclusive remedy against illegal taxes.—*Virginia Coupon Cases*, 114 U. S. 269, 270, 300, 29 L. Ed. 185. See, also, *Snyder v. Marks*, 109 U. S. 189, 193, 27 L. Ed. 901. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 786. See, also, ante, "Injunction against Taxes," VI, H.

92. Must be at law.—*Singer Mfg. Co. v. Wright*, 141 U. S. 696, 700, 35 L. Ed. 906. See ante, "Payment of Tax as Affecting Right to Injunction," VI, H, 1, e.

93. Assumpsit.—*Improvement Co. v. Slack*, 100 U. S. 648, 654, 25 L. Ed. 609, followed in *Railway Co. v. Slack*, 100 U. S. 659, 25 L. Ed. 611. See, also, *Barnes v. The Railroads*, 17 Wall. 294, 310, 21 L. Ed. 544; *Assessors v. Osbornes*, 9 Wall. 567, 574, 19 L. Ed. 748; *State Tonnage Tax Cases*, 12 Wall. 204, 209, 20 L. Ed. 370; *Patton v. Brady*, 184 U. S. 608, 614, 46 L. Ed. 713. See the titles ASSUMPSIT, vol. 2, p. 647, et seq.; REVENUE LAWS, vol. 10, pp. 977, 979.

94. Statutory provisions.—*The Collector v. Hubbard*, 12 Wall. 1, 12, 20 L. Ed. 272.

Payment of taxes into the public treasury before the suit was brought would be a good defense to the action if the right of the plaintiff depended solely upon an implied promise at common law, as the payment was made in pursuance of the requirement of an act of congress. *The Collector v. Hubbard*, 12 Wall. 1, 11, 20 L. Ed. 272. See the title PUBLIC OFFICERS, vol. 10, p. 425.

Internal revenue act of 1862.—The necessary implication from the provisions of the act of 1862 is that actions may be maintained against collectors of the in-

7. OBSERVANCE OF CONDITIONS PRECEDENT.—See note.⁹⁵

8. BURDEN OF PROOF.—Mere irregularities may be passed over without remark in an action of assumpsit brought by the plaintiffs to recover back money which they paid to the collector, and the burden is upon them to show that the defendant *ex aequo et bono* is bound to refund the amount which they paid.⁹⁶

9. INTEREST.—See the title REVENUE LAWS, vol. 10, p. 980.

10. LIMITATION OF ACTION TO RECOVER.—See the title REVENUE LAWS, vol. 10, p. 979.

ternal revenue to recover duties illegally or erroneously assessed. *Philadelphia v. Collector*, 5 Wall. 720, 731, 18 L. Ed. 614.

Revised Statutes, § 3220.—The right of recovery for an illegal tax is provided for by § 3220 of the Revised Statutes of the United States. *Logan County v. United States*, 169 U. S. 255, 258, 43 L. Ed. 737.

Tennessee.—Recovery is provided for in Tennessee, where payment is made with notice of protest. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 36, 29 L. Ed. 785, followed in *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51, 29 L. Ed. 791.

95. Conditions precedent must be observed.—The *Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272; *Curtis v. Fiedler*, 2 Black 461, 17 L. Ed. 273; *Cary v. Curtis*, 3 How. 236, 254, 11 L. Ed. 576; *Cheatham v. United States*, 92 U. S. 85, 89, 23 L. Ed. 561. See the title REVENUE LAWS, vol. 10, pp. 940, 976.

Appeal to commissioner of internal revenue.—See the title REVENUE LAWS, vol. 10, pp. 976, 979. See, also, p. 940.

The presentation of the claims to the commissioner of internal revenue for the refunding of a tax alleged to have been illegally exacted is a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the commissioner within the time and in the manner pointed out by law and relief has been denied him. *Kings County Sav. Inst. v. Blair*, 116 U. S. 200, 205, 29 L. Ed. 657; *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561; *Railroad Co. v. United States*, 101 U. S. 543, 25 L. Ed. 1068; *Arnson v. Murphy*, 115 U. S. 579, 29 L. Ed. 491; *Wright v. Blakeslee*, 201 U. S. 174, 179, 25 L. Ed. 1048; *James v. Hicks*, 110 U. S. 272, 275, 28 L. Ed. 144.

It cannot be claimed there was a waiver of this requirement because the bill of exceptions recited that the plaintiff "proved that the true amount of the tax which should have been assessed against it was the sum of \$428.75, as shown by said amended return," and the defendant having allowed this proof to be made, it is now too late for him to contend that the mere technical preliminaries to establishing this proof were not

observed. *Kings County Sav. Inst. v. Blair*, 116 U. S. 200, 206, 29 L. Ed. 657.

A protest upon its return for taxation against the requirements of the form on which the return is made, accompanied by an amended return, made out according to the plaintiff's construction of the law, is not such a claim to the commissioner of internal revenue for the refunding of a tax illegally collected as is required by the law and the regulations of the secretary of the treasury. *Kings County Sav. Inst. v. Blair*, 116 U. S. 290, 205, 29 L. Ed. 657.

Limitation of appeal.—See the title REVENUE LAWS, vol. 10, p. 977. See, also, post, "Limitation of Action to Recover," IX, B, 10.

Presentation to accounting officers of treasury.—See the titles REVENUE LAWS, vol. 10, p. 978; UNITED STATES.

Written protest.—See the title REVENUE LAWS, vol. 10, p. 978. See, also, p. 942, et seq.

The indorsement of a protest on the checks by which the taxes were paid, and the making of the prescribed and the amended return, with the protest and claim written thereon as above stated, does not show a claim made, as it does not appear by the record that the protest upon the checks was ever brought in any way to the notice of the commissioner. *Kings County Sav. Inst. v. Blair*, 116 U. S. 200, 205, 29 L. Ed. 657.

96. Burden of proof.—*Bailey v. Railroad Co.*, 22 Wall. 604, 638, 22 L. Ed. 840.

Proof that compliance was coerced.—Where no formal protest, made at the time, is, by statute, a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted; and the course of dealing prescribed by the commissioner had been deliberately adopted, had been made known to those interested, and would not be changed on further application, and consequently the business was transacted upon that footing, because it was well known and perfectly understood that it could not be transacted upon any other, a rule of that character, deliberately adopted and made known, and continuously acted upon dispenses with the necessity of proving in each instance of conformity

As to recovery of duties, see the title *REVENUE LAWS*, vol. 10, p. 979. The right of recovery under § 3220, providing for the refundment of taxes, is limited, by Rev. Stat., § 3228, to two years after the payment of such tax.⁹⁷ And the cause of action for a suit for its recovery does not accrue until an adverse decision on the appeal to the commissioner under §§ 3226, 3228.⁹⁸

But the Statute Must Be Pleaded or Put in Issue.—Where the tax was illegally exacted, and recoverable but for the statute limiting the right, but that defense was neither pleaded nor set up at the trial, the plaintiff was entitled to judgment.⁹⁹

11. REIMBURSEMENT OF COLLECTORS.—See note.¹

X. Disposition and Expenditure of Taxes.

A. Power of Legislature.—The power of appropriation of the moneys raised

that the compliance was coerced. *Swift Co. v. United States*, 111 U. S. 22, 30, 28 L. Ed. 341.

97. *Logan County v. United States*, 169 U. S. 255, 258, 43 L. Ed. 737. See, also, § 3227, Rev. Stat.

98. *Wright v. Blakeslee*, 101 U. S. 174, 180, 25 L. Ed. 1048; *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561.

As in July, 1867, when the tax was paid, there was no statutory limitation of time for presenting claims for remission of taxes to the commissioner of internal revenue, and under the act of 1872 providing a limitation of two years for all suits for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, and that all claims for refunding any internal tax or penalty should be presented to the commissioner within two years next after the cause of action accrued, and not after, as when this act was passed, the claim in the present case had not been formally presented to the commissioner, the parties had by the act one year to present their claim to the commissioner; and it was thus presented on the third day of January, 1873, within the time allowed for that purpose. *Wright v. Blakeslee*, 101 U. S. 174, 179, 25 L. Ed. 1048.

"The commissioner rendered his decision on the third day of July, 1873, and then, for the first time, the parties had a right to bring suit against the collector. Then their cause of action first accrued against him. It is manifest, therefore, that the cause of action against the collector was not embraced within either the first or the second proviso of the section just cited; and that it stood upon the primary enactment of that section, requiring that suit should be brought within two years next after the cause of action accrued. This would give the plaintiff until the 3d of July, 1875, to bring his action." *Wright v. Blakeslee*, 101 U. S. 174, 180, 25 L. Ed. 1048.

"The plaintiff is not bound to sue until a decision on the appeal has actually been made, but must sue within six

months thereafter. If he does not choose to wait for a decision, he may nevertheless bring suit before it is made if it is delayed more than six months from the date of the appeal, provided, however, in that case, he sues within twelve months from the date of the appeal." *James v. Hicks*, 110 U. S. 272, 275, 28 L. Ed. 144.

"The objecting party can take his appeal. He can, if the decision is delayed beyond twelve months, rest his case on that decision; or he can pay the amount claimed, and commence his suit at any time within that period. So, after the decision, he can pay at once, and commence suit within the six months; or he can have such delays in payment as he can obtain; and, if this carries him beyond the six months, it is his own fault, and he should not complain." *Cheatham v. United States*, 92 U. S. 85, 89, 23 L. Ed. 561; *Braun v. Sauerwein*, 10 Wall. 218, 19 L. Ed. 895; *The Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272.

Where one appeal was rejected for informality, and a second appeal taken in due time, and rejected, the appeal rejected for informality was not the basis for determining the time within which the suit ought to have been brought. That appeal was not so treated by the commissioner, who rejected it for mere informality and entertained the subsequent appeal, made in proper form, as rightly prosecuted. The latter was the appeal contemplated by the statute. *James v. Hicks*, 110 U. S. 272, 274, 28 L. Ed. 144. See the title *REVENUE LAWS*, vol. 10, p. 979.

Payment of second income tax assessment under protest, old assessment having been set aside on appeal, and no new appeal taken, is not recoverable after six months from decision on old appeal. *Cheatham v. United States*, 92 U. S. 85, 23 L. Ed. 561.

99. *Retzer v. Wood*, 109 U. S. 185, 27 L. Ed. 900. See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 1038.

1. **Reimbursement of collectors.**—See the title *REVENUE LAWS*, vol. 10, p. 980.

by taxation is unlimited in the legislature.²

B. Accountability of Municipality for Taxes Collected under Trust.—

A municipality having collected a special tax and penalties thereon and not having paid over such collections, a judgment creditor having a claim payable out of such tax is entitled to file a creditor's bill against the city for an accounting where the proper board refuses to compel it, the taxes so collected being held in trust by the city, as also is the interest collected by way of penalty.³ But interest will not be allowed to run upon the amount of taxes collected by a city for a special purpose and retained by it, until after failure to pay such sums when required to do so by the proper board or failure to account on demand.⁴

Statute of Limitations.—As the collections of municipal taxes for special purposes are held in trust, the statute of limitations is no defense to an action against the city for an accounting.⁵

C. Preferential Appropriation to Particular Debts.—Property undoubtedly may be appropriated and special taxes pledged to meet future debts created for public purposes, but legislation would conflict with the spirit as well as the express letter of the code of Louisiana if it authorized a municipal body to appropriate its entire property and revenues, except what might be required for the support of its government, to a class of existing demands over others equally entitled to payment.⁶

D. Disposition of Surplus.—Rights of Owner.—The owner of land sold for direct taxes under acts of 1862-3, and bought in for the United States, is entitled to recover the difference between the sum for which it was sold and the tax, penalty, interest and costs.⁷

See, also, *The Collector v. Hubbard*, 12 Wall. 1, 13, 20 L. Ed. 272.

2. Power of legislature.—*New Orleans v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *North Missouri R. Co. v. Magwire*, 20 Wall. 46, 62, 22 L. Ed. 287; *Board of Comm'rs v. Lucas*, 93 U. S. 108, 23 L. Ed. 822; *Essex, etc., Board v. Skinkle*, 140 U. S. 334, 343, 35 L. Ed. 446.

But there would seem to be cogent reasons in abstract justice, against a diversion by the legislature from the purposes of municipality of property raised for its use by taxation from its inhabitants. There are probably provisions in the constitutions of the several states which would prevent any marked diversion in that way. *Board of Comm'rs v. Lucas*, 93 U. S. 108, 115, 23 L. Ed. 822. See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 413; *MUNICIPAL CORPORATIONS*, vol. 8, p. 601, et seq.

For school purposes.—See the titles *CIVIL RIGHTS*, vol. 3, p. 833; *SCHOOLS AND SCHOOL DISTRICTS*, vol. 10, p. 1075.

3. New Orleans v. Fisher, 180 U. S. 185, 45 L. Ed. 485, so held where the city of New Orleans had collected a school tax and had not paid over the collections. See, also, *New Orleans v. Warner*, 180 U. S. 199, 207, 45 L. Ed. 493; *New Orleans v. Warner*, 175 U. S. 120, 44 L. Ed. 96; *Warner v. New Orleans*, 167 U. S. 467, 42 L. Ed. 239. See the title *MUNICIPAL CORPORATIONS*, vol. 8, p. 575.

4. New Orleans v. Fisher, 180 U. S. 185, 45 L. Ed. 485.

5. New Orleans v. Fisher, 180 U. S. 185, 45 L. Ed. 485. See the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 981, et seq.

6. Board of Liquidation v. Hart, 118 U. S. 136, 145, 30 L. Ed. 65; *Sun Mutual Ins. Co. v. Hart*, 118 U. S. 147, 30 L. Ed. 69.

So far as the indebtedness of the city of New Orleans, existing at the adoption of the Louisiana constitution of 1879 is concerned, article 254 of that instrument, which ordained that the general assembly should enact such legislation as might be proper to liquidate the indebtedness of the city, and to apply its assets to the satisfaction thereof, prohibits any such performance and appropriation of its entire property and revenues to a class of existing demands over others equally entitled to payment. *Board of Liquidation v. Hart*, 118 U. S. 136, 145, 30 L. Ed. 65. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, pp. 811, 841, 848, et seq., 861.

7. Disposition of surplus.—*United States v. Lawton*, 110 U. S. 146, 28 L. Ed. 100.

In *United States v. Taylor*, 104 U. S. 216, 26 L. Ed. 721, the land sold for the nonpayment of the tax was sold to a person who paid the purchase money to the United States, and the surplus proceeds were in the treasury. It was held that the provision of § 36 of the act of August 5th, 1861, ch. 46, 12 Stat. 292, allowing the owner to apply for and receive the surplus of the proceeds of

Remainderman's Right.—"It not having been paid to the trustees under the will, or to the life tenant, the appellee, as remainderman, is clearly entitled to it."⁸

Limitation of Suit in Court of Claims.—See the title UNITED STATES.

E. Injunction against Illegal Disposition.—See note.⁹

TAXATION OF COSTS.—See the titles APPEAL AND ERROR, vol. 2, p. 427; COSTS, vol. 4, p. 817.

TAX COLLECTOR.—See the title TAXATION, ante, p. 356.

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TAX LEVY.—See the title TAXATION, ante, p. 356.

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TAX PAYER.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 632.

TAX SALES.—See the title TAXATION, ante, p. 356.

TAX TITLES.—See the title TAXATION, ante, p. 356.

TEA.—As to duty on, see the title REVENUE LAWS, vol. 10, p. 898. As to constitutionality of act to prevent importation of impure tea, see the title REVENUE LAWS, vol. 10, p. 864.

TELEGRAPH OPERATOR.—See the title FELLOW SERVANTS, vol. 6, p. 260.

sale, was not repealed by anything in § 12 or any other section of the act of June 7th, 1862, ch. 98, 12 Stat. 422. *United States v. Lawton*, 110 U. S. 146, 149, 28 L. Ed. 100.

But they had to be construed together. *Bennett v. Hunter*, 9 Wall. 326, 19 L. Ed. 672; *United States v. Taylor*, 104 U. S. 216, 219, 26 L. Ed. 721.

Act providing for payment into treasury—Constitutionality.—Held a mere abstract question. *Castillo v. McConnico*, 168 U. S. 674, 685, 42 L. Ed. 622.

8. Remainderman's right.—*United States v. Lawton*, 110 U. S. 146, 151, 28 L. Ed. 100.

9. Injunction against illegal disposition of county revenue.—*Crampton v. Zabriskie*, 101 U. S. 601, 609, 25 L. Ed. 1070. See the title COUNTIES, vol. 4, p. 843.

1. Tenement not coextensive with fee.—The word tenement has never been construed in a will independently of other circumstances, to pass a fee. *Wright v. Page*, 10 Wheat. 204, 238, 6 L. Ed. 303.

TELEGRAPHS AND TELEPHONES.

BY R. J. BROSSMAN.

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CROSS REFERENCES.

As to right of telegraph company to have an accounting on a broken contract, see the title ACCOUNTS AND ACCOUNTING, vol. 1, p. 73. As to the finality of an order appointing commissioners in condemnation proceedings, see the title APPEAL AND ERROR, vol. 1, p. 980. Telegraph companies as federal agencies and taxation thereof, see the title CONSTITUTIONAL LAW, vol. 4, p. 200. As to the power of a state to classify the different uses of property for taxation, see the title CONSTITUTIONAL LAW, vol. 4, p. 394. As to the right of one telegraph company to acquire stock in another, see the title CORPORATIONS, vol. 4, p. 736. As to the right of telegraph company to hold property in states other than the one which incorporated it, see the title CORPORATIONS, vol. 4, p. 727. As to the jurisdiction of a circuit court to enjoin the use of exchange quotations, see the title COURTS, vol. 4, p. 978. As to the jurisdiction of a United States circuit

court to enjoin county taxation, see the title *COURTS*, vol. 4, p. 978. As to constructing lines over Indian lands, see the title *EMINENT DOMAIN*, vol. 5, p. 757. As to whether a railroad company is liable for the negligence of its telegraph operator where such negligence results in the death of a fireman, see the title *FELLOW SERVANTS*, vol. 6, p. 260. As to power of city to impose license tax, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 377, 444, 445. As to the power of a state to grant an exclusive franchise, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 376. As to taxing telegraph and telephone companies engaged in interstate commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 455, 459. As to the power of a state to tax messages and receipts from messages, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 451, et seq. As to control of a state over buildings, poles and wires under the police power, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 424. As to power of city to impose a tax for police supervision, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 427. As to congressional aid of the telegraph, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 334. As to constructing lines over territories, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 327. As to the right of a state of imposing a privilege tax based upon value of property, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 458. As to the power of a state to impose a penalty for nondelivery of messages within the state where such messages were sent from another state, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 425. As to a state enforcing a penalty for failure to deliver by messenger a telegram sent to another state, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 425. As to whether communication by telegraph constitutes interstate commerce, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 295. As to the lien of a contractor or employee, see the title *LIENS*, vol. 7, p. 894. As to power of city to levy a tax on poles and wires, see the title *LICENSES*, vol. 7, pp. 875, 880, et seq. As to infringement of patent of telegraph and telephone instruments, see the title *PATENTS*, vol. 9, pp. 187, 263, 274, 277. As to a sale of bonds by telegraph, see the title *SALES*, vol. 10, p. 1029. As to the power of a city to tax for the use of its streets, see the titles *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 426; *LICENSES*, vol. 7, p. 880; *STREETS AND HIGHWAYS*, ante, p. 259. As to power to enforce penalties for nonpayment of taxes, see the title *TAXATION*, ante, p. 356.

I. Origin and History.

Telegraph.—The word telegraph is derived from the Greek, and signifies "to write afar off or at a distance." It has heretofore been applied to various contrivances or devices, to communicate intelligence by means of signals or semaphores, which speak to the eye for a moment. But in its primary and literal signification of writing, printing, or recording at a distance, it never was invented, perfected, or put into practical operation until it was done by Morse.¹

II. Nature and Definitions.

Telephone.—A "telephone" is described as "an instrument for electrically transmitting or receiving articulate speech."²

III. Construction and Maintenance.

A. The Right of Way—1. **OVER STREETS AND HIGHWAYS**—a. *Right of Telegraph Companies.*—The occupation of its streets by a telegraph company engaged in interstate commerce, cannot be denied by a city,³ and all the post roads of the United States⁴ may be used in the construction of their lines by

1. **Origin of telegraph.**—*O'Reilly v. Morse*, 15 How. 62, 133, 14 L. Ed. 601.

2. **Definition of telephone.**—*The Telephone Cases*, 126 U. S. 1, 539, 31 L. Ed. 863; *Richmond v. Southern Bell Tel., etc.*,

Co., 174 U. S. 761, 773, 43 L. Ed. 1162.

3. **Over streets of a city.**—*St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, 105, 37 L. Ed. 380.

4. **What are post roads.**—By act of con-

those companies who have accepted the provisions of the act of congress, July 24, 1866.⁵

b. *Right of Telephone Companies.*—Telephone companies are not empowered by the act of congress of July 24, 1866, to use the post roads of the United States in the construction of their lines.⁶

2. **OVER RAILROAD RIGHT OF WAY.**—See the title **EMINENT DOMAIN**, vol. 5, p. 760. A railway company operating one of the post roads of the United States, over which interstate commerce was carried on, could not, at least after the passage of the act of July 24, 1866, grant to any one or more telegraph companies the exclusive right to use its roadway for telegraphic purposes.⁷

3. **OVER PRIVATE PROPERTY.**—See the title **EMINENT DOMAIN**, vol. 5, p. 760.

B. Telephone Companies Not Included in Federal Aid of Telegraph Act.—Telephone companies are not within the category of the grantees of the privileges conferred by the act of July 24, 1866, to aid in the construction of telegraph lines.⁸

C. Liability of Railway for an Inadequate Line of Telegraph.—See the title **CARRIERS**, vol. 3, p. 376.

D. Power of Congress to Compel a Railroad Company to Maintain a Telegraph Line.—It is entirely competent for congress to add to, alter, or amend the acts of 1862 and 1864, so as to require the Union Pacific Railway Company to maintain and operate, by and through its own officers and employees, telegraph lines, for railroad, governmental, commercial and other purposes, and to exercise itself and alone all the telegraphic franchises conferred upon it, where such railway company is enjoying the bounty of the government subject to the condition, among others, that it will perform these duties whenever so required by congress.⁹

IV. Operation.

A. Power of State to Regulate Price of Service.—Of a Public Nature.

—A legislature may prescribe regulations for the management of business of a public nature, even though carried on by private corporations,¹⁰ but the lan-

gress of March 1, 1884, it is provided, "That all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes." *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 49 L. Ed. 312.

5. **Over post roads.**—*Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708; *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 239, 243, 44 L. Ed. 1052.

6. **Telephone right of way.**—*Richmond v. Southern Bell Tel., etc., Co.*, 174 U. S. 761, 43 L. Ed. 1162.

7. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 41, 40 L. Ed. 319; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 11, 24 L. Ed. 708.

8. **Federal aid to telegraph companies does not include telephone companies.**—*Richmond v. Southern Bell Tel. etc., Co.*, 174 U. S. 761, 776, 43 L. Ed. 1162. See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 618.

9. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 38, 40 L. Ed. 319.

Temporary arrangement with a telegraph company.—The provision in the act of 1862 (§ 19), and a similar provision

in the act of 1864 (§ 4), permitted the railroad company to make an "arrangement" with certain telegraph companies to place their lines upon and along the route of the railroad and branches—such transfer to be held and considered, for all the purposes of the act, a fulfillment on the part of said railroad companies of the provisions of the act "in regard to the construction of said lines of telegraph." But such an arrangement, accompanied by the transfer of telegraph lines constructed by telegraph companies to the roadway of the railroad company, had no other effect than to relieve the railroad company from any present duty itself to construct a telegraph line to be used under the franchises granted and for the purpose indicated by congress. It did not affect the authority of congress, under its reserved power, to require the railroad company itself to maintain or operate in the future, by its officers and employees alone, telegraph lines on its main road and branches. *United States v. Union Pac. R. Co.*, 160 U. S. 1, 35, 40 L. Ed. 319.

10. **Regulating the price of telephone service.**—*Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 247, 46 L. Ed. 1144.

guage of such regulations will not be broadened by implication.¹¹

Of a Private Nature.—Congress cannot prescribe what shall be charged for that portion of a telephone company's business which is of a purely private nature.¹²

B. Contract for the Use of Wires.—A contract for the use of a wire will not be rescinded merely because the telegraph company would be able to secure a greater compensation by using that wire otherwise.¹³

C. Conflicting Rights with Other Telegraph Companies.—It is within the power of a telegraph company to form connections with other lines, so as to secure uninterrupted communications, even if by so doing it comes into competition with more direct lines between the same points, in the absence of a violation of a contract.¹⁴

V. Contract for Use of Poles and Wire by Railroad Company.

See the title *RAILROADS*, vol. 10, p. 520.

VI. Duties and Liabilities as to Messages.

A. Duty to Transmit Impartially.—Telegraph companies are bound to serve all customers alike, without discrimination, and must receive to the extent of their capacity, all messages clearly and intelligibly written, and transmit them upon reasonable terms.¹⁵

B. Obligation of Telegraph Company and Common Carrier Contrasted.—Telegraph companies resemble railroad companies and other carriers, in that they are instruments of commerce; and in that they exercise a public employment, and like them cannot contract with their employers for exemption

11. What is included in telephone service.—*Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 248, 46 L. Ed. 1144.

Where the statute prohibited a charge of more than fifty dollars per annum for the use of a telephone on a separate wire and it appears that there are two kinds of equipment, one more expensive and more reliable than the other, and that the company furnishes to some of its customers, besides the mere telephone, such additional equipment, as wall cabinet, desk, auxiliary bells, etc., for which separate charges are made, these additional appliances will not be included in the terms of the statute, and all that is required by its language is the furnishing of the telephone. *Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 248, 46 L. Ed. 1144.

12. Cannot regulate private business.—*Chesapeake, etc., Tel. Co. v. Manning*, 186 U. S. 238, 247, 46 L. Ed. 1144. Such as a local service between the different rooms of the same building.

13. Franklin Tel. Co. v. Harrison, 145 U. S. 459, 36 L. Ed. 776.

Contract construed.—A contract by which a telegraph company gave H. the right to put up at his own expense and maintain and use a wire upon the poles of the company, the company to have the use of the wire when not so employed and to keep and maintain the wire, and to permit such use for a period of ten years, at the end of that time the wire was to be the property of the company, when the company agreed "to lease the same" to H. for a certain sum per annum, upon the same terms in all other respects as if the

wire had not been given up to the company. After the wire was put up by H. and used by him according to the terms of the contract, the company notified H. that the use of the wire by H. had become such as to exclude the company from all use of it, which was not contemplated by the original contract, and that the agreement would be terminated by the company. H. filed his bill to restrain the company from so doing. Held, that H., after the expiration of the ten years, on payment of the agreed compensation was entitled to the same absolute use of the wire which he enjoyed before the wire was given up to the company. *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 36 L. Ed. 776.

14. Western Union Tel. Co. v. Magnetic Tel. Co., 21 How. 456, 459, 16 L. Ed. 189.

Alleged unfair competition.—Where there was a telegraph company from Baltimore to Wheeling, with branches to Washington and Pittsburg, and another company from Pittsburg to Philadelphia, and from Harrisburg to Baltimore; and the former company complained that the latter received messages at Philadelphia, sent from Pittsburg and Wheeling, directed to Baltimore and Washington, and there was no direct infringement of the patent right, nor any violation of the contract, the case is without a legal remedy. *Western Union Tel. Co. v. Magnetic Tel. Co.*, 21 How. 456, 16 L. Ed. 189.

15. Telegraph companies must serve impartially.—*Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14, 38 L. Ed. 883.

from liability for the consequences of their own negligence; but they are not bailees in any sense.¹⁶

C. Validity of Stipulations against Liability for Negligence.—Telegraph companies like common carriers cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent.¹⁷

D. Measure of Damages—1. **DAMAGES NATURALLY FLOWING FROM NEGLIGENCE OR BREACH OF CONTRACT.**—In case of negligence of the telegraph company in transmitting a message erroneously, so as to mislead the party to whom it is addressed, and on the faith of which he acts in the purchase or sale of property the actual loss based upon changes in market value is within the rule for estimating damages. The same rule applies to a negligent delay of a message by a telegraph company whereby actual loss is sustained.¹⁸

2. **IN CASE OF OBSCURE OR CIPHER MESSAGES.**—The measure of damages for negligence or delay in transmitting an obscure or cipher message, where its importance is not brought to the notice of the company, is limited to the amount paid for sending the message.¹⁹

3. **IN CASE OF UNJUST DISCRIMINATION.**—Where there is dissimilarity in the services rendered by a telegraph company, a difference in charges is proper, and no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and the recovery is limited to the amount of the unreasonable discrimination.²⁰

4. **DAMAGES SUCH AS PARTIES MUST HAVE CONTEMPLATED.**—Damages must flow directly and naturally from the breach of the contract, and they must not be speculative or contingent.²¹

VII. Compensation.

A. Discretion of Telegraph Companies as to Forwarding Government Messages.—In absence of directions, a telegraph company is at liberty

16. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14, 38 L. Ed. 883; *Express Co. v. Caldwell*, 21 Wall. 264, 269, 270, 22 L. Ed. 556; *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

17. **Rules reasonable or unreasonable.**—Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 15, 38 L. Ed. 883; *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556.

Repeating messages.—The public are admonished by the notice in the contract, that in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 16, 38 L. Ed. 883.

18. *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 458, 31 L. Ed. 479.

Negligence.—The change of the word "bought" into "buy" is not such negligence as will warrant a recovery of more than the

sum paid for transmitting a message, where the message was not repeated according to the terms printed upon the contract with a telegraph company. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 38 L. Ed. 883.

19. **Cipher messages.**—*Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 33, 38 L. Ed. 883; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 31 L. Ed. 479.

20. **Unreasonable discrimination.**—*Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 99, 45 L. Ed. 765.

21. *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 458, 31 L. Ed. 479.

Speculative damages.—A principal ordered his agent by telegraph to purchase ten thousand barrels of oil at the market price. But he was unable to do so that day in consequence of the delay in the delivery of the message. On the next day the price had advanced, and no purchase was made because the agent to whom the message was addressed, did not deem it advisable to do so, the order being conditional on his opinion as to the expediency of executing it. Action for damages was brought to recover the amount which might have been made, but the plaintiff's recovery was limited to the amount paid for transmitting message.

to send government messages over its own line at the rates established by the postmaster general rather than over the telegraph line constructed by a railroad company with government aid.²²

B. Right of United States to Retain and Apply Compensation as Congress Has Directed.—The United States is entitled to retain and apply, as directed by congress, all sums due from the government, on account of the use by the telegraph company, for public business, of the telegraph line constructed by a railroad company, which accepted the provisions of the federal aid act.²³

VIII. Messages as Evidence.

In the admissibility of telegrams as evidence, much discretion is left to the trial court;²⁴ and where the exclusion of them is immaterial to the result, a decision will not be reversed on that account.²⁵

TELLER.—See the title *BANKS AND BANKING*, vol. 3, p. 87.

TEMPORARY INJUNCTION.—See the title *INJUNCTIONS*, vol. 6, p. 1026.

TEMPERATE—TEMPERANCE.—As to “temperate habits” as used in the law of insurance, see the title *INSURANCE*, vol. 7, p. 163. See, also, *HABIT*, vol. 6, p. 673.

TENANT.—See the title *LANDLORD AND TENANT*, vol. 7, p. 827.

TENANTS IN COMMON.—See the title *JOINT TENANTS AND TENANTS IN COMMON*, vol. 7, p. 533.

Western Union Tel. Co. v. Hall, 124 U. S. 444, 453, 454, 31 L. Ed. 479.

22. In absence of direction may use their own line.—*United States v. Western Union Tel. Co.*, 160 U. S. 53, 69, 40 L. Ed. 337.

23. United States v. Western Union Tel. Co., 160 U. S. 53, 69, 40 L. Ed. 337.

Recovery of sum paid.—But, where a telegraph company sent government messages over its own lines which it might have forwarded, if directed, over a line belonging to a railroad constructed under the congressional aid act and was paid therefor, the amount paid could not be recovered, in the absence of proof as to

what proportion of the messages were sent over the lines of the railroad company. *United States v. Western Union Tel. Co.*, 160 U. S. 53, 40 L. Ed. 337.

24. Clune v. United States, 159 U. S. 590, 592, 40 L. Ed. 269.

In case of conspiracy.—In this case defendants were charged with conspiring to stop the mails, and telegrams sent and received by them in furtherance of a strike were held to be properly admitted. *Clune v. United States*, 159 U. S. 590, 40 L. Ed. 269.

25. Runkle v. Burnham, 153 U. S. 216, 224, 38 L. Ed. 694. See the title *APPEAL AND ERROR*, vol. 2, p. 339.

TENDER.

BY WARREN LEE KINDER.

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CROSS REFERENCES.

See the titles ACCORD AND SATISFACTION, vol. 1, p. 69; COMPROMISE AND SETTLEMENT, vol. 3, p. 980; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; PAYMENT, vol. 9, p. 319; PAYMENT INTO COURT, vol. 9, p. 350; SALES, vol. 10, p. 1022; SPECIFIC PERFORMANCE, ante, p. 14; TAXATION, ante, p. 356; VENDOR AND PURCHASER.

As to tender of assignment of a contract, in the performance of a contract to assign, see the title ASSIGNMENTS, vol. 2, p. 570. As to tender of performance in suit for specific performance, see the title SPECIFIC PERFORMANCE, ante, p. 14. As to tender in contracts for the sale of lands, see the title VENDOR AND PURCHASER. As to a sufficient tender of money to redeem mortgage after foreclosure, see the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 526. As to rule that the mortgagee is not bound to accept a tender of the mortgage debt by a stranger, on condition that an assignment be executed to a third party, see the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 485. As to necessity of payment or tender of premiums to recover on policies of insurance, see the title INSURANCE, vol. 7, p. 120. As to necessity of tender in certain proceedings, under the maxim "he who seeks equity must do equity," see the title MAXIMS, vol. 8, pp. 314, 315. As to necessity of tender of currency which the parties had in mind when contract was made to justify decree for specific performance, see the title MAXIMS, vol. 8, p. 314. As to necessity for and effect of, a tender of the debt in cases of pledges, see the title PLEDGE AND COLLATERAL SECURITY, vol. 9, p. 466. As to necessity, in suits to rescind contracts, of a tender of the consideration received or the property purchased, see the title RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 810. As to necessity of tender in order to attack tax sales, see the title TAXATION, ante, p. 356. As to necessity of tender of rents due in a suit for relief from forfeiture of a lease of a water power, see the title WATER COMPANIES AND WATERWORKS. As to effect of lawful tender, and of refusal of license taxes, see the title LICENSES, vol. 7, p. 887. As to voluntary tender of the amount of excessive duties by a collector to the importer, barring a suit, see the title REVENUE LAWS, vol. 10, p. 948. As to effect of refusal of tender of payment of taxes, see the title TAXATION, ante, p. 356. As to tender of payment of renewal premium to agent, on intervention of war, not binding insurance company, the agent having received no renewal receipts from the company, see the title INSURANCE, vol. 7, p. 123. As to surrender or tender of property sued for mitigating damages, see the title DAMAGES, vol. 5, p. 193. As to letters showing tender of premiums, see the title

INSURANCE, vol. 7, p. 129. As to denial of rights under legal tender acts raising a federal question which may be reviewed by the supreme court, see the title APPEAL AND ERROR, vol. 1, p. 697. As to validity of legal tender acts, see the titles CONSTITUTIONAL LAW, vol. 4, p. 303; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 771.

I. Necessity of Tender.

A. In General.—The creditor's form of the demand cannot dispense with the debtor's obligation to make a tender of payment, agreeable to his own sense of the law and the contract.¹ It may perhaps render it unnecessary that the debtor exhibit the money, but it must be in his actual possession.²

B. Waiver of Tender.—It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted.³ The acts construed as a waiver of performance must have occurred previously to the time fixed for performance.⁴

II. What Constitutes a Sufficient Tender.

A. In General.—A mere offer to pay the money is not, in legal strictness, a tender.⁵ The debtor should make a formal tender by counting out or offering to the creditor the sum due distinctly and directly as a tender.⁶

B. Tender Must Be Unconditional.—A tender must be unconditional; a tender, accompanied by a demand for a release, before delivery of what is tendered, is bad, unless justified by the express stipulation of the parties.⁷

C. Time of Tender.—Tender, when the demand is of money, for a definite sum or for an amount capable of being made certain, may at common law be made on the very day the money becomes due, but it will constitute a defense only when made before the action is brought.⁸

D. Amount of Tender.—A tender made after action is brought must include a sufficient sum to pay the costs.⁹

1. Necessity of tender.—*Searight v. Calbraith*, 4 Dall. 325, 326, 327, 1 L. Ed. 853.

Demand of payment exclusively in certain coin.—Though a creditor demands payment in certain coin, this does not relieve the debtor of the necessity of tender of payment, agreeable to his own sense of the law and the contract. *Searight v. Calbraith*, 4 Dall. 325, 326, 327, 1 L. Ed. 853.

2. Actual possession necessary.—*Searight v. Calbraith*, 4 Dall. 325, 326, 327, 1 L. Ed. 853.

3. Waiver of performance.—*Hills v. Exchange Bank*, 105 U. S. 319, 321, 26 L. Ed. 1052; *United States v. Lee*, 106 U. S. 196, 202, 27 L. Ed. 171; *United States v. Edmondston*, 181 U. S. 500, 508, 45 L. Ed. 971. See, also, *Cheney v. Libby*, 134 U. S. 68, 81, 33 L. Ed. 818; *Bank v. Hagner*, 1 Pet. 455, 467, 7 L. Ed. 219.

Nonperformance due to acts of other party.—Where one prevents a thing from being done, he cannot avail himself of the nonperformance, which he has himself occasioned. *Bank v. Hagner*, 1 Pet. 455, 467, 7 L. Ed. 219.

4. Acts must occur previous to time fixed for performance.—*Bank v. Hagner*, 1 Pet. 455, 467, 7 L. Ed. 219.

5. Mere offer of payment.—*Sheredine v. Gaul*, 2 Dall. 190, 191, 1 L. Ed. 344; *Talty v. Freedman's Sav., etc., Co.*, 93 U. S. 321, 325, 23 L. Ed. 886.

6. To make a tender that will cause the interest to cease, the debtor should ascertain for himself the sum due, or fix upon a sufficient sum, and then make a formal tender by counting out or offering that sum to the creditor distinctly and directly as a tender. *Peugh v. Davis*, 113 U. S. 542, 545, 28 L. Ed. 1127.

7. Tender must be unconditional.—*Hepburn v. Auld*, 1 Cranch 321, 2 L. Ed. 122. See *Hepburn v. Dunlop & Co.*, 1 Wheat. 179, 184, 4 L. Ed. 65.

8. Time for making tender.—*Colby v. Reed*, 99 U. S. 560, 561, 25 L. Ed. 484. See the title ASSUMPSIT, vol. 2, p. 657.

9. Sum must be sufficient to pay the costs.—"Nor is it pretended that the defendant ever made a money tender of the debt due to the plaintiff, either before or after the action was commenced. Such a tender, if made before action brought and kept good, is a defense to the action, as the money to pay the debt remains in the court, and the party plaintiff is not entitled to prevail unless the sum tendered was insufficient, nor is it questioned that such a tender in a proper

E. Medium of Payment.—As to the character of money in which tender shall be made, see the titles *BILLS, NOTES AND CHECKS*, vol. 3, pp. 347, 348, 349; *PAYMENT*, vol. 9, p. 325, et seq. As to rule that a marshal is not authorized by law to receive anything in discharge of an execution, but gold and silver, see the title *EXECUTIONS*, vol. 6, p. 115.

Waiver of Legal Tender as Medium of Payment.—A tender in money, not strictly legal tender, may sometimes be good where it is not objected to by the creditor.¹⁰ The acceptance of money, not strictly legal tender, by the creditor in payment of certain obligations, may sometimes render a tender of such funds effectual as a preventive of forfeiture under a contract.¹¹

III. Keeping Tender Good.

The tender must be kept good to stop interest and costs.¹² The legal effect of a tender paid into court is not changed by its withdrawal under a consent order of court.¹³

IV. Effect of Tender.

A tender of payment stops interest,¹⁴ and costs,¹⁵ but a tender and refusal do not discharge the debt.¹⁶

V. Plea of Tender.

The defendant is not entitled to take advantage of a tender, unless he pleads it, and brings the money into court.¹⁷

Sufficiency of Plea.—See the references given in note.¹⁸

case, and payment of the money into court, may be made after action brought; but the rule is universal, that in that event the tender and the payment must include the costs to that time as well as the debt." *Colby v. Reed*, 99 U. S. 560, 565, 25 L. Ed. 484.

10. Waiver of legal tender as medium of payment.—As to tender in bank notes being good unless objected to, but not good, whether objected to or not, where not current at their par value, nor redeemable on presentation, see the title *PAYMENT*, vol. 9, p. 319.

11. Tender in money not strictly legal tender preventing a forfeiture.—Where a contract was made for the sale of land on payment of certain notes, and payment in current funds was accepted on some of them, such conduct, while not amounting to an absolute waiver of the creditor's right to demand coin or legal tender paper in payments subsequently falling due, it rendered him bound to give notice that he would accept only such funds as, under the contract, strictly interpreted, he was entitled to demand, such notice was not given, and the failure to tender such funds did not work a forfeiture of the contract. *Cheney v. Libby*, 134 U. S. 68, 79, 33 L. Ed. 818.

12. Tender must be kept good.—As to rule that to have effect of stopping interest or costs, a tender must be kept good, and it ceases to have that effect when the money is used by the debtor for other purposes, see the title *COSTS*, vol. 4, p. 808.

13. Withdrawal of tender paid into court.—Where a tender, paid into court, is withdrawn before judgment by a consent order of court, providing that the

legal effect of the tender should be the same as if the money remained in court, its legal effect was not changed. *Dooley v. Smith*, 13 Wall. 604, 606, 20 L. Ed. 547. See the title *PAYMENT INTO COURT*, vol. 9, p. 350.

14. Interest.—*Peugh v. Davis*, 113 U. S. 542, 544, 28 L. Ed. 1127; *Dooley v. Smith*, 13 Wall. 604, 606, 20 L. Ed. 547; *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207. See the title *INTEREST*, vol. 7, p. 236.

As to payment and tender made into court of amount claimed due on taxes, preventing the running of interest, see the title *INTEREST*, vol. 7, p. 236.

As to payment into court during pendency of suit, which prevents one from paying money, discharging him from payment of interest, see the title *INTEREST*, vol. 7, p. 236.

Payee of note is not entitled to interest after tender unless payor has realized interest on the money. See the title *INTEREST*, vol. 7, p. 236.

15. Costs.—As to where a bank is designated as place of payment of a note, if promisor is at the bank at maturity with the necessary funds to pay it, he is not responsible for any future damages, either as costs of suit or interest, for delay, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 349.

16. Debt not discharged.—*Colby v. Reed*, 99 U. S. 560, 561, 25 L. Ed. 484. See, also, *Cheney v. Libby*, 134 U. S. 68, 83, 33 L. Ed. 818.

17. Tender must be pleaded.—*Sherdine v. Gaul*, 2 Dall. 190, 191, 1 L. Ed. 344.

18. As to plea stating that the sum due

VI. Legal Tender.

See the title **PAYMENT**, vol. 9, p. 325.

TENEMENT.—See **LAND**, vol. 7, p. 825; **REAL ESTATE**, vol. 10, p. 533. See, also, the titles **ESTATES**, vol. 5, p. 904; **WILLS**. See, also, note 1. As to the words "lands and tenements," in their ordinary sense, importing a mere local description of property, see **LAND**, vol. 7, p. 825.

TEN HOUR LABOR LAW.—See the title **LABOR**, vol. 7, p. 788.

TENNESSEE.—See the title **BOUNDARIES**, vol. 3, p. 494. As to power of cities and towns to issue bonds, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**, vol. 8, pp. 660, 661.

TENURE.—See the titles **CLERKS OF COURT**, vol. 3, p. 851; **PUBLIC OFFICERS**, vol. 10, p. 396.

TERM.—See the title **ADJOURNMENTS**, vol. 1, p. 118; **COURTS**, vol. 4, p. 886. As to provision that a petition for removal of a cause from state to federal court must be filed at or before the "term at which the cause could be tried," see the title **REMOVAL OF CAUSES**, vol. 10, p. 697. As to construction of a power of attorney authorizing agent to sell lands "on such terms used in all respects" as he shall deem most advantageous, see the title **POWERS**, vol. 9, p. 602. As to terms of office, see the title **PUBLIC OFFICERS**, vol. 10, p. 396.

TERMINI.—See the title **RAILROADS**, vol. 10, p. 468.

TERRE PLATES.—See the title **REVENUE LAWS**, vol. 10, p. 886.

TERRE TENANTS.—As to revival of judgment against, see the title **SCIRE FACIAS**, vol. 10, p. 1078.

TERRITORIES.—See the titles **ADMIRALTY**, vol. 1, p. 119; **APPEAL AND ERROR**, vol. 1, p. 333; **CONSTITUTIONAL LAW**, vol. 4, p. 1; **COURTS**, vol. 4, p. 860; **CRIMINAL LAW**, vol. 5, p. 43; **DUE PROCESS OF LAW**, vol. 5, p. 499; **EMINENT DOMAIN**, vol. 5, p. 746; **INDIANS**, vol. 6, p. 906; **INTERNATIONAL LAW**, vol. 7, p. 239; **PUBLIC LANDS**, vol. 10, p. 1; **RAILROADS**, vol. 10, p. 455; **REVENUE LAWS**, vol. 10, p. 838; **STATES**, ante, p. 33; **STATUTES**, ante, p. 62; **TAXATION**, ante, p. 356. See, also, **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 269; **INTERNATIONAL LAW**, vol. 7, p. 239; **NEW TRIAL**, vol. 8, p. 907; **REVENUE LAWS**, vol. 10, p. 838; **STATES**, ante, p. 53; **VENUE**; **WAR**. As to appeal to circuit court of appeals from territorial court of Hawaii, see the title **ADMIRALTY**, vol. 1, p. 184. As to jurisdiction of territorial courts in admiralty, see the title **ADMIRALTY**, vol. 1, p. 153. As to creation of admiralty court by territorial legislature, see the title **ADMIRALTY**, vol. 1, p. 153. As to authority of territorial legislature to create a court with power to decree for salvage, the sale of a vessel and cargo, see the title **ADMIRALTY**, vol. 1, p. 153, note 44. As to district courts of territories having same jurisdiction as district courts in states, see the titles **ADMIRALTY**, vol. 1, p. 153; **COURTS**, vol. 4, p. 1156. As to admiralty jurisdiction of territorial courts, see the title **ADMIRALTY**, vol. 1, p. 153. As to creation of admiralty court by territorial legislature, see the title **ADMIRALTY**, vol. 1, p. 153, note 44. As to power of congress with respect to creation of territorial courts, see the title **ADMIRALTY**, vol. 1, p. 153, note 43. As to appeals to the United States supreme court from Indian Territory, see the title **APPEAL AND ERROR**, vol. 1, pp. 525, 527. As to appeals from territorial court to United States supreme court in divorce proceedings, see the title **APPEAL AND ERROR**, vol. 1, pp. 855, 856. As to appeals from supreme court of Porto Rico, see the title **APPEAL AND ERROR**, vol. 1, pp. 855, 858. As to amount in controversy necessary for an appeal from territorial court to United

on a promissory note is a certain amount, on a certain day, and averring a tender on that day of the sum due, in legal tender notes of the United States, being a good plea of tender, see the title **BILLS**.

NOTES AND CHECKS, vol. 3, p. 361.

As to allegations of plea of tender in an action of assumpsit, see the title **ASSUMPSIT**, vol. 2, p. 657.

States supreme court, see the title *APPEAL AND ERROR*, vol. 1, p. 834. As to appeal from supreme court of territory in quo warranto proceeding, see the title *APPEAL AND ERROR*, vol. 1, p. 854, note 10. As to appeal from refusal of territorial court of Nevada and Utah to grant new trial, see the title *APPEAL AND ERROR*, vol. 1, p. 1000. As to appeals from supreme court of territory in habeas corpus proceedings, see the title *APPEAL AND ERROR*, vol. 1, pp. 530, 531. As to United States supreme court passing on judgment of supreme court of territory on question of practice in equity case, see the title *APPEAL AND ERROR*, vol. 1, p. 541, note 20. As to whether decree of territorial supreme court modifying decree of territorial district court is final for purposes of appeal, see the title *APPEAL AND ERROR*, vol. 1, p. 535, note 99. As to review of matters of fact determined by highest court of territory, see the title *APPEAL AND ERROR*, vol. 1, p. 535. As to territorial statute authorizing joint judgment against principal and sureties on an appeal bond being constitutional, see the title *APPEAL AND ERROR*, vol. 2, p. 192. As to whether appeal or writ of error is proper remedy to review appeals from territorial courts, see the title *APPEAL AND ERROR*, vol. 1, pp. 388, 390. As to territorial statute abolishing distinction between appeals and writ of error, see the title *APPEAL AND ERROR*, vol. 1, p. 388, note 72. As to jurisdiction to review judgments of territorial courts in habeas corpus, see the title *APPEAL AND ERROR*, vol. 1, pp. 530, 531. As to power of United States supreme court to review actions of territorial courts in refusing to set aside judgment by default, see the title *APPEAL AND ERROR*, vol. 1, p. 995, note 57. As to disposal of cases pending in United States supreme court from territory, on admission of territory as state, see the title *APPEAL AND ERROR*, vol. 1, p. 528. As to the 25th section of judiciary act applying to case where validity of territorial statute is in question, see the title *APPEAL AND ERROR*, vol. 1, pp. 555, 556. As to appeal from refusal of territorial court to give a new trial, see the title *APPEAL AND ERROR*, vol. 1, p. 1000. As to appeals from supreme court in certain proceedings without regard to amount in controversy, see the title *APPEAL AND ERROR*, vol. 1, pp. 904, 919. As to sufficiency of amount in controversy in appeals from territorial courts, see the title *APPEAL AND ERROR*, vol. 1, p. 834. As to review of criminal cases from a territory, see the title *APPEAL AND ERROR*, vol. 1, pp. 529, 530. As to abatement of writ of error on admission of territory as state, see the title *APPEAL AND ERROR*, vol. 1, p. 528. As to review of criminal cases from territorial courts, see the title *APPEAL AND ERROR*, vol. 1, p. 420. As to limitation upon time for taking appeal from territorial courts, see the title *APPEAL AND ERROR*, vol. 2, p. 13. As to laws governing appeals from territory, see the title *APPEAL AND ERROR*, vol. 1, p. 382. As to review of proceedings in territorial court by appeal or writ of error, see the title *APPEAL AND ERROR*, vol. 1, pp. 388, 389. As to acts of congress relative to judicial proceedings in territory of Florida giving right of appeal to United States supreme court, see the title *APPEAL AND ERROR*, vol. 1, p. 384. As to appellate jurisdiction over territorial courts, see the title *APPEAL AND ERROR*, vol. 1, pp. 522, 545. As to writ of error to review judgment of supreme court of territory on conviction of cohabitation with more than one woman, see the title *APPEAL AND ERROR*, vol. 1, p. 530. As to jurisdiction to hear appeal from territorial court drawing in question authority of territorial government to appoint an auditor, see the title *APPEAL AND ERROR*, vol. 1, p. 909, note 84; p. 913, note 92; *CONSTITUTIONAL LAW*, vol. 4, p. 120. As to scope of review in direct appeals from Indian Territory, see the title *APPEAL AND ERROR*, vol. 2, p. 372. As to appeals from territorial courts as dependent on amount in controversy, see the title *APPEAL AND ERROR*, vol. 1, p. 834. As to appropriate remedy for review of cases from territorial court not tried by jury, see the title *APPEAL AND ERROR*, vol. 1, pp. 389, 390, notes 80, 81. As to scope and extent of review of appeals from territorial courts where no errors are assigned or exceptions, see the title *APPEAL AND ERROR*, vol. 1, p. 537. As to procedure where no findings by supreme court of territory and no bill of

exceptions, see the title *APPEAL AND ERROR*, vol. 1, p. 543. As to review of cases from Hawaii, see the title *APPEAL AND ERROR*, vol. 1, p. 527. As to proper party to prosecute offenses in a territory, see the title *ATTORNEY GENERAL*, vol. 2, p. 742. As to bank created by territorial legislature taking conveyance before charter is approved by congress, see the title *BANKS AND BANKING*, vol. 3, p. 67, note 5. As to review of matters of law in proceedings of district court of territory of Oklahoma in bankruptcy, see the titles *APPEAL AND ERROR*, vol. 1, pp. 523, 525; *BANKRUPTCY*, vol. 2, pp. 832, 833. As to power of territory to prohibit polygamy, see the title *BIGAMY AND POLYGAMY*, vol. 3, p. 226. As to statutes of territory of Hawaii conferring certain powers on judges at chambers and vacation, see the title *CHAMBERS AND VACATION*, vol. 3, p. 666. As to liability of clerk of district court to account for fees received in naturalization and other proceedings, see the title *CLERKS OF COURTS*, vol. 3, p. 863. As to adoption of common law in territories, see the title *COMMON LAW*, vol. 3, p. 972. As to right to jury trial in unincorporated territory as in Hawaii, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 118. As to status of acquired territory as foreign and domestic, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 97, 100. As to operation of constitutional provisions as to protection of life, liberty and property being applicable to territories, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 462. As to status of Cuba, Porto Rico, Philippines, Hawaii as territory of United States when under military occupation of United States, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 98, 99. As to power of territorial legislature to pass law prohibiting bigamists, polygamists, etc., from voting, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 122, note 13; *ELECTIONS*, vol. 5, p. 724, note 22. As to operation of United States constitution in territories, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 69. As to power of congress to amend acts of territorial legislature, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 123. As to power of congress to make laws relative to suffrage in territories and exclude polygamists from franchise, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 109, note 69, p. 123, note 23. As to power of territorial legislature to grant charters of incorporation, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 122. As to right of territorial legislature to endow institutions of learning, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 122. As to power of territorial legislature to legislate as to succession to estates of deceased and inheritances by illegitimate children, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 122. As to delegation of congressional powers to territorial legislature, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 287. As to power of congress to deny equal rights in territories, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 108, notes 62, 123. As to power of territorial legislature to dispense with jury trial, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 121, note 10. As to territorial operation of federal constitution in the territories, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 69. As to acquisition, government and control of territory, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 89, 91. As to government of territories, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 100, 125. As to congress being subject to restrictions of constitution, establishing and defining judicial power of United States, in the territories, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 115. As to exercise of legislative or political functions by judiciary in questions growing out of cession of territory, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 241. As to citizens of territories invoking constitutional guarantees, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 462. As to effect of admission upon laws and ordinances respecting territories, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 338. As to power to acquire, govern and dispose of territory, see the title *CONSTITUTIONAL LAW*, vol. 4, pp. 96, 125. As to the seventh amendment securing jury trial which involved unanimity in territorial courts, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 119. As to inhabitants of territory being entitled to protection of fifth, sixth and seventh amendments, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 119, note 5, p. 118. As to constitu-

tionality of law of Alaska depriving persons accused of misdemeanors of right to trial by common law jury, see the title CONSTITUTIONAL LAW, vol. 4, p. 120. As to effect of admission of territory as state on territorial corporations, see the title CORPORATIONS, vol. 4, pp. 666, 667, note 36. As to power of congress to repeal charter of territorial corporation such as Mormon Church, see the title CORPORATIONS, vol. 4, p. 690. As to power of territorial legislature to create corporation, see the title CORPORATIONS, vol. 4, p. 666. As to joinder of legal and equitable remedies in territorial courts, see the title COURTS, vol. 4, pp. 1160, 1161. As to decision of recently admitted state being binding on appeal from territory, see the title COURTS, vol. 4, p. 1053, note 9. As to territorial courts being United States courts, see the title COURTS, vol. 4, pp. 1154, 1155. As to laws governing selection of jurors in territorial courts, see the title COURTS, vol. 4, p. 1160. As to citizen of territory being able to sue citizen of state in federal courts, see the title COURTS, vol. 4, p. 941. As to establishment, organization, powers, jurisdiction, etc., of territorial courts, see the title COURTS, vol. 4, pp. 1154, 1163. As to transfer of causes from territorial courts on admission of state, see the title COURTS, vol. 4, pp. 1161, 1163. As to whether territorial courts are courts of United States, see the title COURTS, vol. 4, pp. 1154, 1155. As to practice and procedure in territorial courts, see the title COURTS, vol. 4, pp. 1159, 1160. As to jurisdiction of territorial courts, see the title COURTS, vol. 4, pp. 1156, 1159. As to terms and sessions of territorial courts, see the title COURTS, vol. 4, p. 1156. As to jurisdiction of territorial courts in criminal cases, see the title CRIMINAL LAW, vol. 5, pp. 94, 95. As to crimes in territories, see the title CRIMINAL LAW, vol. 5, pp. 88, 90. As to power of territorial legislature to define offenses and prescribe punishment, see the title CRIMINAL LAW, vol. 5, p. 55. As to jurisdiction of territorial courts, see the title CRIMINAL LAW, vol. 5, p. 94. As to punishment of various crimes committed in territory, see the title CRIMINAL LAW, vol. 5, p. 88. As to power of territorial legislature to define and punish criminal offenses, see the title CRIMINAL LAW, vol. 5, p. 55. As to power of congress to adopt criminal code of state for territory, see the title CRIMINAL LAW, vol. 5, p. 59. As to necessity for witnesses to deed of land in territory, see the title DEEDS, vol. 5, p. 262, note 95. As to power of territorial legislature to grant divorce, see the title DIVORCE AND ALIMONY, vol. 5, p. 413, note 4. As to power of territorial courts to allow alimony, see the title DIVORCE AND ALIMONY, vol. 5, p. 429. As to jurisdiction of territorial courts in divorce, see the title DIVORCE AND ALIMONY, vol. 5, p. 414. As to act of congress of 1887, regulating dower, being applicable to territories in general, see the title DOWER, vol. 5, p. 490. As to signing of statement of facts on appeal from territorial court, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 39, note 96. As to necessity for statement of facts in appeal from territory, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 22. As to settlement of bill of exceptions during or after terms in cases from Montana, and North Dakota territories, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, pp. 66, 68. As to result on case brought up from territorial court when there is no bill of exceptions, statement of facts or special verdict, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 32. As to impanelling of grand jurors in territory of Utah, see the title GRAND JURY, vol. 6, p. 575, note 36. As to whether laws passed by territorial legislature are within contract clause of constitution, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 779. As to jurisdiction of United States circuit court over murder of non Indian in Indian reservation within territory, see the title INDIANS, vol. 6, p. 952, note 12. As to jurisdiction of territorial courts over crimes committed within and without Indian reservation within territory, see the title INDIANS, vol. 6, pp. 951, 952. As to Indian reservation within territory being part of territory, see the title INDIANS, vol. 6, p. 954. As to Cherokee nation being a state or territory, see

the title *INDIANS*, vol. 6, p. 913. As to taxation of Indian and non-Indian property within territory, see the title *INDIANS*, vol. 6, pp. 955, 956. As to regulation of commerce by congress between states and territories, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 307. As to quo warranto to test right of person to exercise functions of judge in territory, see the title *JUDGES*, vol. 7, p. 541. As to removal of judge of district court of district of Alaska, see the title *JUDGES*, vol. 7, p. 540, notes 5, 8. As to selection of jurors in Indian Territory, see the title *JURY*, vol. 7, p. 768, note 53. As to jury trials in territorial courts, see the title *JURY*, vol. 7, pp. 753, 754. As to act of territorial legislature prohibiting jury trials being unconstitutional, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 121; *JURY*, vol. 7, p. 753, note 23. As to judicial notice of territorial laws, see the title *JUDICIAL NOTICE*, vol. 7, p. 696. As to judicial notice of territorial extent of jurisdiction of United States, see the title *JUDICIAL NOTICE*, vol. 7, p. 681. As to power of congress to impose license taxes in territories, see the title *LICENSES*, vol. 7, pp. 872, 873. As to mandamus to territorial officer, see the title *MANDAMUS*, vol. 8, p. 66. As to issue of writ of mandamus by territorial court, see the title *MANDAMUS*, vol. 8, p. 24. As to mandamus to secretary of treasury to pay salary of judge of territory, see the title *MANDAMUS*, vol. 8, p. 24. As to water rights in territories, see the title *MINES AND MINERALS*, vol. 8, pp. 401, 403. As to power of territorial legislature to create special tribunal for hearing claims against municipal corporations, see the title *MUNICIPAL CORPORATIONS*, vol. 8, p. 613. As to refunding of territorial bonds by congress, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 686. As to navigable waters in territories, see the title *NAVIGABLE WATERS*, vol. 8, p. 817. As to territorial statute limiting or denying new trials, see the title *NEW TRIAL*, vol. 8, p. 910. As to effect of admission of territory as state upon power of congress over public lands in territory, see the titles *PUBLIC LANDS*, vol. 10, p. 54; *CONSTITUTIONAL LAW*, vol. 4, pp. 153, 154. As to swamp land act applying to territories, see the title *PUBLIC LANDS*, vol. 10, p. 220. As to effect of admission of territory as state upon power of congress to legislate for protection of public lands, see the title *PUBLIC LANDS*, vol. 10, p. 54. As to title to grant of land in Indian Territory for railroads where Indians were in possession, see the title *PUBLIC LANDS*, vol. 10, p. 182, note 2. As to grants of land in territory to state to aid in construction of railroads, see the title *PUBLIC LANDS*, vol. 10, p. 154, note 27. As to congress authorizing territory to construct railroads in territory and making grant of land therefor, see the title *PUBLIC LANDS*, vol. 10, p. 154. As to name in which quo warranto by territory must issue, see the title *QUO WARRANTO*, vol. 10, p. 453. As to remittitur in territorial court, see the title *REMITTITUR*, vol. 10, pp. 660, 661. As to operation of revenue clauses of constitution in newly acquired territory, see the titles *CONSTITUTIONAL LAW*, vol. 4, p. 116; *REVENUE LAW*, vol. 10, p. 862. As to whether territorial act of Utah authorized one convicted of capital offense to be shot, see the title *SENTENCE AND PUNISHMENT*, vol. 10, p. 1103, note 50. As to territory being liable to suit, see the title *STATES*, ante, p. 33. As to power of congress over territory being abrogated upon admission as state, see the title *STATES*, ante, p. 33. As to territorial statutes being void because repugnant to acts of congress, see the title *STATUTES*, ante, p. 62. As to presumption that act officially attested, approved and committed to see if territory was enacted properly, see the title *STATUTES*, ante, p. 62. As to power of taxation by territories, see the title *TAXATION*, ante, p. 356. As to railroad in Indian reservation being taxable by territory, see the title *TAXATION*, ante, p. 356. As to taxation of national banks by territories, see the title *TAXATION*, ante, p. 356. As to whether laws relative to competency of witnesses in United States courts are applicable to territories, see the title *WITNESSES*. As to title to property of territory passing to state upon admission, see the title *STATES*, ante, p. 33.

TESTAMENTARY CAPACITY.—See the title **WILLS**.

TESTE.—See the title **SUMMONS AND PROCESS**, ante, p. 299. As to teste of writ of error, see the title **APPEAL AND ERROR**, vol. 2, p. 141.

TESTIMONIO.—See the title **PUBLIC LANDS**, vol. 10, pp. 281, 351.

TEST OATH.—See the titles **ATTORNEY AND CLIENT**, vol. 2, p. 708; **JURY**, vol. 7, p. 765. See, also, references under title **OATH**, vol. 8, p. 951.

TEXAS.—See the title **ALIENS**, vol. 1, pp. 214, 231, 234; **BOUNDARIES**, vol. 3, p. 506. As to manner of disposing of public lands in Texas, see the title **PUBLIC LANDS**, vol. 10, p. 28. As to Texas fever, see the title **ANIMALS**, vol. 1, p. 326. As to Texas recording acts, see the title **RECORDING ACTS**, vol. 10, pp. 595, 596. As to construction of Texas statute providing for service on foreign corporations, see the title **SUMMONS AND PROCESS**, ante, p. 299. As to Texas anti-trust laws, see the title **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 437.

THALWEG.—"The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between states, meaning the middle or deepest or most navigable channel. And while often styled 'airway' or 'midway' or 'main channel,' the word itself has been taken over into various languages."¹

THE.—See note 2.

THEATERS AND SHOWS.—As to distribution of money remaining in treasury of centennial board of finance at close of exposition, see the title **CORPORATIONS**, vol. 4, p. 798. As to forgery of theater tickets, see the title **FORGERY AND COUNTERFEITING**, vol. 6, p. 382. As to constitutionality of law which gives right of admission to place of amusement to all that are orderly and possessing proper tickets of admission, see the titles **CONSTITUTIONAL LAW**, vol. 4, p. 379; **POLICE POWER**, vol. 9, p. 533. As to equal enjoyment of the accommodations and privileges of theaters and shows, see the titles **CIVIL RIGHTS**, vol. 3, p. 834; **SLAVERY AND INVOLUNTARY SERVITUDE**, vol. 10, p. 1213.

THEIR.—As to construction of "their roads" in a state statute authorizing railroad companies to contract with other companies, in and without the state, for leasing or running their roads, see **LEASE**, vol. 7, p. 848. See, also, the title **RAILROADS**, vol. 10, p. 517.

THEOLOGICAL SEMINARY.—As to exemption of from taxation, see the title **TAXATION**, ante, p. 356.

THEORY OF THE CASE.—See the titles **APPEAL AND ERROR**, vol. 2, p. 119; **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 53; **REVENUE LAWS**, vol. 10, p. 950.

THERE.—As to adverbs of time, such as where, there, after, from, etc., in a devise of remainder, being construed to relate merely to the time of enjoyment of the estate, and not to the time of vesting in interest, see **FROM**, vol. 6, p. 535.

THEREAFTER.—See note 3.

1. **Thalweg.**—*Louisiana v. Mississippi*, 202 U. S. 1, 49, 50 L. Ed. 913. See the title **WATERS AND WATER-COURSES**.

As to the applicability of the rule of **thalweg** to lakes, bays, sounds, straits, etc., see the title **BOUNDARIES**, vol. 3, p. 496.

2. **The ferry.**—In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 5830, 9 L. Ed. 773, in referring to the grant of "the ferry between Boston and Charlestown," the court said: "This pronoun 'the,' or 'illa,' is necessarily descriptive of the place, by direct reference to the ferry, as located in fact and long occupation.

Ferry is a term of the law, perfectly defined and a grant of 'the ferry,' 'that ferry,' has the same effect as a grant of 'that land,' 'those lands,' by which nothing else can pass but those which are referred to in words of description, by metes, bounds or occupation."

The sound.—As to what is embraced within the term the sound in a grant of land on Long Island sound, see the title **BOUNDARIES**, vol. 3, p. 483.

3. **Every year thereafter.**—A life insurance policy recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an

THEREOF.—As to construction of the word thereof in an act extending the meaning of the word insolvency to cases where “a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors,” see **PROPERTY**, vol. 9, p. 814.

THERMOMETERS.—As to duty on, see the title **REVENUE LAWS**, vol. 10, p. 899.

THING PATENTED.—See note 1.

THIRD OPPOSITION.—A third opposition is defined by the code of practice of Louisiana, as “a demand brought by a person not originally a party in the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him.” It is a suit at law, a short, summary proceeding, and not a formal one in chancery.²

THIRD PARTIES—THIRD PERSONS.—See the titles **PARTIES**, vol. 9, p. 34; **RES ADJUDICATA**, vol. 10, p. 743. See, also, note 3.

THIRTEENTH AMENDMENT.—See the titles **CIVIL RIGHTS**, vol. 3, p. 814; **CONSTITUTIONAL LAW**, vol. 4, p. 1; **DUE PROCESS OF LAW**, vol. 5, p. 499; **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 810; **SLAVERY AND INVOLUNTARY SERVITUDE**, vol. 10, p. 1212, et seq.

THOROUGHGOOD v. BRYAN, DOCTRINE OF.—See the title **NEGLIGENCE**, vol. 8, p. 892.

THREATS.—See the titles **DURESS**, vol. 5, p. 682; **EXTORTION**, vol. 6, p. 214; **RAPE**, vol. 10, p. 530. As to eviction of tenant by threats, see the title **LANDLORD AND TENANT**, vol. 7, p. 839. As to threats against election officer, see the title **ELECTIONS**, vol. 5, p. 728. As to evidence of threats in trial for homicide, see the titles **HOMICIDE**, vol. 6, p. 709; **RES GESTÆ**, vol. 10, p. 830.

annual premium of twenty-one dollars, “and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.” The court said: “May not the words ‘in every year thereafter’ mean in every year after the year, the premiums for which have been paid? Or, in every year after the current year from the date of the policy?” *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 40, 46 L. Ed. 64.

1. **Patent laws.**—The words “newly-invented machine, manufacture, or composition of matter” in the 7th section of the act of 1839, providing for the sale and use of such article where purchased or constructed prior to the application by the inventor, have the same meaning as “invention,” or **thing patented**. *McClurg v. Kingsland*, 1 How. 202, 210, 11 L. Ed. 102. See *Wilson v. Rousseau*, 4 How. 646, 682, 11 L. Ed. 1141. See, also, the title **PATENTS**, vol. 9, p. 136.

2. **Third opposition.**—*Lacassagne v. Chapuis*, 144 U. S. 119, 125, 36 L. Ed. 368, citing *Van Norden v. Morton*, 99 U. S. 378, 381, 25 L. Ed. 453. See the titles **EXECUTIONS**, vol. 6, p. 109; **PARTIES**, vol. 9, p. 62.

Appeals.—It is a proceeding at law, and not a cause in equity, and is properly brought up by writ of error. See the title **APPEAL AND ERROR**, vol. 1, p. 385.

Grant of an injunction or prohibition

under a third opposition.—When property not liable on execution is seized in Louisiana, the remedy of the owner is by an intervention called a **third opposition**, on which, by giving security, an injunction or prohibition may be granted to stop the sale. *New Orleans v. Louisiana Constr. Co.*, 129 U. S. 45, 46, 32 L. Ed. 607.

3. **Public lands.**—The term **third persons**, mentioned in the fifteenth section of the act of March 3d, 1851, against whom the decree and patent of the United States are not conclusive, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property. *Beard v. Federy*, 3 Wall. 478, 479, 18 L. Ed. 88. See the title **PUBLIC LANDS**, vol. 10, p. 244.

Registry laws.—It is provided by article 176 of the constitution of Louisiana that mortgages or privileges on immovable property should not affect **third persons** unless recorded or registered. By the words **third persons** are to be understood to be “all persons who are not parties to the act or the judgment on which the mortgage is founded.” Article 3343, Civil Code. *Lovell v. Cragin*, 136 U. S. 130, 149, 34 L. Ed. 372. *Cucullu v. Hernandez*, 103 U. S. 105, 113, 26 L. Ed. 322. See the title **RECORDING ACTS**, vol. 10, p. 595.

THROUGH.—The primary meaning of the word “through” is from end to end, or from side to side, but it is used in a narrower and different sense. Frequently it means simply “within.” Its meaning is often qualified by the context.¹

TICKER.—See note 2.

TICKET.—See note 3.

TIDE LANDS.—See the title **COURTS**, vol. 4, p. 1113; **NAVIGABLE WATERS**, vol. 8, p. 805.

TIDES—TIDAL RIVERS—TIDAL WATERS.—See the titles **ADMIRALTY**, vol. 1, p. 132; **BOUNDARIES**, vol. 3, p. 478; **NAVIGABLE WATERS**, vol. 8, p. 807, et seq.; **WATERS AND WATERCOURSES**.

TILE.—See the title **REVENUE LAWS**, vol. 10, p. 885.

TIMBER.—See the title **TREES AND TIMBER**. “As to cutting and removing timber on public lands, see the title **PUBLIC LANDS**, vol. 10, p. 54. As to whether cutting timber constitutes adverse possession, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 937. As to right to use of timber on mineral lands, see the title **MINES AND MINERALS**, vol. 8, p. 404.

TIMBER AND MATERIAL RIGHTS.—See the title **PUBLIC LANDS**, vol. 10, p. 208.

TIME.

CROSS REFERENCES.

See the titles **ACTIONS**, vol. 1, p. 111; **APPEAL AND ERROR**, vol. 1, p. 333; **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 684; **BILLS, NOTES AND CHECKS**, vol. 3, p. 257; **CONSTITUTIONAL LAW**, vol. 4, p. 29; **CONTRACTS**, vol. 4, p. 552; **COURTS**, vol. 4, p. 861; **DEEDS**, vol. 5, p. 245; **DEPOSITIONS**, vol. 5, p. 321; **EMINENT DOMAIN**, vol. 5, p. 793; **EQUITY**, vol. 5, p. 803; **EVIDENCE**, vol. 5, p. 1006; **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 1; **GUARANTY**, vol. 6, p. 580; **INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 961; **INSURANCE**, vol. 7, p. 66; **JUDGMENTS AND DECREES**, vol. 7, p. 544; **JUDICIAL NOTICE**, vol. 7, p. 672; **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 900; **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452; **NEW TRIAL**, vol. 8, p. 907; **PAYMENT**, vol. 9, p. 319; **PLEADING**, vol. 9, p. 418; **POWERS**, vol. 9, p. 588; **PREMATURE SUITS**, vol. 9, p. 610; **PRESUMPTIONS AND BURDEN OF PROOF**, vol. 9, p. 618; **REFERENCE**, vol. 10, p. 600; **REMOVAL OF CAUSES**, vol. 10, p. 664; **REVENUE LAWS**, vol. 10, p. 838; **SALES**, vol. 10, p. 1022; **SENTENCE AND PUNISHMENT**, vol. 10, p. 1090; **SHIPS AND SHIPPING**, vol. 10, p. 1148; **STATUTES**, ante, p. 62; **SUMMONS AND PROCESS**, ante, p. 299; **TAXATION**, ante, p. 356; **TRIAL**; **VARIANCE**. See, also, **FORTHWITH**, vol. 6, p. 391.

As to what constitutes reasonable time in giving notice of dishonor or negotiable paper, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 329. As to what constitutes reasonable time within which to demand payment on negotiable paper payable on demand, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 282. As to inclusion of day on which verdict rendered in computing time for motion,

1. **Through.**—*Provident Life, etc., Co. v. Mercer County*, 170 U. S. 593, 602, 42 L. Ed. 1156.

Completion of railroad “through” county.—See the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 645.

2. **Cotton ticker.**—“The quotations are communicated through a ticker, which is a machine with a tape attached to it, that registers the price of cotton, giving the hour.” *Hunt v. New York Cotton Ex-*

change, 205 U. S. 322, 333, 51 L. Ed. 821.

3. **Lottery tickets.**—A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title. *Francis v. United States*, 188 U. S. 375, 377, 47 L. Ed. 508. See the title **LOTTERIES**, vol. 7, p. 1070. As to tickets and fares, see the title **CARRIERS**, vol. 3, p. 570.

see the title JUDGMENTS AND DECREES, vol. 7, p. 597. As to time of serving a declaration in ejectment, see the title SUMMONS AND PROCESS, ante, p. 299.

Week.—See WEEK.

Month.—See MONTH, vol. 8, p. 450.

Computation of Time.—See note.¹

Fractions of a Day May Be Ascertained.—The law, generally speaking, does not regard the fractions of a day,² but when the priority of one legal right over another depending upon the order of events occurring on the same day, is involved, this rule is necessarily departed from.³

Inclusion or Exclusion of the Terminus a Quo.—Whether the terminus a quo should be included in the reckoning of periods of time, has been a vexed question for many centuries, and where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction of title.⁴

TIME TO PLEAD.—See the title PLEADING, vol. 9, p. 428.

TIN PLATES.—See the title REVENUE LAWS, vol. 10, p. 886.

TISSUE PAPER.—See the title REVENUE LAWS, vol. 10, p. 895.

TITLE, OWNERSHIP AND POSSESSION.—See OWN—OWNER, vol. 8, p. 1018; POSSESSION, vol. 9, p. 548; REAL ESTATE, vol. 10, p. 533; REAL PROPERTY, vol. 10, p. 534. See, also, note 5.

1. As to computation of time "from" or "within" certain periods, see the titles BANKRUPTCY, vol. 2, p. 943; CONTRACTS, vol. 4, p. 579; INDIANS, vol. 6, p. 936; PUBLIC OFFICERS, vol. 10, p. 396; STATUTES, ante, p. 62.

As to inclusion of Sundays in reckoning periods of time, see the title SUNDAYS AND HOLIDAYS, ante, p. 330.

Entry of judgment.—In calculating the lapse of time, the date of the entry of judgment governs, and not the date when judgment was read to and signed by the judges. *Boise County Comm'rs v. Gorman*, 19 Wall. 661, 22 L. Ed. 226. See the title APPEAL AND ERROR, vol. 2, p. 132.

2. **Day as a unit.**—*Bank v. Swann*, 9 Pet. 33, 9 L. Ed. 40; *Renner v. Bank*, 9 Wheat. 581, 6 L. Ed. 166. See DAY, vol. 5, p. 198.

The proclamation of the president of June 13, 1865 (13 Stat. 763), annulling, in the territory of the United States east of the Mississippi, all restrictions previously imposed upon intercourse and trade, took effect as of the beginning of the day, and money collected by treasury agents on that day pursuant to those restrictions could be recovered. *United States v. Norton*, 97 U. S. 164, 24 L. Ed. 907. See the title PRESIDENT OF THE UNITED STATES, vol. 9, p. 616.

3. **Fractions of a day.**—*National Bank v. Burkhardt*, 100 U. S. 686, 689, 25 L. Ed. 766.

Courts may ascertain the precise hour a statute took effect. *Louisville v. Savings Bank*, 104 U. S. 469, 478, 26 L. Ed. 775; *Taylor v. Brown*, 147 U. S. 640, 37 L. Ed. 313. See the title CONSTITUTIONAL LAW, vol. 4, p. 29.

4. *Griffith v. Bogert*, 18 How. 158, 162, 163, 15 L. Ed. 307.

The terminus a quo included.—The laws of Missouri allow the lands of a deceased debtor to be sold under execution, but prohibit it from being done until after the expiration of eighteen months from the date of the letters of administration upon his estate. Where the letters of administration were dated on the 1st of November, 1819, and the sale took place on the 1st of May, 1821, the sale was valid. In this case the terminus a quo was included. *Griffith v. Bogert*, 18 How. 158, 15 L. Ed. 307. See the title EXECUTIONS, vol. 6, p. 94.

5. **Title defective in form.**—A title defective in form which is insufficient to be a basis of prescription, is a **title**, on the face of which some defect appears, and not one that may be proved defective by circumstances, or evidence dehors the record. *Texas, etc., Ry. Co. v. Smith*, 159 U. S. 66, 70, 40 L. Ed. 77.

Title or color of title.—Under the statute of limitations of Texas, providing that suits to recover real estate, as against those in possession under title or color of title, shall be instituted within three years, the term **title** means a regular change or transfer from and under the sovereignty of the soil. *Christy v. Alford*, 17 How. 601, 602, 15 L. Ed. 256; *Devila v. Munford*, 24 How. 214, 222, 16 L. Ed. 619; *League v. Atchison*, 6 Wall. 112, 115, 18 L. Ed. 764; *Stanley v. Schwalby*, 147 U. S. 508, 514, 37 L. Ed. 259.

Color of title.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 952, et seq.

Necessary title to redeem land.—As to

TITLE BONDS.—See the title **VENDOR AND PURCHASER**.

TITLE DEEDS.—As to whether deposit of constitutes an equitable mortgage, see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 464.

TITLE GUARANTY COMPANY.—As to examination of evidences of records of federal courts by title guaranty company, see the title **RECORDS**, vol. 10, p. 598.

TITLE OF NOBILITY.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 298.

TITULO.—The term *titulo*, in the Spanish language, only means the instrument which is given as evidence of the right, interest, or estate conferred; it does not indicate the measure of such right, interest, or estate; hence it applies equally to papers which convey title in the usual acceptation of the term, and to those which confer a mere right of occupancy.¹

TO.—See the title **TIME**, ante, p. 600. See, also, **FROM**, vol. 6, p. 535. And see, note 2. As to a conveyance of all right, title and interest "in and to" lands granted by a contract of sale, operating as an assignment, see the title **ASSIGNMENTS**, vol. 2, p. 553. As to construction of statute authorizing subscriptions of stock by commissions of any county to, into, through, from, or near which any railroad is located, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 629. As to construction of statute authorizing subscriptions by municipal authorities to subscribe for stock in a chartered company for making roads to a city, see the title **MUNICIPAL, COUNTY, STATE AND FEDERAL AID**, vol. 8, p. 630.

rights and title in land which makes the person the owner, so far as it is necessary to redeem, see the title **TAXATION**, ante, p. 356.

As to the title being a part of the act, see the title **STATUTES**, ante, p. 62.

"Right or title first accrued."—See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 1017.

Legal owner.—As to a mortgagee not being embraced within the terms of the act of 1891 giving a particular sum to the legal owner or owners for land sold by the government under the direct tax act of 1861, see **LEGAL**, vol. 7, p. 848.

Possession may be actual or constructive.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442, 35 L. Ed. 1062.

An actual possession is when there is an occupancy, such as the property is capable of, according to its adaptation to use. A constructive possession is where a person has the paramount title, which in contemplation of law, draws to and connects it with the possession. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442, 35 L. Ed. 1062.

As to what constitutes actual and constructive possessions, within the meaning of the law as to adverse possession, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, pp. 936, 964.

Peaceable possession.—As to what constitutes peaceable possession under a Texas statute prescribing limitations of actions for recovery of real property, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 941.

Presumption as to continuance of pos-

session of real property.—In an action to recover rental value of certain lands alleged to have been used for the purpose of pasturage, the record of a former judgment against the defendant obtained by the plaintiff for the rental value of such lands was admissible for the purpose of showing exclusive possession in the defendant. **Possession** of real property once proven to exist is presumed to continue. *Lazarus v. Phelps*, 156 U. S. 202, 205, 39 L. Ed. 397. See the titles **EVIDENCE**, vol. 5, p. 1031; **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 1047.

Possession prima facie evidence of ownership.—The possession of land by a party, claiming it as his own in fee, is prima facie evidence of his ownership and seisin of the inheritance. *Ricard v. Williams*, 7 Wheat. 59, 5 L. Ed. 398.

1. **Titulo.**—*De Haro v. United States*, 5 Wall. 599, 18 L. Ed. 681.

2. **"To make use of, to put to use."**—"In use" is defined to be "in employment;" "out of use" to be "not in employment;" "to make use of, to put to use" to be "to employ, to derive service from." *Astor v. Merritt*, 111 U. S. 202, 213, 28 L. Ed. 401.

Insurance "to" a certain island.—See the title **MARINE INSURANCE**, vol. 8, p. 160.

"To" my knowledge.—As to where the assured in an insurance policy stated that there is no hereditary taint of disease in his family "to my knowledge," see the title, **INSURANCE**, vol. 7, p. 162.

English treaty as to creditor's right to the recovery of bona fide debts.—See **RECOVERY**, vol. 10, p. 599.

TOBACCO.—See the title *REVENUE LAWS*, vol. 10, p. 888.

TOLLBRIDGE.—See the title *BRIDGES*, vol. 3, p. 528. See, also, note 1.

TOLLS.—See the titles *BRIDGES*, vol. 3, p. 528; *TURNPIKES AND TOLLROADS*. As to state taxation of tolls where merchandise is carried from one state to another, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 463. As to a provision that certain navigable waters should be free of taxes, imposts and duties not preventing the imposition of tolls for improvements, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 395. A toll is the sum demanded for passage,² and it is the compensation for services rendered, or facilities furnished to a passenger or transporter.³ The word is also used to express the compensation allowed by law or custom to a miller for grinding grain.⁴

TOMATOES.—See the title *REVENUE LAWS*, vol. 10, p. 889.

1. **Tollbridge held to be a public bridge.**—*County Comm'rs v. Chandler*, 96 U. S. 205, 209, 24 L. Ed. 625.

2. "Toll thorough is a sum demanded for a passage through an highway; or, for a passage over a ferry, bridge, etc.; or, for goods which pass by such a port in a river; and it may be demanded in consideration of the repair of the pavement in a high street; or, of the repair of a sea-wall, bridge, etc.; cleansing of a river, etc. But a toll thorough cannot be claimed simply, without any consideration." *County Comm'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625.

Toll thorough and toll traverse distinguished.—Where a toll is demandable by an express grant, by custom or prescription, on a public highway, in a public port, or for the use of public property, it is termed toll thorough, because the party claiming it is presumed to have had no original right to the place where he demands toll. Toll traverse, or a toll demanded for passing on or over the private property of the claimant, or using it in any other way, is of a different description; being founded on the right which every man has to the exclusive enjoyment of what is exclusively his private property; its use by others is a sufficient consideration for the exaction of toll. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 583 q, 9 L. Ed. 773.

3. **Charge for transportation.**—While toll is a word peculiarly applicable to charges for the use of a highway, as con-

tradistinguished from the charge for transportation, which is more properly denominated "freight;" it must be conceded, that, in the actual language of railroad legislation, the word toll is very often used to express the charge for transportation also. *Lake Superior, etc., R. Co. v. United States*, 93 U. S. 442, 454, 23 L. Ed. 965.

Tolls as used in tax laws of Pennsylvania are there construed to be a tribute or custom paid for passage, not for carriage, something taken for a liberty or privilege, not for a service. See *New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 431, 435, 39 L. Ed. 1043. See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 463.

Toll and tax distinguished.—Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the state. A tax is a demand of sovereignty; a toll is a demand of proprietorship. *Case of the State Freight Tax*, 15 Wall. 232, 278, 21 L. Ed. 146.

A tax by a state upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, is not a toll. *Case of the State Freight Tax*, 15 Wall. 232, 378, 21 L. Ed. 146.

4. **Toll compensation for grinding grain.**—*Lake Superior, etc., R. Co. v. United States*, 93 U. S. 442, 458, 23 L. Ed. 965.

TONNAGE DUTIES.

BY T. B. BENSON.

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As to distinction from pilotage fees, see the title PILOTS, vol. 9, p. 407. As to collection of tonnage duty on French vessels, see the title SHIPS AND SHIPPING, vol. 10, p. 1206. As to collection of tonnage duties in California during the war with Mexico, see the title WAR.

I. Definitions.

A. Tonnage.—By the word “tonnage,” as applied to American ships and vessels, is meant their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation.¹

B. Tonnage Taxes or Duties.—Tonnage duties are duties upon vessels in proportion to their capacity. The vital principle of such a tax or duty is that it is imposed, whatever the subject, solely according to the rule of weight, either as to the capacity to carry, or the actual weight of the thing itself.²

1. Definition of “tonnage.”—State Tonnage Tax Cases, 12 Wall. 204, 212, 20 L. Ed. 370; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 243, 24 L. Ed. 118; *Transportation Co. v. Wheeling*, 99 U. S. 273, 284, 285, 25 L. Ed. 412. But see post, “Prohibition Not Restricted to Duties Graduated According to Tonnage,” II, G. “Evidently the word tonnage in commercial designation means the number of tons burden the ship or vessel will carry as estimated and ascertained by the official admeasurement and computation prescribed by the public authority. * * * Hence the term, as applied to a ship, has become almost synonymous with that of size.” State Tonnage Tax Cases, 12 Wall. 204, 225, 20 L. Ed. 370.

2. Definition of “tonnage taxes or du-

ties.”—*Inman Steamship Co. v. Tinker*, 94 U. S. 238, 243, 24 L. Ed. 118.

Taxes on vessels according to measurement, without any reference to value, are taxes on tonnage. *Telegraph Co. v. Texas*, 105 U. S. 460, 465, 26 L. Ed. 1067; State Tonnage Tax Cases, 12 Wall. 204, 20 L. Ed. 370; *Peete v. Morgan*, 19 Wall. 581, 22 L. Ed. 201; *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118.

Tonnage duties are as much taxes as duties on imports or exports. State Tonnage Tax Cases, 12 Wall. 204, 215, 20 L. Ed. 370; *Gibbons v. Ogden*, 9 Wheat. 1, 202, 6 L. Ed. 23.

The phrases, “duty of tonnage,” and “tonnage tax or duty,” mean a charge,

II. Power of States to Levy.

A. In General.—The constitution of the United States declares that no state shall, without the consent of congress, lay any duty of tonnage, and no consent has ever been given by congress to the states to exercise any such power.³

B. Forbids Tax upon Privilege of Arriving and Departing.—Any duty, or tax, or burden imposed under the authority of the states which is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity, is a violation of that provision unless the consent of congress be obtained.⁴

C. Does Not Prohibit Charge for Services Actually Rendered, or for Use of Facilities Afforded.—The prohibition to the state against the imposition of a duty of tonnage was designed to guard against local hinderances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. A charge for services rendered, or for conveniences provided, is in no sense a tax or a duty, and is not within the prohibition against duties upon tonnage.⁵

tax, or duty on a vessel for the privilege of entering a port; and although usually levied according to tonnage, and so acquiring its name, it is not confined to that method of rating the charge. It has nothing to do with wharfage, which is a charge against a vessel for using or lying at a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. *Transportation Co. v. Parkersburg*, 107 U. S. 691, 698, 27 L. Ed. 584, quoted in *Huse v. Glover*, 119 U. S. 543, 550, 30 L. Ed. 487.

3. Power of states to lay duties of tonnage.—United States Constitution, art. 1, § 10, cl. 3; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *Steamship Co. v. Portwardens*, 6 Wall. 31, 18 L. Ed. 749; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L. Ed. 370; *Ward v. Maryland*, 12 Wall. 418, 427, 20 L. Ed. 449; *Railroad Co. v. Peniston*, 18 Wall. 5, 50, 21 L. Ed. 787; *Peete v. Morgan*, 19 Wall. 581, 22 L. Ed. 201; *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Transportation Co. v. Wheeling*, 99 U. S. 273, 25 L. Ed. 412; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Machine Co. v. Gage*, 100 U. S. 676, 678, 25 L. Ed. 754; *Head Money Cases*, 112 U. S. 580, 596, 28 L. Ed. 798; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 463, 30 L. Ed. 237.

Prior to the adoption of the constitution the states attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the confederation and to the more perfect union under the present constitution. *State Tonnage Tax Case*, 12 Wall. 204, 214, 20 L. Ed. 370.

4. Forbids tax upon privilege of arriving or departing.—*Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *State Tonnage Tax Cases*, 12 Wall. 204, 20 L. Ed. 370; *Peete v. Morgan*, 19 Wall. 581, 22 L. Ed. 201; *Transportation Co. v. Wheeling*, 99 U. S. 273, 283, 25 L. Ed. 412; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 463, 20 L. Ed. 237.

An ordinance of the city of New Orleans, which demands of all steamboats which shall moor or land in any part of the port of New Orleans a sum measured by the tonnage of the vessel, is a tonnage tax within the meaning of the federal constitution, and, therefore, void. It is a tax for the privilege of stopping in the port of New Orleans, and cannot be justified under the plea that it is intended as a compensation for the use of wharves built by the city. *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 429.

So much of the act of the legislature of New York, passed May 22, 1862, amended April 17, 1865, as requires, with certain exceptions, all ships or vessels which enter the port of New York, or load or unload, or make fast to any wharf therein, to pay a certain percentage per ton, to be computed on the tonnage expressed in the registers of enrollments of such ships or vessels respectively, is in violation of the constitution of the United States, and therefore void. *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118.

5. Charge for services rendered or for use of facilities afforded not forbidden.—*Cooley v. Philadelphia*, 12 How. 299, 13 L. Ed. 996; *Steamship Co. v. Portwardens*, 6 Wall. 31, 18 L. Ed. 749; *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Packet Co. v. Keokuk*, 95 U. S. 80, 85, 24 L. Ed. 377; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Head Money*

But Charge Must Be for Actual Service Rendered or for Actual Use of Facilities.—In order to be valid, however, such exactions must be limited to charges for services actually rendered or for facilities actually afforded and used. A mere arbitrary charge, exacted without regard to whether any service is actually rendered or not, is nothing more nor less than a duty upon the privilege of entering, lying in, or departing from port, and is within the constitutional prohibition.⁶

Cases, 112 U. S. 580, 596, 28 L. Ed. 798; *Johnson v. Chicago, etc., Elevator Co.*, 119 U. S. 388, 30 L. Ed. 447; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487.

It cannot be thought the framers of the constitution, when they drafted the prohibition, had in mind charges for services rendered or for conveniences furnished to vessels in port, which are facilities to commerce rather than hindrances to its freedom; and, if such charges were not in mind, the mode of ascertaining their reasonable amount could not have been. The amount may be ascertained by the tonnage of the ships. *Packet Co. v. Keokuk*, 95 U. S. 80, 87, 88, 24 L. Ed. 377, affirmed in *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. Ed. 690; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *Huse v. Glover*, 119 U. S. 543, 30 L. Ed. 487.

Dock charges, towage, pilotage, wharfage, etc.—A demand of compensation for the use of a dry dock for repairing a vessel, or a demand for towage in a harbor, is not a demand of a tonnage tax, no matter whether the dock was the property of a private individual or of a state, and no matter whether proportioned or not to the size or tonnage of the vessel. *Packet Co. v. Keokuk*, 95 U. S. 80, 85, 24 L. Ed. 377. See the titles INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 401, 429; WHARVES AND WHARFINGERS.

Exaction of charge under quarantine law.—The enactment of quarantine laws is within the province of the states of the Union. Such a law is not invalid because of a provision which requires that the vessels which are examined at the quarantine station, with respect to their sanitary condition and that of their passengers, shall pay the compensation fixed by the law for this service. The quarantine fee is not a tonnage tax, in fact, it is not a tax within the true meaning of that word as used in the constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel which receives the certificate that declares it free from further quarantine requirements. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 463, 30 L. Ed. 237. See *Compagnie Francaise v. Louisiana State Board of Health*, 186 U. S. 380, 46 L. Ed. 1209.

But a state cannot impose a tonnage tax upon vessels owned in foreign ports

to defray the expenses of administering her quarantine regulations where there is no service rendered. *Peete v. Morgan*, 19 Wall. 581, 22 L. Ed. 201; *Machine Co. v. Gage*, 100 U. S. 676, 678, 25 L. Ed. 754.

For providing wharves.—A town may collect a reasonable tonnage duty to defray the expense incurred in the execution and maintenance of such wharves. *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169.

While neither a "state, nor any municipal corporation acting under its authority, can lay duties of tonnage; for that is expressly forbidden by the constitution; but charges for wharfage may be graduated by the tonnage of vessels using a wharf; and that this is not a duty of tonnage, within the meaning of the constitution, has been distinctly held in several cases; amongst others, in those of *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169, and *Transportation Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584. The charges in the municipal ordinance of New Orleans are professedly for wharfage, and we see nothing in the ordinance fixing the rates inconsistent with the idea that they are such. The city, by its charter, had the power to fix the rates of wharfage, and it established those now complained of. We do not see the slightest pretext for calling them anything else than wharfage. The manner in which the receipts are to be appropriated does not change the character of the charges made." *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 30 L. Ed. 976.

6. Charge must be for service actually rendered, or for actual use of facilities.—

Passenger Cases, 7 How. 283, 12 L. Ed. 702; *Steamship Co. v. Portwardens*, 6 Wall. 31, 18 L. Ed. 749; *Peete v. Morgan*, 19 Wall. 581, 22 L. Ed. 201; *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118; *Packet Co. v. Keokuk*, 95 U. S. 80, 89, 24 L. Ed. 377; *Cook v. Pennsylvania*, 97 U. S. 566, 571, 24 L. Ed. 1015; *Packet Co. v. St. Louis*, 100 U. S. 423, 428, 25 L. Ed. 688; *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. Ed. 1169; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 697, 27 L. Ed. 584; *Gloucester Ferry Co.*

D. License Tax upon Ferry Keepers, Not a Duty upon Tonnage.—A license fee exacted by city ordinance from the keepers of ferries living in the state, upon account of boats owned by them and used in ferrying passengers and goods from a landing in the state, across a navigable river, to a landing in another state, is not a tonnage tax, which the states are forbidden to lay without the consent of congress.⁷

E. Ships May Be Taxed as Property.—Taxes levied by a state upon ships and vessels owned by the citizens of the state, not as instruments of commerce but as property based on a valuation of the same as property, are not within the tonnage duty prohibition of the constitution.⁸

F. Ownership of Vessel Immaterial.—The prohibition against tonnage duties is general, withdrawing altogether from the states the power to lay any duty upon tonnage under any circumstances without the consent of congress. A state cannot impose a tonnage tax upon vessels belonging to her own citizens, and engaged exclusively in commerce between places within its own limits, any more than it can upon vessels owned by nonresidents and engaged in foreign or interstate commerce.⁹

G. Prohibition Not Restricted to Duties Graduated According to Tonnage.—While in its restricted sense a tonnage duty implies a tax graduated according to the tonnage or carrying capacity of the vessel, it is well settled that the constitutional provision has no such restricted meaning, but extends to the prohibition of any duty imposed upon a vessel as an instrument of commerce, whether the same be proportioned according to tonnage or not.¹⁰

H. Charge for Service Rendered or for Use of Facilities Afforded Not Void; Though Proportioned to Tonnage.—On the other hand, a charge made for service actually rendered or for the actual use of a wharf or other like facility in aid of navigation, not being in any sense a tonnage duty, is not void even though it be graduated according to the tonnage of the vessel.¹¹

v. Pennsylvania, 114 U. S. 196, 29 L. Ed. 158; *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 463, 30 L. Ed. 237.

A state cannot give to the master and wardens of a port, in addition to other fees, the sum of five dollars, whether they are called on to perform any service or not, for every vessel arriving in the port. *Machine Co. v. Gage*, 100 U. S. 676, 677, 25 L. Ed. 754; *Steamship Co. v. Portwardens*, 6 Wall. 31, 18 L. Ed. 749.

"In *Peete's Case* the tax was for every vessel arriving at a quarantine station, whether any service was rendered or not, \$5.00 for the first hundred tons of her capacity, and one and a half cents for every additional ton; and this mode of measuring the tax was held to make it a tonnage tax." *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, 462, 30 L. Ed. 237. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 405.

7. License tax on ferry keepers.—*Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 376, 27 L. Ed. 419. See the titles FERRIES, vol. 6, p. 274; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 365.

8. Property tax on ships owned by citizens of state.—*Passenger Cases*, 7 How. 283, 479, 12 L. Ed. 702; *State Tonnage Tax Cases*, 12 Wall. 204, 213, 20 L.

Ed. 370; *Transportation Co. v. Wheeling*, 99 U. S. 273, 283, 25 L. Ed. 412. See the title SHIPS AND SHIPPING, vol. 10, p. 1149.

9. Ownership of vessel immaterial.—*State Tonnage Tax Cases*, 12 Wall. 204, 213, 214, 20 L. Ed. 370; *Peete v. Morgan*, 19 Wall. 581, 583, 22 L. Ed. 201; *Transportation Co. v. Wheeling*, 99 U. S. 273, 277, 25 L. Ed. 412; *Machine Co. v. Gage*, 100 U. S. 676, 678, 25 L. Ed. 754. See, also, *Gibbons v. Ogden*, 9 Wheat. 1, 202, 6 L. Ed. 23; *Sinnot v. Davenport*, 22 How. 227, 238, 16 L. Ed. 243; *Foster v. Davenport*, 22 How. 244, 245, 16 L. Ed. 248.

10. Any duty prohibited.—*Steamship Co. v. Portwardens*, 6 Wall. 31, 18 L. Ed. 749; *State Tonnage Tax Cases*, 12 Wall. 204, 218, 20 L. Ed. 370; *Cannon v. New Orleans*, 20 Wall. 577, 582, 22 L. Ed. 417; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 698, 27 L. Ed. 584.

11. Charge for service or for use of facilities not invalid because proportioned to tonnage.—*Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377; *Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. Ed. 688; *Guy v. Baltimore*, 100 U. S. 134, 25 L. Ed. 743; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 561, 26 L. Ed. 1169; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 697, 27 L. Ed. 584; *Head Money Cases*, 112 U. S. 580, 596, 28 L. Ed. 798;

III. Power of United States to Levy.

Congress cannot impose a tonnage duty on vessels which ply between ports within the same state, or require such vessels to take out a license, or impose a tax on persons transported in them.¹² But as to foreign ports it can.¹³

TORTS.

BY FRANK L. THOMASSON.

I. Definition and Nature, 608.

II. Procedure, 609.

CROSS REFERENCES.

See the titles ASSAULT AND BATTERY, vol. 2, p. 546; CONFLICT OF LAWS, vol. 3, p. 1077; CONSPIRACY, vol. 3, p. 1099; FALSE IMPRISONMENT, vol. 6, p. 242; FRAUD AND DECEIT, vol. 6, p. 394; INJUNCTIONS, vol. 6, p. 1022; LIBEL AND SLANDER, vol. 7, p. 860; MALICIOUS PROSECUTION, vol. 7, p. 1080; NEGLIGENCE, vol. 8, p. 871; NUISANCES, vol. 8, p. 933; REMOVAL OF CAUSES, vol. 10, pp. 681, 682, 683; TRESPASS; TROVER AND CONVERSION. See, also, CRIMINAL CONVERSATION, vol. 5, p. 42.

As to abatement of action for tort by death of a tortfeasor, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 22. As to jurisdiction of courts of admiralty over torts, see the title ADMIRALTY, vol. 1, p. 143. As to marine torts, see the title ADMIRALTY, vol. 1, p. 143. As to assignability of right of action for torts, see the title ASSIGNMENTS, vol. 2, p. 566. As to malicious interference with contract relations, see the title CONTRACTS, vol. 4, p. 594. As to contribution between joint tortfeasors, see the title CONTRIBUTION AND EXONERATION, vol. 4, p. 596. As to rights to maintain action against the United States for damages sounding in tort, see the title COURTS, vol. 4, pp. 1025, 1026. As to priority of judgment for tort over prior mortgage, see the title JUDGMENTS AND DECREES, vol. 7, p. 652. As to liability of master for tort of servant, see the title MASTER AND SERVANT, vol. 8, p. 298. As to liability of principal for torts of agent, see the title PRINCIPAL AND AGENT, vol. 9, p. 683. As to effect of a judgment against one joint tortfeasor, see the title RES ADJUDICATA, vol. 10, p. 755. As to wrongful transfer of stock by stockholder, see the title STOCK AND STOCKHOLDERS, ante, p. 228.

I. Definition and Nature.

Definition.—"A tort means only a wrong, independent of or as contradistinguished from a mere breach of a contract."¹

Essential Elements.—Willful design or force is not an essential element of a tort.²

Huse v. Glover, 119 U. S. 543, 550, 30 L. Ed. 487; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 448, 30 L. Ed. 976.

12. *Passenger Cases*, 7 How. 283, 400, 12 L. Ed. 702.

13. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 332, 336, 344, 396, 463, 464, 475. See, also, the title SHIPS AND SHIPPING, vol. 10, p. 1206.

1. **Definition.**—*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 429, 12 L. Ed. 465.

2. **Essential elements.**—"Though the wrong done is not committed by force or design, it is still treated as *ex delicto* and a tort, if it was done either by a clear

neglect of duty, by an omission to provide safe and well-furnished carriages or vessels, by carelessness in guarding against fires and other accidents, by omitting preparations and precautions enjoined expressly by law, or by damages consequent on the negligent upsetting of carriages, or unsafe and unskillful navigation of vessels." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 430, 12 L. Ed. 465.

"When the act complained of is not unlawful *per se*, the characterizing it as malicious and wrongful will not be sufficient to sustain the action." *Adler v. Fenton*, 24 How. 407, 411, 16 L. Ed. 696. See the title FRAUDULENT AND

Right of Action.—The right of action may arise by misfeasance or nonfeasance,³ as the result of the violation of some obligation owed to the public from general law,⁴ or voluntarily assumed.⁵

Actions of Tort and Contract Distinguished.—The action of tort is distinct from that of contract.⁶

II. Procedure.

Parties.—In an action for tort, the joint tort feorsors, may be sued either separately or jointly at the election of the injured party.⁷

Right of Joinder of Causes.—In actions *ex delicto*, acts of negligence and willful tort may be commingled in one statement as causes of injury.⁸

Allegations and Proof.—The party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property affected, before he can be deemed to have sustained damages for which an action will lie.⁹

General Issue.—Where the action is one on the case for a tort, it is laid

VOLUNTARY CONVEYANCES, vol. 6, p. 520.

3. Right of action.—"Causing harm by negligence is a tort." *Bigby v. United States*, 188 U. S. 400, 408, 47 L. Ed. 519.

The term "torts" includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. 209, 16 L. Ed. 433.

"So little does the law regard, in some cases, the distinction between nonfeasance and misfeasance, in creating a tort and giving any peculiar form of action for it, that in some instances a nonfeasance is considered as becoming misfeasance; such as a master of a vessel leaving his register behind, or his compass, or anchor. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222, 235, 7 L. Ed. 659. And 'torts of this nature,' as in the present case, may be committed either by 'nonfeasance, misfeasance, or malfeasance,' and often without force." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 429, 12 L. Ed. 465.

4. Guardian Trust, etc., Co. v. Fisher, 200 U. S. 57, 69, 50 L. Ed. 367.

"The books are full of actions on the case where contracts existed, which were brought and which count entirely independent of any contract, they being founded on some public duty neglected, to the injury of another, or on some private wrong or misfeasance, without reference to any promise or agreement broken." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 429, 12 L. Ed. 465; *Garland v. Davis*, 4 How. 131, 146, 11 L. Ed. 907.

"The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby." *Guardian Trust, etc., Co. v. Fisher*, 200 U. S.

57, 63, 50 L. Ed. 367.

5. An individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it. Even if the water company was under no contract obligations to construct waterworks in the city or to supply the citizens with water, yet having undertaken to do so it comes under an implied obligation to use reasonable care, and if through its negligence injury results to an individual it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort and not for breach of contract. *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57, 69, 50 L. Ed. 367.

6. Actions of tort and contract distinguished.—"The distinction is this—if the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort." *Atlantic, etc., R. Co. v. Laird*, 164 U. S. 393, 399, 41 L. Ed. 485.

7. Parties.—*Atlantic, etc., R. Co. v. Laird*, 164 U. S. 393, 399, 41 L. Ed. 485; *Sessions v. Johnson*, 95 U. S. 347, 24 L. Ed. 598. See the title PARTIES, vol. 9, p. 56.

8. Right of joinder of causes.—*Cincinnati, etc., R. v. Bohon*, 200 U. S. 221, 225, 50 L. Ed. 448. See the title ACTIONS, vol. 1, p. 111.

9. Allegations and proof.—*Adler v. Fenton*, 24 How. 407, 410, 16 L. Ed. 696.

down in most elementary treatises that "not guilty" is the proper general issue, and therefore the plea of "non assumpsit" is bad on demurrer.¹⁰

Right of Recovery—Against Whom.—In an action against several joint tortfeasors recovery may be had against one.¹¹

Joint Liability.—The master and servant are jointly liable as joint tortfeasors for the tort of the servant committed within the scope of his employment and while in the master's service.¹²

TOTAL DISABILITY.—As to "total disability" as used in the pension laws, see the title PENSIONS, vol. 9, p. 372.

TOTAL LOSS.—See the titles BOTTOMRY AND RESPONDENTIA, vol. 3, p. 457; INSURANCE, vol. 7, p. 186; MARINE INSURANCE, vol. 8, pp. 191, 194, et seq.

TOUCH—TOUCHING.—As to touching at unauthorized ports being a deviation within meaning of a marine insurance policy, see the title MARINE INSURANCE, vol. 8, p. 187. As to cases "to touching patent rights" being appealable without regard to sum in dispute, see the title APPEAL AND ERROR, vol. 1, p. 907.

TOYS.—See the title REVENUE LAWS, vol. 10, pp. 876, 880.

TOWAGE, TUGS AND TOWS.

BY R. J. BROSSMAN.

I. Nature and Character of Business, 611.

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III. Duties and Liabilities, 611.

A. Duties, 611.

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CROSS REFERENCES.

As to admiralty jurisdiction in a case of injury to building by towed vessel, see the title ADMIRALTY, vol. 1, p. 145. As to sufficiency of averments and accuracy of statements in libel for collision, see the titles ADMIRALTY, vol. 1, p. 164; COLLISION, vol. 3, p. 947. As to whether tug boats are common carriers or insurers, see the title CARRIERS, vol. 3, p. 565. As to liability of tug for

10. **General issue.**—*Garland v. Davis*, 4 How. 131, 141, 11 L. Ed. 907. See the title TRESPASS.

11. **Right of recovery—Against whom.**—*Atlantic, etc., R. Co. v. Laird*, 164 U. S. 393, 400, 41 L. Ed. 485. See the title PARTIES, vol. 9, p. 56.

12. **Joint liability.**—*Cincinnati, etc., R. Co. v. Bohon*, 200 U. S. 221, 225, 50 L. Ed. 448. See the titles CONTRIBUTION AND EXONERATION, vol. 4, p. 596; MASTER AND SERVANT, vol. 8, p. 298.

loss of goods during deviation of journey, see the titles CARRIERS, vol. 3, p. 596; SHIPS AND SHIPPING, vol. 10, p. 1182. As to consideration of tug and tow as one vessel, see the title COLLISION, vol. 3, pp. 908, 929. As to duty of vessels to avoid drifting tugs, see the title COLLISION, vol. 3, p. 910. As to necessity for use of tugs by large steamers in crowded harbor, see the title COLLISION, vol. 3, p. 920. As to liability of tug for loss of tow by a collision with an anchored vessel, see the title COLLISION, vol. 3, p. 927. As to presumption of fault in collision of two tows, see the title COLLISION, vol. 3, p. 929. As to rule governing two tugs, approaching vessel to secure contract, see the title COLLISION, vol. 3, p. 929. As to liability of tug for collision where subject to orders of tow, see the title COLLISION, vol. 3, p. 930. As to duty of third vessel to avoid tug and tow, see the title COLLISION, vol. 3, p. 930. As to liability for collision to another vessel as between tug and tow, see the title COLLISION, vol. 3, p. 930, n. 93. As to duty of tug and tow to keep out of way of sailing vessels, see the title COLLISION, vol. 3, p. 931. As to liability for the collision of third vessel, see the title COLLISION, vol. 3, p. 932. As to apportionment of damages between tug, tow and third vessel, see the title COLLISION, vol. 3, p. 934. As to liability of tug to general average where the tug sacrifices the tow, see the title GENERAL AVERAGE, vol. 6, p. 553. As to power of city to impose a license tax on tugs, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 446. As to a lien given by state statute for non-maritime cause of action, see the title MARITIME LIENS, vol. 8, p. 241. As to lien for advances made to pay towage, see the title MARITIME LIENS, vol. 8, p. 224. As to priority of a lien on a tug for tort over a lien for supplies furnished, see the title MARITIME LIENS, vol. 8, p. 236. As to agent of plaintiff in sequestration proceedings being liable for earnings of tug to defendant, see the title PRINCIPAL AND AGENT, vol. 9, p. 688. See, also, the title SUBROGATION, ante, p. 276. As to the right of salvage by tug towing fire engines to ship, see the title SALVAGE, vol. 10, p. 1066. As to salvage contracts, see the title SALVAGE, vol. 10, p. 1069. As to whether a canal boat is a "barge carrying passengers," see the title SHIP AND SHIPPING, vol. 10, p. 1199.

I. Nature and Character of Business.

Tugs, Towboats and Lighters.—The character and business of a steamboat, employed as a lighter and towboat, cannot be distinguished from that in which the vessels it towed or unloaded were engaged and is within the rule that forbids a state to interfere with or put a direct burden upon interstate and foreign commerce.¹

II. Nature of Contract of Towage.

By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and a master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his vessel, and they are responsible for his acts in her navigation.²

III. Duties and Liabilities.

A. Duties—1. OF TUG—*a. Degree of Care Required.*—The contract of tow-

1. **Tugs, towboats and lighters.**—*Moran v. New Orleans*, 112 U. S. 69, 73, 28 L. Ed. 653; *Foster v. Davenport*, 22 How. 244, 16 L. Ed. 248; *Harman v. Chicago*, 147 U. S. 396, 409, 37 L. Ed. 216. See the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 387.

2. *Sturgis v. Boyer*, 24 How. 110, 16 L.

Ed. 591; *The J. P. Donaldson*, 167 U. S. 599, 603, 42 L. Ed. 292.

An agreement "to tow the ship and furnish coast pilot" in itself does not imply that the pilot is the servant of the ship towed rather than of the tug. *The Steamer Webb*, 14 Wall. 406, 20 L. Ed. 774.

age requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services.³

b. *Particular Duties*—(1) *To Be Familiar with Waters Navigated*.—A master of a tug is bound to know the channel of her home port,⁴ and must be familiar with the known obstructions and be able to choose the most feasible track for his route.⁵

(2) *Management and Making Up of Tow*.—The tow is of necessity under the control and management of the tug,⁶ and it is the duty of the latter to see that the tow is properly made up and that the lines are strong and securely fastened.⁷

(3) *To Divide Tow*.—A steamer having a very large tow, and approaching a place where, from the number of vessels in the water, and the force of counter current, navigation with such a tow is apt to be dangerous, is bound to proceed with great care, and if within two or three miles of the place, though not nearer, she can divide her tow, she is bound to divide it.⁸

(4) *To Consider Safety of Tow*.—A tug with vessels in tow is bound to consult their safety as well as her own.⁹

2. *Of Tow*.—It is the duty of the tow to follow the guidance of the tug, to keep as far as possible in her wake, to conform to her direction, and to exercise reasonable skill and care within this sphere.¹⁰

B. Liability for Negligence—1. *IN GENERAL*.—The tug is liable for injuries to the tow caused by an improper and unseamanlike conduct of the tug.¹¹

2. *EFFECT OF MISTAKE OF TOW*.—An act of mistaken judgment on the part of the tow in an effort to save herself from a peril into which she has been negligently brought by the tug, cannot excuse the latter from liability.¹²

3. *EFFECT OF ASSUMPTION OF RISK BY TOW*.—Although a contract of towage provides that the tow is being towed at her own risk, nevertheless, if the tow has suffered loss by the negligence of the tug, she is liable.¹³

3. *Degree of care*.—The *Margaret*, 94 U. S. 494, 24 L. Ed. 146; The *L. P. Dayton*, 120 U. S. 337, 351, 30 L. Ed. 669; *Transportation Line v. Hope*, 95 U. S. 297, 24 L. Ed. 477.

4. The *Margaret*, 94 U. S. 494, 24 L. Ed. 146.

5. The *Lady Pike*, 21 Wall. 1, 22 L. Ed. 499.

6. *Transportation Line v. Hope*, 95 U. S. 297, 300, 24 L. Ed. 477.

7. The *Quickstep*, 9 Wall. 665, 19 L. Ed. 767.

8. The *Steamer Syracuse*, 12 Wall. 167, 20 L. Ed. 382.

9. The *Syracuse*, 9 Wall. 672, 19 L. Ed. 783.

10. The *Margaret*, 94 U. S. 494, 496, 24 L. Ed. 146.

11. *Liability for negligence*.—The *Margaret*, 94 U. S. 494, 497, 24 L. Ed. 146; The *Steamer Webb*, 14 Wall. 406, 20 L. Ed. 774; The *J. P. Donaldson*, 167 U. S. 599, 603, 42 L. Ed. 292; The *Propeller Burlington*, 137 U. S. 386, 392, 34 L. Ed. 731; The *Steamer New Philadelphia*, 1 Black 62, 17 L. Ed. 84; The *Lady Pike*, 21 Wall. 1, 22 L. Ed. 499.

In an effort to recover a tow which had become detached from the fleet, the tug proceeded to back, which caused the bridle line connecting two tows, one on either side of the tug, to part, as a result of which one of the tows lashed to the

side of the tug collided with the tug and was sunk. The tug was held liable for negligence. The *Quickstep*, 9 Wall. 665, 19 L. Ed. 767.

In the *Cayuga*, 16 Wall. 177, 21 L. Ed. 354, a steamer was held liable for an accident occurring to her tow, which she was taking round a dangerous point with a very long hawser.

Where a tug with a large tow of barges was proceeding down the Hudson river upon a dark, stormy night, when no landmarks were visible, and nothing was done by those in charge of the tug to ascertain the depth of the water or whether they were approaching flats which existed in that part of the river, it was held that the tug was in fault and liable when she went aground and one of the barges collided with her and was injured. The *Adela*, 154 U. S., appx., 595, 598, 21 L. Ed. 675.

12. The *Steamer Webb*, 14 Wall. 406, 20 L. Ed. 774.

Where a tow is placed in peril by the negligence of the tug's master it is not contributory negligence for those on board the tow to leave it if they reasonably believed their lives are in danger, although such act puts the tow in greater peril. *Transportation Line v. Hope*, 95 U. S. 297, 301, 24 L. Ed. 477.

13. The *Steamer Syracuse*, 12 Wall. 167, 171, 20 L. Ed. 382; The *John G. Stevens*, 170 U. S. 113, 126, 42 L. Ed. 969.

IV. Actions.

A. Nature of Action.—A suit by the owner of a tow against her tug, to recover for an injury to the tow by the negligence on the part of a tug, is an action *ex delicto*.¹⁴

B. Evidence—Burden of Proof.—The burden is always upon him who alleges the breach of a contract to tow to show either that there has been no attempt at performance, or that there has been negligence, or unskillfulness to his injury in the performance.¹⁵

C. Damages.—Apportionment of Damages.—Where two vessels are in fault, causing a collision whereby a boat towed by one of them is sunk, the loss may be apportioned between them.¹⁶

TOWNS AND TOWNSHIPS.

CROSS REFERENCES.

See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; COUNTIES, vol. 4, p. 825; DAMAGES, vol. 5, p. 157; ELECTIONS, vol. 5, p. 721; MANDAMUS, vol. 8, p. 1; MUNICIPAL CORPORATIONS, vol. 8, p. 546; MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650; PUBLIC OFFICERS, vol. 10, p. 363; STREETS AND HIGHWAYS, ante, p. 259; SUMMONS AND PROCESS, ante, p. 299; TAXATION, ante, p. 356.

As to abatement of suit against township clerk, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 27. As to effect of consolidation and annexation of towns and townships, see the title MUNICIPAL CORPORATIONS, vol. 8, p. 560. As to legislative control over towns and townships see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 840; MUNICIPAL CORPORATIONS, vol. 8, p. 563.

Definitions, Nature and Distinctions.—A town is any collection of houses larger than a village or any number of houses to which belongs a regular market, and which is not a city.¹

14. The John G. Stevens, 170 U. S. 113, 126, 42 L. Ed. 969. See the title COLLISION, vol. 3, p. 942.

15. The Steamer Webb, 14 Wall. 406, 414, 20 L. Ed. 774; The Propeller Burlington, 137 U. S. 386, 391, 34 L. Ed. 731.

Libel against two offending tugs.—Where there is a collision between the tow of one tug and the tow of another, which may have been caused by a fault of navigation upon the part of one or both of the tugs, the burden of proof is upon the libellant to establish a case of negligence against each of the tugs separately and independently. The L. P. Dayton, 120 U. S. 337, 351, 30 L. Ed. 669.

Negligent act presumed from result.—But there may be cases in which the result is a safe criterion by which to judge of the act which has caused it. When a steamer undertaking to tow a ship and having a well known and straight course to pursue, suffered the ship, after towing her for but one hour or an hour and a half, to run aground at the end of a course of nine miles, on a shoal between three and four miles from the proper line of the voyage, the court held the steamer liable, especially as there was very considerable evidence that her compasses

were untrue. And this decision was not affected by the fact that the voyage lay through waters where the currents were variable in the direction of their flow (the direction and force, however, being well known), and though for a part of the nine miles there was a thick fog. The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774. See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF, vol. 9, p. 618.

16. The Connecticut, 103 U. S. 710, 26 L. Ed. 467. See the title COLLISION, vol. 3, p. 934.

1. **Definition of towns.**—Enfield v. Jordon, 119 U. S. 680, 685, 30 L. Ed. 523.

In Maryland and most of the Southern States the word "town" is used in a broad sense to include all collections of houses from a city down to a village. Enfield v. Jordon, 119 U. S. 680, 683, 30 L. Ed. 523.

In New Jersey, Pennsylvania, Ohio, Indiana, Michigan, and Illinois, the words "town" and "village" are indiscriminately applied to large collections of houses less than a city. Enfield v. Jordon, 119 U. S. 680, 686, 30 L. Ed. 523.

In Delaware the counties are divided into hundreds, the words "town" and "village" being indiscriminately applied to

A village is a small collection of houses in the country, less than a town.²

Nature of Towns.—Towns, are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation.³

Nature of Townships.—See footnote.⁴

Township Distinguished from Town.—A township is a different thing from a town in the organic law of Missouri; the latter being an incorporated municipality, the former only a geographical subdivision of a county.⁵

The differences between towns and municipal corporations is that one has, far more than the other, the powers, capacities and duties of a private corporation; so that a delegation of power to the one, if adjudged valid, does not justify the inference that a delegation of a like power to the other must also be valid.⁶

Officers.—The township trustee in Kansas, is in law the principal officer of the township.⁷

Election.—The appointment of a member to a town board in Illinois by the other members of such board is not invalid because one member had resigned but continued in office, when such member took no part in the election.⁸

Tenure of Office.—By the constitution of Kansas, art. 9, § 4, township officers, except justices of the peace, hold their offices one year from the Monday next succeeding their election, and until their successors are qualified.⁹

collections of houses. *Enfield v. Jordon*, 119 U. S. 680, 683, 30 L. Ed. 523.

In Illinois, an incorporated town and an incorporated village are one and the same thing. *Enfield v. Jordon*, 119 U. S. 680, 685, 30 L. Ed. 523.

The antique meaning of the word town signifies any walled collection of houses; by modern use, it is said to be applied to an undefined collection of houses, or habitations; also to the inhabitants; emphatically to the metropolis. *Enfield v. Jordon*, 119 U. S. 680, 683, 30 L. Ed. 523.

2. Village.—*Enfield v. Jordon*, 119 U. S. 680, 685, 30 L. Ed. 523.

3. Nature of a town.—*Commissioners v. Commissioners*, 92 U. S. 307, 313, 23 L. Ed. 552.

In New England and New York, towns are the political units of a territory, into which the county is subdivided, and answer, politically, to parishes and hundreds in England, but are vested with greater powers of local government. *Enfield v. Jordon*, 119 U. S. 680, 685, 30 L. Ed. 523.

Nature of Connecticut towns.—Towns in Connecticut, as in the other New England States, are territorial corporations, into which the state is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; and all the inhabitants of the town are members of the quasi corporation. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 129, 30 L. Ed. 923.

4. Nature of township in Ohio.—A township in Ohio created for purposes of local administration is a corporation. *Leob v. Columbia Tp. Trustees*, 179 U. S. 472, 486, 45 L. Ed. 280.

In Kansas a township is a body corporate and politic. County Commissioners

v. Wilson, 109 U. S. 621, 623, 27 L. Ed. 1053.

Nature of township in New England.—"There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions, and have authority also to perform certain acts and duties, by means of different agents, sometimes designated in the statutes creating them, and sometimes left to their own choice. Of this nature are the townships in New England, where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties, under the guidance and direction of the corporation." *United States Bank v. Dandridge*, 12 Wheat. 64, 75, 6 L. Ed. 552.

The term township indicates a local jurisdiction, for objects of local police, with powers and officers to effectuate the jurisdiction. *Commonwealth v. Franklin*, 4 Dall. 254, 265, 1 L. Ed. 823.

Congressional townships.—See the title MUNICIPAL CORPORATIONS, vol. 8, p. 554.

5. Distinction between township and town.—*Harshman v. Bates County*, 92 U. S. 569, 573, 23 L. Ed. 747.

6. Towns distinguished from municipal corporations.—*Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 72, 34 L. Ed. 864.

7. Township trustee.—County Commissioners *v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053.

8. Election—Validity.—*Oregon v. Jennings*, 119 U. S. 74, 90, 30 L. Ed. 323. See the title ELECTIONS, vol. 5, p. 721.

9. Tenure of office.—*Salamanca Tp. v. Wilson*, 109 U. S. 627, 628, 27 L. Ed. 1055. See the titles MUNICIPAL, CORPORA-

Meetings.—In order to sustain the validity of a town meeting in Connecticut, it must be shown that there was a notice or warning issued before the meeting, specifying the matters to be acted upon, so that the inhabitants may know in advance what business is to be transacted.¹⁰

Duties and Liabilities of Officers.—In Connecticut by statute it is made the duty of the selectmen to superintend the concerns of the town, to adjust and settle all claims against it, and to draw orders on the treasurer for their payment, to keep a true and regular account of all the expenditures of the town, and to exhibit the same at the annual meeting, and it is the duty of the treasurer to receive all the money belonging to the town, for taxes, fines, forfeitures, debts or otherwise, and to make an annual statement of the receipts of money into the treasury, and the expenditures which shall be adjusted by the selectmen, and laid before the town at the annual meeting.¹¹

Trustee of Township.—It is the duty of the trustee to superintend all the pecuniary concerns of the township, and with the advice and concurrence of the board of county commissioners, to levy all taxes required to meet the liabilities of the township not otherwise provided for by law; but if he fails in this duty, the board must make the necessary levies for him;¹² and the sureties on a township trustee's bond are only subject to liability under the Revised Statutes of Indiana, when persons have in good faith parted with money or property to the township on the strength of the official character of the transaction.¹³

Powers and Liabilities of Towns and Townships.—Towns in Connecticut have those powers only, which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs.¹⁴ They cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified or warned.¹⁵ Under the original laws of Missouri a township has no power by itself to make independent contracts, or to become bound in its separate capacity. The law has not invested it with that power. It forms an integral part of the county, and the county to a certain extent controls and acts for it.¹⁶ By the law of Ohio a

TIONS, vol. 8, p. 611; PUBLIC OFFICERS, vol. 10, p. 363.

10. Validity of meeting.—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 129, 30 L. Ed. 932.

Thus a vote passed at the annual meeting of a Connecticut town purporting to authorize the town treasurer to borrow money for the use of the town, was invalid, for want of any evidence that the subject was specified in the warning. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 134, 30 L. Ed. 923.

Record as evidence.—A statement in the record of a town meeting, that it was "legally warned," shows only that it had been duly warned for some purposes, not for what purposes. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 125, 30 L. Ed. 923.

Reports of selectmen as evidence.—The reports made by the selectmen and the treasurer to the annual meetings, in performance of the duties imposed upon those officers by statute, were not, unless expressly approved or acted on by the town at a meeting duly held upon sufficient warning, evidence to charge the town with liability for debts which those officers had no authority to contract.

Bloomfield v. Charter Oak Bank, 121 U. S. 121, 135, 30 L. Ed. 823.

And the acceptance of reports may by the selectmen and the treasurer of a town does not ratify acts, which were not authorized. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 136, 30 L. Ed. 923.

11. Duties of selectmen and treasurer under Connecticut statute.—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 136, 30 L. Ed. 923.

Under the statute in Connecticut neither the selectmen nor the treasurer have any general power to make contracts, to borrow money, or to incur new debts, in behalf of the town, except for particular objects. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 136, 30 L. Ed. 923.

12. Trustees' duty to levy taxes, etc.—*County Commissioners v. Wilson*, 109 U. S. 621, 625, 27 L. Ed. 1053.

13. Liability of sureties on township trustees' bond.—*Indiana v. Glover*, 155 U. S. 513, 518, 39 L. Ed. 243.

14. Powers of Connecticut towns.—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 30 L. Ed. 823.

15. Power to contract.—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 129, 30 L. Ed. 923. See ante, this title, "Meeting."

16. Harshman v. Bates County, 92 U.

township is suable on account of any liabilities incurred by it;¹⁷ and a town under the laws of the state of New York is a corporation, so far as respects the making of contracts, the right to sue and the liability to be sued.¹⁸

Property Liable for Judgment against Town.—In Connecticut, as in Massachusetts and Maine, by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town.¹⁹

TOWN SITE.—As to exploration of mineral deposits in townsites, see the title MINES AND MINERALS, vol. 8, p. 371. See, also, the title PUBLIC LANDS, vol. 10, p. 71.

TRACT.—See note 1.

TRADE—TRADING.—The word “trade” in its broadest signification includes not only the business of exchanging commodities by barter, but that of buying and selling for money, or commerce and traffic generally.²

TRADE COMBINATIONS AND CORPORATE TRUSTS.—See the title MONOPOLIES AND CORPORATE TRUSTS, vol. 8, p. 431.

TRADE FIXTURES.—See the title FIXTURES, vol. 6, p. 300.

S. 569, 573, 23 L. Ed. 747. See, generally, the title COUNTIES, vol. 4, p. 825.

17. **Township liable to suit.**—Leob v. Columbia Tp. Trustees, 179 U. S. 472, 486, 45 L. Ed. 280.

18. **Liability of town to suit.**—Andes v. Ely, 158 U. S. 312, 325, 39 L. Ed. 996.

19. **Inhabitants property subject to execution for town debts.**—Bloomfield v. Charter Dak. Bank, 121 U. S. 121, 129, 30 L. Ed. 923.

1. **Tract construed to mean land and not timber.**—Where in a concession permission was granted to build a mill on a designated place and it was added that if this tract was not sufficient, an “equivalent quantity” at another place would be granted, the word **tract** was held to mean land, not timber, and the words “equivalent quantity” to refer to the antecedent word **tract**, and consequently mean land. United States v. Richard, 8 Pet. 470, 472, 8 L. Ed. 1013.

2. **Trade.**—May v. Sloan, 101 U. S. 231, 25 L. Ed. 797.

Sale construed as a trade.—Where, to effect a settlement of all his indebtedness to B. and C., who each held a mortgage upon his lands and personal property, A. entered into an agreement in writing with them, containing sundry provision, by one of which C. stipulated “not to interfere with any bona fide **trades** made by A., so far as any of the mortgaged property is concerned, provided the **trades** have been carried out in good faith and completed,” held, that a sale by A. to B. of a portion of the lands, which was known to C., and evidenced by an instrument under seal, was a **trade**, within the mean-

ing of the agreement. May v. Sloan, 101 U. S. 231, 25 L. Ed. 797.

Dealing and trading used as equivalent in meaning.—See DEAL, vol. 5, p. 199.

Power to trade, sell, or collect bond and mortgage.—See the title POWERS, vol. 9, p. 598.

Trade of merchandise.—As to what is necessary to bring a case within an exception in a statute of limitations of accounts concerning the trade of merchandise between merchants, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 932.

Term applies more to the trade of a mechanic than to a learned profession.—Where a testatrix bequeathed the interest of certain funds “to the proper education of certain persons ‘in some useful **trade**,’” in ascertaining the amount applicable to such education, one of the learned professions could not be taken as the standard, with as much propriety as the **trade** or art of a mechanic. Dandridge v. Washington, 2 Pet. 370, 7 L. Ed. 454.

Vessels trading with the enemy.—See the title PRIZE, vol. 9, p. 753.

Negotiation or contract has, therefore, no necessary connection with the offense of trading with the enemy. Intercourse, inconsistent with actual hostility, is the offense against which the operation of the rule is directed. The Rapid, 8 Cranch 155, 162, 3 L. Ed. 520.

Vessel trading in violation of license.—See the title SHIPS AND SHIPPINGS, vol. 10, p. 1157.

Trading partnership.—See the title PARTNERSHIP, vol. 9, p. 100.

TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION.

BY T. ELLIS HARVEY.

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CROSS REFERENCES.

As to jurisdiction of United States courts over trademarks, see the title COURTS, vol. 4, p. 923. As to use of trademarks in connection with good will, see the title GOOD WILL, vol. 6, p. 567. As to regulation of trademarks by congress to their use in commerce, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 336. As to disposition of trademark on dissolution of firm, see the title PARTNERSHIP, vol. 9, p. 79.

I. Trademarks.

A. General Considerations—1. DEFINITION.—Trademarks are the means by which manufacturers and merchants identify their manufacturers and merchandise, and are the symbols by which men engaged in trade and manufactures become known in the marts of commerce, by which their reputation and that of their goods are extended and published.¹

2. DISTINGUISHED FROM INVENTION.—The ordinary trademark has no necessary relation to invention or discovery.²

1. Definition.—Trade-Mark Cases, 100 U. S. 82, 87, 25 L. Ed. 550. Mark Cases, 100 U. S. 82, 94, 25 L. Ed. 550.

2. Distinguished from invention.—Trade-Property in the use of a trademark or

3. **DEPENDENT ON STATE LAW.**—The property in trademarks and the right to their exclusive use rest on the laws of the states, and depend on them for security and protection.³

4. **TRADEMARK AS PROPERTY RIGHT.**—The exclusive right to use a trademark with respect to a vendible commodity constitutes property,⁴ which has long been recognized and protected by the common law and by the statutes of the several states, and does not derive its existence from the fact of congress providing for the registration of them in the patent office.⁵

Damages for Violation.—A right to adopt and use a symbol or a device is a property right for the violation of which damages may be recovered in an action at law and the continued violation of it will be enjoined by a court of equity with compensation for past infringement.⁶

B. Office and Purpose of.—The primary object of a trademark is to indicate by its meaning or association the origin or ownership of the article to which it is affixed.⁷ This may be done by a name, mark or device well known, but not previously applied to the same article.⁸

C. What May Be Adopted as Trademarks—1. **IN GENERAL.**—A trademark may consist of a name, symbol, figure, letter, form, or device, if not employed by another, and may be adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells to distinguish the same from those manufactured or sold by another, to the end that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry, and fidelity.⁹

name has very little analogy to that which exists in copyrights, or in patents for inventions. *Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581.

A trademark is neither an invention, a discovery, nor a writing, within the meaning of the eighth clause of the eighth section of the first article of the constitution, which confers on congress power to secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries. *Trade-Mark Cases*, 100 U. S. 82, 93, 25 L. Ed. 550. See the title **PATENTS**, vol. 9, p. 136.

3. **State law governs.**—*Trade-Mark Cases*, 100 U. S. 82, 93, 25 L. Ed. 550; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 53, 25 L. Ed. 993.

4. **Trademark as property right.**—*Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 224, 27 L. Ed. 706; *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. Ed. 828.

5. **Statutory and common-law protection.**—*Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550.

The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the states. *Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550.

6. **Recovery of damages and compensation for past infringement.**—*Trade-Mark Cases*, 100 U. S. 82, 92, 25 L. Ed. 550.

7. **Object.**—*Kidd v. Johnson*, 100 U. S.

617, 620, 25 L. Ed. 769; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 37 L. Ed. 1144; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 54, 25 L. Ed. 993, cited in *Goodyear's, etc., Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604, 32 L. Ed. 535.

Exclusiveness of mark that others may use with equal truth.—A trademark may consist in any symbol or in any form of words, but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that "no sign or form of words can be appropriated as a valid trademark, which from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose. *Elgin Nat. Watch Co. v. Illinois, etc., Co.*, 179 U. S. 665, 673, 45 L. Ed. 365.

8. **Previous application.**—*Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581, cited in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 546, 34 L. Ed. 997.

9. **What may be used as trademarks.**—*McLean v. Fleming*, 96 U. S. 245, 254, 24 L. Ed. 828. See ante, "Office and Purpose of," I. B.

Every one is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others, and thus secure to himself the benefits of increased sale by reason of any peculiar excellence he may have given to it. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 53, 25 L. Ed. 993; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 222, 27 L. Ed. 706.

Original Inventions Not Necessary.—Words or devices may be adopted as trademarks which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others.¹⁰

Property Claimed in False Symbol.—Where any symbol or label claimed as a trademark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed in it, or in other words, the right to the exclusive use of it cannot be maintained.¹¹

Combination—Exclusive Use of One Word.—A combination of words as a trademark gives no exclusive use of one word of the combination.¹²

2. **WORDS IN COMMON USE.**—Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same, or like articles of production.¹³

3. **FANCIFUL OR ARBITRARY WORDS OR PHRASES.**—Words or phrases which are purely fanciful or arbitrary may be adopted as trademarks.¹⁴

4. **GENERIC OR DESCRIPTIVE TERMS**—a. *In General.*—No one can claim protection for the exclusive use of a trademark or tradename which is a generic name, or a name merely descriptive of an article of trade, of its qualities, or character.¹⁵

10. **Original inventions not necessary.**—*Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581, cited in *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

11. **False symbol.**—*Worden v. California Fig Syrup Co.*, 187 U. S. 516, 528, 47 L. Ed. 282; *Holzappel's, etc., Co. v. Rahtjen's, etc., Co.*, 183 U. S. 1, 8, 46 L. Ed. 49; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 225, 27 L. Ed. 706. See ante, "Trademark as Property Right," I, A, 4.

Fraudulent use of word "patent."—No right to a trademark which includes the word "patent," and which describes the article as "patented" can arise when there is and has been no "patent," nor is the claim a valid one for the other words used where it is based upon their use in connection with that word. *Holzappel's, etc., Co. v. Rahtjen's, etc., Co.*, 183 U. S. 1, 8, 46 L. Ed. 49.

12. **Combination—Exclusive use of one word.**—*Corbin v. Gould*, 133 U. S. 308, 33 L. Ed. 611.

13. **Words in common use.**—*Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581.

14. **Fanciful or arbitrary words and phrases.**—*Menendez v. Holt*, 128 U. S. 514, 32 L. Ed. 526.

Hunyadi.—The name "Hunyadi" used as a trademark, being neither descriptive nor geographical, but purely arbitrary and fanciful as applied to medicinal waters, is the proper subject of a trademark. *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 30, 45 L. Ed. 60.

La Favorita.—The words "La Favorita" as applied to a certain grade of flour, is not in itself indicative of quality, but a mere fancy name and good as a trademark. *Menendez v. Holt*, 128 U. S. 514, 520, 32 L. Ed. 526, cited in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 548, 34 L. Ed. 997.

15. **Generic or descriptive terms.**—*Canal*

Co. v. Clark, 13 Wall. 311, 323, 20 L. Ed. 581; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 54, 25 L. Ed. 993.

It is well established that words which are merely descriptive of the character, qualities or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trademark. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 542, 35 L. Ed. 247, citing *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 533, 47 L. Ed. 282.

If the device or symbol is not adopted for the purpose of indicating origin, manufacture or ownership, but is placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trademark. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 547, 548, 34 L. Ed. 997; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 37 L. Ed. 1144.

The words "Iron Bitters" are so far indicative of the ingredients, characteristics and purposes of the preparation that it cannot be used as a trademark. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 542, 35 L. Ed. 247.

Letters or figures affixed to merchandise by a manufacturer, for the purpose of denoting its quality only, cannot be appropriated by him to his exclusive use as a trademark. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993.

The letters "LL" marked on sheets are descriptive of quality and indicate grade and cannot be used as a trademark. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 551, 34 L. Ed. 997.

Mere numerals.—No monopoly can be claimed of mere numerals, used descriptively, and therefore they are not capable of exclusive appropriation because they

Selected Goods.—But a merchant may use his best judgment in the selection of an article for sale and apply a trademark to same in order to designate the goods selected.¹⁶

b. *Names Descriptive by Use.*—Where the primary object of the trademark is to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common property of the trade.¹⁷ It is only in respect to names which are descriptive of the article and incapable of being appropriated as a trademark that the doctrine that the name becomes public property applies.¹⁸

5. **GEOGRAPHICAL NAMES.**—Words that do not in and of themselves indicate anything in the nature of origin, manufacture or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trademark.¹⁹

Fraudulent Use of Geographical Names.—Where a geographical name is used fraudulently by others the original owner may assert an exclusive right to same.²⁰

represent the number of thread, and are, therefore, of value as information to the public. *Coats v. Merrick Thread Co.*, 149 U. S. 562, 572, 37 L. Ed. 847, citing *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993.

As to the term "Goodyear Rubber" being exclusively appropriated, see *GOOD-YEAR RUBBER*, vol. 6, p. 568.

16. **Selected goods.**—This does not fall within the rule that devices used to denote quality are incapable of exclusive appropriation, as announced in *Manufacturing Co. v. Trainer*, 101 U. S. 51, 55, 25 L. Ed. 993; *Menendez v. Holt*, 128 U. S. 514, 520, 32 L. Ed. 526.

17. **Names descriptive by use.**—*Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 547, 34 L. Ed. 997.

18. *Corbin v. Gould*, 133 U. S. 308, 33 L. Ed. 611.

Tycoon.—The word "Tycoon" is and has been for many years in general and common use as a term descriptive of a class of teas introduced into the American market, and one which belongs to the public and is not subject to appropriation by any person as a trademark. *Corbin v. Gould*, 133 U. S. 308, 314, 33 L. Ed. 611.

Vichy.—By long and interrupted use the word "vichy" had become a generic name and the plaintiff have no trademark or tradename therein, or any legal right to protection in the exclusive use of it. *French v. Republic Saratoga, etc., Co.*, 191 U. S. 427, 437, 48 L. Ed. 247.

Effort made to prevent words becoming generic.—If Hungarian waters known as Hunyadi waters had become generic with the assent and acquiescence of the plaintiff, he cannot thereafter assert his right to the exclusive use, but where he apparently made every effort in his power to put a stop to the use of the word Hunyadi, it ought not to be charged up against his claim that the word had become generic. *Saxlehner v. Eisner, etc., Co.*,

179 U. S. 19, 33, 45 L. Ed. 60.

19. **Geographical names.**—*Elgin Nat. Watch Co. v. Illinois, etc., Co.*, 179 U. S. 665, 673, 45 L. Ed. 365, citing *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144.

No one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation. *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581.

It is obvious that the same reasons which forbids the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. *Canal Co. v. Clark*, 13 Wall. 311, 324, 20 L. Ed. 581, cited in *Corbin v. Gould*, 133 U. S. 308, 314, 33 L. Ed. 611. See ante, "Generic or Descriptive Terms," I, C, 4.

Lackawanna coal.—So held as to the name "Lackawanna coal," it being in fact and in its generic character properly so designated, although more properly described when specifically spoken of as "Scranton coal" or "Pittston coal," and when specifically spoken of usually so called. *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, cited in *Goodyear's, etc., Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 603, 32 L. Ed. 535.

Columbia.—One cannot establish an exclusive right to the use of the word "Columbia" as a trademark. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 464, 466, 37 L. Ed. 1144.

20. **Fraudulent use of geographical names.**—Geographical names often acquire a secondary signification indicative

6. **PERSONAL NAMES.**—An ordinary surname cannot be appropriated as a trademark by any one person as against others of the same name, who are using it for a legitimate purpose; although cases are not wanting of injunctions issued to restrain the use even of one's own name where a fraud upon another is manifestly intended, or where he has assigned or parted with his right to use it.²¹

7. **COLOR.**—Mere color itself cannot constitute a valid trademark, but if it is impressed in a particular design, as a circle, triangle, etc., it doubtless may.²²

D. Acquisition of Right to Trademark.—Right in Use.—At common law the exclusive right to a trademark or name grows out of its use, and not its mere adoption.²³

Priority of use of a device or symbol will deprive the plaintiff of an injunction against user.²⁴

E. Evidence of Right to Trademark.—Prior public use of a trademark is not established by evidence that it was used casually by a third party twenty

not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another. *French Republic v. Saratoga, etc., Co.*, 191 U. S. 427, 435, 48 L. Ed. 247, cited in *Elgin Nat. Watch Co. v. Illinois, etc., Co.*, 179 U. S. 665, 45 L. Ed. 365.

21. **Use of own name.**—*Brown Chemical Co. v. Meyer*, 139 U. S. 540, 542, 35 L. Ed. 247, citing *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Goodyear's, etc., Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 32 L. Ed. 535.

Where words are not in themselves a trademark, they are not made a monopoly by the addition of the proprietor's name as against a person of the same name used in connection with his preparations. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 544, 35 L. Ed. 247.

One cannot have a right, even in his own name as against another person of the same name, unless such other person uses a form or stamp or label so like that used by the complaining party as to represent that the goods of the former are of the latter's manufacture. *McLean v. Fleming*, 96 U. S. 245, 252, 24 L. Ed. 828.

Right against trader of different names.—It is doubtless correct that a person may have a right in his own name as a trademark against a trader or dealer of a different name; but is not, in general, entitled to the exclusive use of a name, merely as such, without more. *McLean v. Fleming*, 96 U. S. 245, 252, 24 L. Ed. 828.

22. **Color as trademark.**—*Leschen & Sons Rope Co. v. Broderick, etc., Co.*, 201 U. S. 166, 171, 50 L. Ed. 710.

The description of a colored streak,

which would be answered by a streak of any color painted spirally with the strand, longitudinally across the strands, or by a circular streak around the rope, is too indefinite to be the subject of a valid trademark. *Leschen & Sons Rope Co. v. Broderick, etc., Co.*, 201 U. S. 166, 170, 50 L. Ed. 710.

If the trademark be a colored streak, it should be, at least, described, and a statement of the mode in which the same is applied and affixed to the rope, and a trademark which may be infringed by a streak of any color, however applied, is manifestly too broad. *Leschen & Sons Rope Co. v. Broderick, etc., Co.*, 201 U. S. 166, 171, 50 L. Ed. 710.

23. **Acquisition and right to trademark.**—*Trade-Mark Cases*, 100 U. S. 82, 94, 25 L. Ed. 550.

Purpose in adopting.—To acquire the right to the exclusive use of a name, device, or symbol, as a trademark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trademark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 37 L. Ed. 1144. See ante, "Office and Purpose of," I, B.

24. **Priority of use.**—*Leggett, etc., Co. v. Finzer*, 128 U. S. 182, 32 L. Ed. 395.

The plaintiffs are not entitled to an injunction restraining the defendant from using the words "La Normanda" or "Normanda" as a label for cigars, where prior to the plaintiff's adoption, the word had been used by the defendants in their business. *Stachelberg v. Ponce*, 128 U. S. 686, 32 L. Ed. 569.

Priority of appropriation.—The exclusive right to the use of the mark or device claimed as a trademark is founded on priority of appropriation; that is to say, the claimant of the trademark must have been the first to use or employ the same on like articles of production. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 463, 37 L. Ed. 1144.

years ago, where such use had been abandoned before the defendants had appropriated the trademark, and there was no attempt to resume it.²⁵

F. Registration.—As to right of appeal from refusal to register trademarks, see the title *APPEAL AND ERROR*, vol. 1, p. 855.

Color Registered.—A trademark cannot be registered when its only distinction is its color.²⁶

Registration of One Word.—The fact that a trademark registered contains several words is no waiver of the right to subsequently register it in one of the words alone.²⁷

G. Assignment, Transfer, and Consent—1. *IN GENERAL.*—The owner of a trademark which is affixed to articles manufactured at his establishment may, in selling the latter, lawfully transfer to the purchaser the right to use the trademark.²⁸

Consent.—Where consent by the owner to the use of his trademark by another is to be inferred from his knowledge and silence merely, it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.²⁹

Defense.—Where such person seeks to excuse his action by showing the owner of the trademark consented to such use, the excuse is disposed of by a showing that the consent had been revoked.^{29a}

Name and Portrait.—The fact that a trademark bears the name and portrait of the owner of the goods, does not render it unassignable to another.³⁰

Trademark as Subject of Sale.—As distinct property, a trademark, separate from the article created by the original producer or manufacturer, is not a subject of sale.³¹

2. *ASSIGNEE'S DUTY TO USE QUALIFYING STATEMENT.*—Where a right to use a trademark is transferred to others, either by act of original manufacturer or by operation of law, the fact of transfer should be stated in connection with its use.³²

H. Abandonment or Termination of Right.—A name, mark or sign may become public property by abandonment or dedication,³³ where actual intention to abandon is clearly shown.³⁴

Owner's Acquiescence of Abandonment.—The abandonment of a trademark by one having an exclusive right to its use by contract with original owner, such contract being revocable at will of owner, would not be binding

25. **Evidence of right.**—*Menendez v. Holt*, 128 U. S. 514, 521, 32 L. Ed. 526.

26. **Color registered.**—*Leschen & Sons Rope Co. v. Broderick, etc., Co.*, 201 U. S. 166, 172, 50 L. Ed. 710. See ante, "Color," I, C, 7.

27. **Subsequent registration of one word.**—Registering the words "Hunyadi Janos" as a trademark is no waiver of the right to subsequently register the name "Hunyadi" alone. *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 32, 45 L. Ed. 60.

28. **Lawful transfer.**—*Brown Chemical Co. v. Meyer*, 139 U. S. 540, 547, 35 L. Ed. 247, citing *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. Ed. 769.

29. **Consent to use.**—*Menendez v. Holt*, 128 U. S. 514, 524, 32 L. Ed. 526.

29a. **Defense.**—*Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 39, 45 L. Ed. 60.

30. **Name and portrait.**—*Richmond Nervine Co. v. Richmond*, 159 U. S. 293, 302, 40 L. Ed. 155.

31. **Sale of trademark.**—*Kidd v. John-*

son, 100 U. S. 617, 620, 25 L. Ed. 769.

32. **Assignee's duty to use qualifying statement.**—*Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 223, 27 L. Ed. 706.

33. **Abandonment and termination of right.**—*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 186, 41 L. Ed. 118.

When the right to manufacture a certain article becomes public, the right to use the only word descriptive of the article manufactured becomes public also. *Holzappel's, etc., Co. v. Rahtjen's, etc., Co.*, 183 U. S. 1, 9, 46 L. Ed. 49.

34. To establish the defense of abandonment it is necessary to show not only acts indicating practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed. *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 31, 45 L. Ed. 60, citing *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 181, 41 L. Ed. 118.

upon the owner unless abandoned with owner's knowledge and acquiescence.³⁵

Taking Trademark from Public Dominion.—Where a tradename is dedicated to the public, it cannot be taken out of the public dominion by the mere fact of using that name as one of the constituent elements of a trademark.³⁶

Under Treaty Provision.—The use of the word "Hunyadi Matyas" became public property in the Kingdom of Hungary, and under our treaties with the Austro-Hungarian Empire the word became public property here, and a subsequent change of laws in Hungary giving the plaintiff the exclusive use of the words "Hunyadi Matyas," does not enure to his advantage in this country.³⁷

I. What Constitutes an Infringement.—See post, "Unfair Competition," III.

1. IN GENERAL.—Although no precise rule, applicable in all cases, can be laid down as to the degree of resemblance necessary to constitute an infringement of a trademark, it is generally held that where the limitation is so close that the form, marks, contents, words, or their special arrangement, or by the general appearance of the infringing device, purchasers exercising ordinary caution are likely to be misled into buying the article bearing it for the genuine one, this constitutes an infringement.³⁸

Use of Infringer's Name.—It is no defense to a suit for infringement that the infringer's name accompanied the trademark.³⁹

Essence of Wrong.—The essence of the wrong in imitating a trademark consists in the sale of the goods of one manufacturer or vendor as those of another.⁴⁰

2. FRAUDULENT INTENT.—Positive proof of fraudulent intent on the part of the infringer is not required, where the infringement is clearly shown.⁴¹

J. Relief in Equity.—Equity gives relief in case of infringement upon the

35. Owner's acquiescence of abandonment.—*Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 34, 45 L. Ed. 60.

36. Taking of trademark from public dominion.—*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 203, 41 L. Ed. 118. See ante, "Evidence of Right to Trademark," I, E.

37. Under treaty provisions.—*Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 36, 45 L. Ed. 60.

38. What constitutes infringement.—*McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

Exact similitude.—Exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. *McLean v. Fleming*, 96 U. S. 245, 253, 24 L. Ed. 828.

An injunction will not be granted to restrain a manufacturer from using a label bearing no resemblance to the complainant's, except that certain letters, which alone convey no meaning, are inserted in the centre of each, the dissimilarity of the labels being such that no one will be misled as to the true origin or ownership of the merchandise. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 140, 49 L. Ed. 972, citing *Coats v. Merrick Thread Co.*, 149 U. S. 562, 37 L. Ed. 847; *Leggett, etc., Co. v. Finzer*, 128 U. S. 182, 32 L. Ed. 395; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144.

Equity will not prohibit the use of a

trademark where it is not of that degree of similarity which is calculated to mislead purchasers as to the origin of the goods to which it is attached. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 56, 25 L. Ed. 993.

No trader can adopt a trademark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled. *McLean v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828.

39. Infringer's name used.—*Menendez v. Holt*, 128 U. S. 514, 521, 32 L. Ed. 526.

40. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581.

41. Fraudulent intent.—*McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

The fact that one has acted innocently does not exonerate him from the charge of infringement. *Saxlehner v. Siegle-Cooper*, 179 U. S. 42, 45 L. Ed. 77.

The intentional use of another's trademark is a fraud. *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 39, 45 L. Ed. 60; *Menendez v. Holt*, 128 U. S. 514, 523, 32 L. Ed. 526.

Trademark as evidence.—A trademark is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 34 L. Ed. 997.

Necessity for entire appropriation.—It is not necessary to constitute an infringe-

ground that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity, because if the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity.⁴²

Interference by Injunction.—The jurisdiction of the court in the protection of trademarks rests upon property, and the court interferes by injunction, because that is the only mode by which property of that description can be effectually protected.⁴³

K. Laches.—Unreasonable delay and inexcusable laches in seeking relief forbids the plaintiff from bringing suit for infringement of trademark.⁴⁴

Delay in Seeking Relief.—Equity courts will not, in general refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear.⁴⁵

Past Profits.—But where there has been an unreasonable delay in bringing suit for infringement of trademark, equity will preclude the party from any right to an account for past profits.⁴⁶

Defense of Laches in Case of Fraud.—The defense of laches will not be available in a case of actual fraud, or an attempt to foist upon the public certain articles of the defendant as those of the original manufacturer.⁴⁷

II. Tradenames.

Personal Names.—It is well settled that a personal name cannot be exclusively appropriated by any one as against others having the same name.⁴⁸

ment that every word of a trademark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 33, 45 L. Ed. 60.

42. Relief in equity.—*McLean v. Fleming*, 96 U. S. 245, 251, 24 L. Ed. 828.

43. Interference by injunction.—*Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 224, 27 L. Ed. 706.

As to necessity of party seeking injunction coming into court with clean hands, see the titles *INJUNCTIONS*, vol. 6, p. 1046; *MAXIMS*, vol. 8, p. 317. And see ante, "In General," I, C, 1.

44. Unreasonable delay.—*McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. See ante, "Relief in Equity," I, J.

Where the plaintiff was not ignorant of the fact that certain waters were exported for a long time and sold in competition with his own waters, and the said exportations were of the same name, it is too late under such circumstances to maintain an exclusive title, and that the plaintiff had been guilty of laches will preclude a right to an injunction. *Saxlehner v. Nielsen*, 179 U. S. 43, 45 L. Ed. 77.

Long practice, and with the acquiescence of the plaintiff, in using a black and gold label bearing certain words and figures, precludes any claim of infringement. *Coats v. Merrick Thread Co.*, 149 U. S. 562, 571, 37 L. Ed. 847.

45. Delay in seeking relief.—*Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 39, 45 L. Ed. 60.

46. Past profits.—*McLean v. Fleming*, 96 U. S. 245, 253, 24 L. Ed. 828.

47. Defense of laches in case of fraud.—*French Republic v. Saratoga, etc., Co.*, 191 U. S. 427, 439, 48 L. Ed. 247, citing *McIntire v. Pryor*, 173 U. S. 38, 43 L. Ed. 606; *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, 45 L. Ed. 60; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Menendez v. Holt*, 128 U. S. 514, 32 L. Ed. 526.

48. Personal names.—*Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 134, 49 L. Ed. 972, citing *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 41 L. Ed. 118; *Elgin Nat. Watch Co. v. Illinois, etc., Co.*, 179 U. S. 665, 45 L. Ed. 365. See ante, "What May Be Adopted as Trademarks," I, C.

In the absence of contract, fraud or estoppel, any man may use his own name, in all legitimate ways, and as the whole or a part of a corporate name. *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 140, 49 L. Ed. 972.

Although every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name, in such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria*. But although he may thus use his name he cannot resort to any artifice, or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 136, 49 L. Ed. 972, citing *Singer Mfg.*

III. Unfair Competition.

See ante, "What Constitutes Infringement," I, I.

A. Definition.—Unfair competition is the palming off, or the attempt to palm off, upon the public the goods of one man as being the goods of another.⁴⁹

B. In General.—The act of dressing one's goods in such manner as to deceive an outstanding purchaser and induce him to believe he is buying those of another amounts to unfair competition.⁵⁰

Truthful Description by Second Producer.—But the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, there is no legal or moral wrong done.⁵¹

Co. v. June Mfg. Co., 163 U. S. 169, 41 L. Ed. 118.

One corporation is not entitled to restrain another from using in its corporate title a name to which others have a common right. *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 137, 49 L. Ed. 972, citing *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144.

49. Definition.—*Saxlehner v. Eisner*, etc., Co., 179 U. S. 19, 45 L. Ed. 60; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 34 L. Ed. 997; *Goodyear's*, etc., Mfg. Co. v. *Goodyear Rubber Co.*, 128 U. S. 598, 32 L. Ed. 535; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 55, 25 L. Ed. 993; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Howe Scale Co. v. Wyckoff*, 198 U. S. 118, 140, 49 L. Ed. 972.

50. What constitutes.—*Coats v. Merrick Thread Co.*, 149 U. S. 562, 566, 37 L. Ed. 847.

If one affix to goods of his own manufacture signs or marks which indicate that they are the manufacture of others, he is deceiving the public, which no court of equity will countenance. *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 223, 27 L. Ed. 706.

Chancery protects trademarks upon the ground that a party shall not be permitted to sell his own goods as the goods of another; and, therefore, he will not be allowed to use the names, marks, letters, or other indicia of another, by which he may pass off his own goods to purchasers as the manufacture of another. *McLean v. Fleming*, 96 U. S. 245, 255, 24 L. Ed. 828, cited in *Goodyear's*, etc., Mfg. Co. v. *Goodyear Rubber Co.*, 128 U. S. 598, 604, 32 L. Ed. 535.

Where a manufacturer has habitually stamped his goods with a particular mark or brand, a court of equity will restrain another party from adopting it for the same kind of goods. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

In all cases where rights to the exclusive use of a trademark are invaded, it is invariably held that the essence of the

wrong consists in the sale of goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. *French Republic v. Saratoga*, etc., Co., 191 U. S. 427, 440, 48 L. Ed. 247.

An unfair and fraudulent competition conducted with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 34 L. Ed. 997.

The shape of certain bottles, the design of the capsules and labels are entitled to be protected from fraudulent imitation. *Saxlehner v. Eisner*, etc., Co., 179 U. S. 19, 45 L. Ed. 60.

The lettering "New York S. M. Mfg. Co.," on the brass plates of the defendant's machine corresponding in size and style to the lettering on the plaintiff's machine, it was held that there was fraud on the public, and the device cannot be used by the defendant company. *Singer Mfg. Co. v. Bent*, 163 U. S. 205, 41 L. Ed. 131.

51. Truthful description by second producer.—*Canal Co. v. Clark*, 13 Wall. 311, 327, 20 L. Ed. 581.

Pocahontas.—One has no trademark in the word Pocahontas, and is not entitled to the exclusive use of that word to designate a certain grade or quality of coal, but, on the contrary, the word Pocahontas indicates coal mined in the Pocahontas coal field, and all producers of that region have the right to use the same name. *Castner v. Coffman*, 178 U. S. 168, 44 L. Ed. 1021.

Elgin.—The word "Elgin" is a geographical name which cannot be appropriated exclusively as a trademark, but used by others in such a way as to amount to a fraud on the public will not be allowed. *Elgin Nat. Watch Co. v. Illinois*, etc., Co., 179 U. S. 665, 673, 45 L. Ed. 365.

Right to Use Exclusive.—To entitle a name to equitable protection as a trademark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. And this is so although the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product.⁵²

Restricting Word to Primary Meaning.—Where an alleged trademark is not in itself a good trademark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin.⁵³

Protection of Other than Manufacturer.—A proprietor, if he owns or controls the goods which he exposes to sale, is entitled to the exclusive use of any trademark adopted and applied by him to the goods, to distinguish them as being of a particular manufacture and quality, even though he is not the manufacturer, and the name of the real manufacturer is used as part of the device.⁵⁴

TRADE SECRETS.—See the title *INJUNCTIONS*, vol. 6, p. 1051.

TRAFFIC.—Traffic consists in the buying and selling, or interchange of commodities.¹

TRAFFIC CONTRACTS.—See the title *RAILROADS*, vol. 10, p. 522.

TRAIL.—See note 2.

TRAIN DISPATCHER.—See the title *FELLOW SERVANTS*, vol. 6, p. 255.

TRAINMAN.—See the title *FELLOW SERVANTS*, vol. 6, p. 265.

TRANSACT—TRANSACTION.—See note 3.

52. Exclusive right of use—Necessity for.—*Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581.

53. Restricting word to primary meaning.—*Elgin Nat. Watch Co. v. Illinois, etc., Co.*, 179 U. S. 665, 674, 45 L. Ed. 365, citing *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 34 L. Ed. 997; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 37 L. Ed. 847; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 41 L. Ed. 118.

54. Protection of other than manufacturer.—*McLean v. Fleming*, 96 U. S. 245, 258, 24 L. Ed. 828; *Menendez v. Holt*, 128 U. S. 514, 520, 32 L. Ed. 526.

1. Traffic.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 282.

Commerce is traffic.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 282.

Trafficking in intoxicating liquors.—The establishment of places within the state of Ohio by manufacturers of liquors, distinct from the manufactory from which their goods are sold and delivered, constitutes a **trafficking** in intoxicating liquors. *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 456, 45 L. Ed. 269.

2. Trail.—In *United States v. Andrews*, 179 U. S. 96, 99, 45 L. Ed. 105, the court in referring to the finding of the lower court that the Chisom **trail** was an established trail en route from Texas to a market in Kansas, said: "We under-

stand that by the use in the finding of the word **trail**, in connection with the balance of the finding, is meant a way, road or path suitable for the purpose of driving cattle over or along on their way to a market."

The Chisom trail from Texas to Kansas was a work of utility or necessity within meaning of an Indian treaty, and was legally established. *United States v. Andrews*, 179 U. S. 96, 99, 45 L. Ed. 105.

3. Business "actually transacted in court."—See the title *CLERKS OF COURT*, vol. 3, p. 855.

Transactions with the deceased.—As to the incompetency of parties, in actions against executors and administrators, to testify as to **transactions** with the deceased, see the title *WITNESSES*.

"Transaction or compromise" in Louisiana.—Where the city of New Orleans was invested with power to **transact** and contract for the purchase and settlement of any rights, franchises and privileges, the word **transact**, which seemed ambiguous, was explained by article No. 3071 of the Civil Code of Louisiana, which defines "a **transaction** or compromise" to be "an agreement between two or more persons, who, for the purpose of preventing or putting an end to a lawsuit, adjust their differences by mutual consent." *New Orleans v. Warner*, 180 U. S. 199, 204, 45 L. Ed. 493. See the title *COMPROMISE AND SETTLEMENT*, vol. 3, p. 981.

TRANSCRIPT.—As to the record or transcript on appeal, see the title *APPEAL AND ERROR*, vol. 2, p. 194. As to treasury transcripts as evidence in cases of delinquency of revenue officers or other persons accountable for public money, see the title *DOCUMENTARY EVIDENCE*, vol. 5, p. 438.

TRANSFER.—See the titles *BANKRUPTCY*, vol. 2, p. 792; *DEEDS*, vol. 5, p. 295; *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 472; *SALES*, vol. 10, p. 1022. See, also, note 1. As to what constitutes a transfer by a bankrupt, with intent to hinder, delay, or defraud creditors, see the title *BANKRUPTCY*, vol. 2, p. 936.

TRANSITORY ACTIONS.—See the title *VENUE*.

TRANSPORT—TRANSPORTATION.—See the title *CARRIERS*, vol. 3, p. 556; *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 269. "The word transport, correctly interpreted, as well as in its ordinary acceptation, means to carry, to convey."² "Transportation implies the taking up of persons or property at some point and putting them down at another."³

TRAVEL—TRAVELER.—See the title *INNS AND INNKEEPERS*, vol. 6, p. 1069. As to walking not constituting a means of traveling by either a public or private conveyance, see the title *ACCIDENT INSURANCE*, vol. 1, p. 59.

TRAVELING EXPENSES.—See references under *MILEAGE*, vol. 8, p. 341.

TRAVELING SALESMEN.—See references under *DRUMMERS*, vol. 5, p. 495.

1. **Limitation of shipowner's liability.**—In the provision that it shall be a sufficient compliance on the part of the owner of a vessel with the requirements of the statute relating to his liability for loss, if he shall transfer his interest in the vessel and freight for the benefit of the claimants to a trustee, the word transfer is not confined to cases of actual transfer (which is merely allowed as a sufficient compliance with the law), but must be regarded as extending to cases in which what is required and done is tantamount to such transfer; as, where the value of the owners' interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested. In *re Morrison*, 147 U. S. 14, 35, 37 L. Ed. 60; *Providence, etc., Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578, 600, 27 L. Ed. 1038. See *City of Norwich*, 118 U. S. 468, 502, 30 L. Ed. 134. See, also, the title *SHIPS AND SHIPPING*, vol. 10, p. 1188.

2. **Transport.**—*United States v. Sheldon*, 2 Wheat. 119, 120, 4 L. Ed. 199.

3. **Transportation.**—*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. Ed. 158.

"A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation." *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203, 29 L. Ed. 158.

The term "transportation" as used in the interstate commerce act, includes all instrumentalities of shipment or carriage. See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 479.

Transportation is commerce.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 282.

Transported and carried equivalent terms.—Where a way bill describes merchandise as transported from one place to another, it may be that transported or carried were equivalent terms, and quite distinct from the idea of forwarding. *Railroad Co. v. Pratt*, 22 Wall. 123, 133, 22 L. Ed. 827.

Continuous transportation.—A transportation from one point to another remains continuous, so long as intent remains unchanged, no matter what stoppages or transshipments intervene. *The Bermuda*, 3 Wall. 514, 553, 18 L. Ed. 200.

Transportation, extradition and deportment distinguished.—See the title *EXTRADITION*, vol. 6, p. 216.

Goods "awaiting delivery" does not include goods "awaiting transportation."—See *AWAITING*, vol. 2, p. 763.

As to the driving of living cattle not being a transportation thereof within the meaning of a nonintercourse law, see the title *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 735. As to transportation bond, see the title *REVENUE LAWS*, vol. 10, p. 973.

TREASON.

BY BEIRNE STEDMAN.

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CROSS REFERENCES.

See the titles ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1; ACCOMPLICES AND ACCESSORIES, vol. 1, p. 63; ALIENS, vol. 1, p. 210; CITIZENSHIP, vol. 3, p. 788; CONFESSIONS, vol. 3, p. 1009; CONSPIRACY, vol. 3, p. 1099; CRIMINAL LAW, vol. 5, p. 43; EVIDENCE, vol. 5, p. 1004; EXTRADITION, vol. 6, p. 215; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961; INTERNATIONAL LAW, vol. 7, p. 239; JURY, vol. 7, p. 748; OUTLAWRY, vol. 8, p. 1017; PARDON, vol. 9, p. 1; STATES, ante, p. 33; UNITED STATES; VENUE; WAR. See, also, ALLEGIANCE, vol. 1, p. 258; NATIONALITY, vol. 8, p. 796.

As to whether one who, owing allegiance to a government, sells goods to an armed combination to overthrow that government, knowing that they are bought for that purpose, is, guilty of treason, see the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 8. As to allegiance of domiciled aliens, see the title ALIENS, vol. 1, p. 217. As to liability of domiciled aliens for treason and kindred offenses, see the title ALIENS, vol. 1, p. 218. As to right of election in revolutions like the American Revolution, see the title ALIENS, vol. 1, p. 216. As to time the right of election in Pennsylvania continued, see the title ALIENS, vol. 1, p. 216. As to appellate and original jurisdiction in the case of treason, see the title APPEAL AND ERROR, vol. 1, p. 417. As to admissibility in evidence of copy of letter inciting to insurrection, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 459. That drunkenness is no excuse for committing the offense of misprision of treason, see the title DRUNKENNESS, vol. 5, 497. As to relevancy of proof of other crimes on trial of indictment for treason, see the title EVIDENCE, vol. 5, p. 1021. As to admissibility of proof of an overt act of treason committed in another county on the trial of an indictment for treason, see the title EVIDENCE, vol. 5, p. 1023. That treason is an extraditable crime, see the title EXTRADITION, vol. 6, p. 223. As to right of traitor to recover for false imprisonment, see the title FALSE IMPRISONMENT, vol. 6, p. 242. As to effect of attainder on powers personal to the parties, see the title POWERS, vol. 9, p. 599.

I. Definition and General Consideration.

Treason is a criminal attempt to destroy the existence of the government.¹ It is a breach of allegiance,² and there is no crime greater than treason,³ nor

1. **Treason defined.**—*Respublica v. Chapman*, 1 Dall. 53, 57, 1 L. Ed. 33.

2. **Breach of allegiance.**—*United States v. Wiltberger*, 5 Wheat. 76, 97, 5 L. Ed. 37; *Young v. United States*, 97 U. S. 39, 62, 24 L. Ed. 992.

Nature of allegiance.—See the title CITIZENSHIP, vol. 3, p. 807.

3. **No crime greater.**—*Hanauer v. Doane*, 12 Wall. 342, 347, 20 L. Ed. 439.

any which can more excite and agitate the passions of men.⁴

The word "crime" includes treason, which was a "felony," at common law.⁵

Constructive treason is where the direct and avowed object is not the destruction of the sovereign power.⁶

No Accessories in treason.—In treason all are principals, to its source.⁷

The thirteen colonies by the Declaration of Independence became separate and independent sovereignties, against which treason might be committed.⁸

II. Who May Commit the Offense.

Treason can be committed by him only who owes allegiance, either perpetual or temporary;⁹ therefore, a nonresident¹⁰ or unnaturalized alien is incapable of committing the offense.¹¹

III. What Constitutes the Offense.

At Common law levying war against the king was treason.¹²

In Pennsylvania there were three species of treason: First, to take a commission or commissions from the king of Great Britain, or any under his authority; second, to levy war against the state or government thereof; and third, knowingly and willingly to aid and assist any enemies at open war against the state, or the United States.¹³

The constitution provides that treason against the United States shall consist only in levying war against them,¹⁴ or in adhering to their enemies, giving

4. *Ex parte Bollman*, 4 Cranch 75, 125, 2 L. Ed. 554.

5. **Felony at common law.**—4 Bl. Com., 94 *Kentucky v. Dennison*, 24 How. 66, 99, 100, 16 L. Ed. 717, cited in *Hyatt v. Corkran*, 188 U. S. 691, 716, 47 L. Ed. 657.

6. **Constructive treason.**—*United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

7. **No Accessories in treason.**—*United States v. Burr*, 4 Cranch, appx., 470, 473; 2 Burr's Trial, 401. See *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693.

8. **The thirteen colonies.**—*Kentucky v. Dennison*, 24 How. 66, 101, 16 L. Ed. 717.

9. **Necessity for allegiance.**—*Young v. United States*, 97 U. S. 39, 62, 24 L. Ed. 992; *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37; *Shanks v. Dupont*, 3 Pet. 242, 261, 7 L. Ed. 666 (dissenting opinion).

10. **Nonresident alien.**—*Young v. United States*, 97 U. S. 39, 63, 24 L. Ed. 992.

11. **Unnaturalized alien.**—*United States v. Villato*, 2 Dall. 370, 373, 1 L. Ed. 419.

12. **Levying war at common law.**—*United States v. Burr*, 4 Cranch, appx., 470, 477; 2 Burr's Trial, 401.

13. **In Pennsylvania.**—*Respublica v. Carlisle*, 1 Dall. 35, 37, 1 L. Ed. 26.

The legislature explained the meaning of the words, aiding and assisting, to be, "by joining the armies of the enemy, or by enlisting, or procuring or persuading others to enlist, for that purpose; or by furnishing such enemies with arms or ammunition, provision or any other article or articles for their aid or comfort, or by carrying on a traitorous correspondence with them." *Respublica v. Carlisle*, 1 Dall. 35, 37, 1 L. Ed. 26.

The word "persuading," used by the legislature, means to succeed and there

must be an actual enlistment of the person persuaded, in order to bring the defendant within the intention of the act of assembly: "That if any person or persons knowingly and willingly shall aid or assist any enemies at open war with this state, etc., by persuading others to enlist for that purpose, etc., he shall be adjudged guilty of high treason." *Respublica v. Roberts*, 1 Dall. 39, 1 L. Ed. 27.

14. **Levying war against United States.**—U. S. Const., art. III, § 3, cl. 1. *Ex parte Bollman*, 4 Cranch 75, 126, 154, 2 L. Ed. 554; *United States v. Burr*, 4 Cranch, appx., 470, 471; 2 Burr's Trial, 401.

The words, "owing allegiance to the United States," in the first section of the act of April 30, 1790, which declares that if any person or persons, owing allegiance to the United States of America, shall levy war, etc., "such person or persons shall be adjudged guilty of treason," etc., are entirely surplus words, which do not, in the slightest degree, affect its sense. *United States v. Wiltberger*, 5 Wheat. 76, 96, 5 L. Ed. 37.

The words "levying war" are of the same import with the words raising or creating war, but the term also comprehends making war, or carrying on war. *United States v. Burr*, 4 Cranch, appx., 470, 471; 2 Burr's Trial, 401.

The term "levying war," is used in the constitution of the United States, in the same sense in which it was understood, in England and in this country, to have been used in the statute of 25 Edw. II, from which it was borrowed. *United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

What constitutes a levying of war.—To constitute treason by levying war, war must be actually levied against the United

States. *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554.

When war is levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554. See *United States v. Burr*, 4 Cranch, appx., 470, 473; 2 Burr's Trial, 401.

So if an army be actually raised, for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately, before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases, who never saw the army, but who, knowing its object, and leaguering himself with the rebels, supplied that army with provisions, or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him. *United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

If the war be actually levied, if the accused has performed a part, but is not leagued in the conspiracy, and has not appeared in arms against his country, he is not a traitor. *United States v. Burr*, 4 Cranch, appx., 470, 475; 2 Burr's Trial, 401.

A person may be concerned in a treasonable conspiracy, and yet be legally, as well as actually, absent, while some one act of the treason is perpetrated. Every one concerned in a treasonable conspiracy, is not constructively present at every overt act of the treason, committed by others, not in his presence. A man may be legally absent, who has counselled or procured the treasonable act. *United States v. Burr*, 4 Cranch, appx., 470, 491; 2 Burr's Trial, 401.

A person can only be constructively present at an overt act of treason, unless he be aiding and abetting at the fact, or ready to afford assistance, if necessary. If the particular overt act of treason charged be advised, procured or commanded by the accused, he is guilty accessorially and not directly as principal. A person in one part of the United States cannot be considered as constructively present at an overt act committed in a remote part of the United States. The presence of a party, where presence is necessary to his guilt, as part of the overt act, must be proved by two witnesses. *United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

Same—Joining the enemy.—Assembling, joining or arraying oneself with the forces of the enemy, is a sufficient overt act of levying war. *Respublica v. Carlisle*, 1 Dall. 35, 38, 1 L. Ed. 26. See *Respublica v. McCarty*, 2 Dall. 86, 87, 1 L. Ed. 300.

So appearing at the head of an army,

would be an overt act of levying war. So, also, detaching a military corps from it, for military purposes. *United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

Same—Assemblage of men with treasonable intent.—To constitute a levying of war, there must be an assemblage of persons, for the purpose of affecting, by force, a treasonable purpose. Enlistment of men to serve against the government is not sufficient. *Ex parte Bollman*, 4 Cranch 75, 127, 2 L. Ed. 554.

The assemblage of men, which will constitute levying war, must be a "warlike assemblage" carrying the appearance of force, and in a situation to practice hostility. *United States v. Burr*, 4 Cranch, appx., 470, 480; 2 Burr's Trial, 401.

So an assemblage of men, with a treasonable design, but not in force, nor in a condition to attempt the design, nor attended with warlike appearances, does not constitute the fact of levying war. *United States v. Burr*, 4 Cranch, appx., 470, 482; 2 Burr's Trial, 401.

Any assembling of men, for the purpose of revolutionizing, by force, the government established by the United States, in any of its territories, although as a step to, or the means of executing, some greater projects, amounts to levying war. *Ex parte Bollman*, 4 Cranch 75, 134, 2 L. Ed. 554.

"The particular words used by Mr. Swartwout are, that Col. Burr 'was levying an armed body of 7,000 men.' If the term levying in this place, imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it largely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war." *Ex parte Bollman*, 4 Cranch 75, 135, 2 L. Ed. 554.

Where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. *United States v. Burr*, 4 Cranch, appx., 470, 476; 2 Burr's Trial, 401.

The meeting of particular bodies of men, and their marching from different places of partial to a place of general rendezvous, would be such an assemblage as would constitute a levying of war. *Ex parte Bollman*, 4 Cranch 75, 134, 2 L. Ed. 554. See *United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

But the traveling of several individuals to the place of rendezvous, either separately or together, but not in military form, would not constitute levying war. *United States v. Burr*, 4 Cranch, appx., 470, 485; 2 Burr's Trial, 401; *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554.

Same—Suppression of office of excise, etc.—An insurrection to suppress the ex-

them aid and comfort.¹⁵

IV. Indictment.

See, generally, the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961.

Requisites.—In the case of treason the overt acts must, by statute, be spe-

cise offices, and to prevent the execution of an act of congress, by force and intimidation, is an usurpation of the authority of government; is high treason, by levying of war. *United States v. Mitchell*, 2 Dall. 348, 355, 1 L. Ed. 410. See *United States v. Vigol*, 2 Dall. 346, 347, 1 L. Ed. 409.

The prisoner was one of a band of insurgents and accompanied the armed party, who attacked the houses of excise officers, insisted upon the surrender of their official papers, and extorted oaths from them that they would never act again in the execution of the excise law. It was the intention of the insurgents to suppress the office of excise, in the fourth survey of Pennsylvania, and to render null and void, in effect, an act of congress. Held, this constituted high treason in the contemplation of the constitution and law of the United States. *United States v. Vigol*, 2 Dall. 346, 1 L. Ed. 409. See *United States v. Mitchell*, 2 Dall. 348, 355, 1 L. Ed. 410.

Same—Arms not requisite.—Arms are not an indispensable requisite in levying war; nor the actual application of force to the object. *United States v. Burr*, 4 Cranch, appx., 470, 488; 2 Burr's Trial, 401.

Same—Actual force necessary.—War can only be levied by the employment of actual force. *United States v. Burr*, 4 Cranch, appx., 470, 487; 2 Burr's Trial, 401.

Same—Question for jury.—Levying of war is a fact which must be decided by the jury. *Sparf v. United States*, 156 U. S. 51, 66, 39 L. Ed. 343. See *United States v. Burr*, 4 Cranch, appx., 470, 506; 2 Burr's Trial, 401.

Same—Directing verdict.—Where, in the trial of an indictment for high treason, by levying war against the United States, it was discovered that the defendant was not the person liable to the charge, but another person of the same name, the jury, by direction of the court, found a verdict of not guilty. *United States v. Porter*, 2 Dall. 345, 1 L. Ed. 409.

Same—Conspiracy.—On the overt act of treason, it is clear that the intention and the act, the will and the deed, must concur; for a bare conspiracy is not treason. *United States v. Mitchell*, 2 Dall. 348, 355, 1 L. Ed. 410.

"However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct of-

fenses. The first must be brought into open action, by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed." *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554.

Lord Coke says that a compassing or conspiracy to levy war is no treason, for there must be a levying of war in fact. *United States v. Burr*, 4 Cranch, appx., 470, 477; 2 Burr's Trial, 401.

15. Adhering to enemies, etc.—U. S. Const., art. 3, § 3, cl. 1. *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554.

As was said in *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554: "All those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in general conspiracy, are to be considered as traitors." In *East's Pleas and Crown*, the same principle is thus stated: "Every species of aid or comfort, in the words of the act, which, when given to a rebel within the realm, would make the subject guilty of levying war, if given to an enemy, whether within or without the realm, would make the party guilty of adhering to the king's enemies." 1 *East*, P. C. 78. *Young v. United States*, 97 U. S. 39, 65, 24 L. Ed. 992.

Mr. Justice Field, in *United States v. Greathouse* (4 Sawyer 472), states the same doctrine in this language: "Wherever overt acts are committed, which in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law aid and comfort are given." *Young v. United States*, 97 U. S. 39, 65, 24 L. Ed. 992.

In 1863, a nonresident alien entered into a contract with North Carolina to provide the "country" with warlike supplies, and to assist in running out regularly through the blockade cotton for the state. He also acted as the agent of North Carolina for the sale in England of its "obligations for the delivery of cotton." He entered into a contract with the Confederate States for the purchase and delivery of warlike supplies in cotton. For this he was granted special privileges. He sent through the blockade and presented to North Carolina a gun, "reported to be peculiarly destructive," and another time two Whitworth guns as a gift from himself, which were accepted by the government and used in its service. Held, had these things been done by a citizen of the United States, he would have been guilty of treason.

cially laid in the indictment,¹⁶ but it has been held sufficient to lay in such an indictment, that the defendant sent intelligence to the enemy, without setting forth the particular letter, or its contents.¹⁷

Allegation Not Sustained by Proof.—See footnote.¹⁸

Proof.—The overt act of levying war must be proved as laid in the indictment.¹⁹

Delivery of Copy of Indictment, and List of Witnesses to Accused.—See elsewhere.²⁰

V. Evidence.

Relevancy.—If the overt act be not proved by two witnesses, so as to be submitted to the jury, all other testimony is irrelevant.²¹

Intention.—See footnote.²²

Young v. United States, 97 U. S. 39, 63, 64, 24 L. Ed. 992.

Same—Joining enemy.—Enlisting, or procuring any person to be enlisted, in the service of the enemy, is clearly an act of treason. *Respublica v. McCarty*, 2 Dall. 86, 87, 1 L. Ed. 300.

Though when an old government is dissolved and a new one formed, one has an unrestrainable right to remove with his property into another country, yet it seems that to join a party, or nation, at open war with the country he leaves, would amount to an act of treason. *Respublica v. Chapman*, 1 Dall. 53, 58, 1 L. Ed. 33.

The words "aid or comfort" are used in the clause of the constitution defining treason (art. 3, § 3), in their hostile sense. *Young v. United States*, 97 U. S. 39, 62, 24 L. Ed. 992.

16. Overt acts must be laid in indictment.—*United States v. Gooding*, 12 Wheat. 460, 475, 6 L. Ed. 693.

It is not sufficient, that an indictment for treason allege, generally, that the accused had levied war against the United States. The charge must be more particularly specified, by laying an overt act of levying war. *United States v. Burr*, 4 Cranch, appx., 470, 490; 2 Burr's Trial, 401.

It was particularly stated in an indictment for treason, that the defendant took a commission under the king of Great Britain, to watch and guard the gates of the city of Philadelphia. Held, the offense is certain enough in this description, though, without some overt act, it would not be sufficient for a conviction. *Respublica v. Carlisle*, 1 Dall. 35, 38, 1 L. Ed. 26.

17. *Respublica v. Carlisle*, 1 Dall. 35, 38, 1 L. Ed. 26.

18. On the trial of an indictment for high treason the number of the insurgent party was not proved to be so great, as the indictment stated. Held, this is immaterial; whether the crime was committed by one hundred, or five hundred, cannot alter the guilt of the defendant. *United States v. Vigol*, 2 Dall. 346, 347, 1 L. Ed. 409.

19. Proof of overt act.—*United States*

v. Burr, 4 Cranch, appx., 470, 490; 2 Burr's Trial, 401; *United States v. Gooding*, 12 Wheat. 460, 475, 6 L. Ed. 693.

The prisoner can only be convicted upon the overt act laid in the indictment. If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. *United States v. Burr*, 4 Cranch, appx., 470, 493; 2 Burr's Trial, 401.

An indictment charging a person with being present at an overt act of treason, cannot be supported by proving only that the person accused caused the act to be done by others, in his absence. No presumptive evidence, no facts from which presence can be inferred, will satisfy the constitution and the law. *United States v. Burr*, 4 Cranch, appx., 470; 2 Burr's Trial, 401.

20. Delivery of copy of indictment and list of witnesses to accused.—See the title CRIMINAL LAW, vol. 5, p. 110.

21. Relevancy.—*United States v. Burr*, 4 Cranch, appx., 470, 505, 506; 2 Burr's Trial, 401.

In an indictment for treason there was proof of an overt act, that the prisoner did enlist, and evidence was offered to show, that he also endeavored to persuade others to enlist, in the armies of the enemy. Held, the evidence is proper to show quo animo the prisoner himself joined the British forces. *Respublica v. Roberts*, 1 Dall. 39, 1 L. Ed. 27.

In order to prove an overt act of treason, in that defendant took a commission under the king of Great Britain, evidence was offered to show that the prisoner had a power of granting passes into and out of the city which was in the possession of the enemy. Held, the evidence ought to be received, but not as conclusive proof, of the defendant's having taken a commission. Nor will the evidence of seizing the salt, or any act of disarming the inhabitants whom the defendant called rebels, apply to this species of treason; however they may support the allegation of his having joined the armies of the king of Great Britain. *Respublica v. Carlisle*, 1 Dall. 35, 38, 1 L. Ed. 26.

22. Words showing intention to join the enemy.—The defendant, mistaking

Sufficiency.—Under the constitution no person can be convicted of treason, unless on the testimony of two witnesses to the same overt act,²³ or on confession in open court.²⁴

Confessions.—See the title CONFESSIONS, vol. 3, p. 1018.

VI. Jury.

See, generally, the title JURY, vol. 7, p. 748.

Biased Juror—New Trial.—See footnote.²⁵

Peremptory Challenge.—See footnote.²⁶

Delivery of List of Jurors to Accused.—See the title CRIMINAL LAW, vol. 5, p. 110.

VII. Bail.

A prisoner charged with high treason may be admitted to bail,²⁷ but the circumstances must be very strong in his favor.²⁸

VIII. Defense and Punishment.

Defense.—Nothing will excuse the act of joining the public enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property.²⁹

Punishment—Estates Forfeitable for Attainder of Treason.—See footnote.³⁰

American troops for British, went over to them. Evidence was offered of words spoken by the defendant, to prove this mistake, and his real intention of joining and adhering to the enemy. Held, no evidence of words, relative to the mistake of the American troops, can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason. But, as it appears that the prisoner was actually with the enemy, at another time, words indicating his intention to join them are proper testimony, to explain the motives upon which that intention was afterwards carried into effect. *Respublica v. Malin*, 1 Dall. 33, 1 L. Ed. 25.

23. Proof of overt act.—Constitution, art. 3, § 3. *Ex parte Bollman*, 4 Cranch 75, 127, 2 L. Ed. 554. See *United States v. Mitchell*, 2 Dall. 348, 355, 1 L. Ed. 410, holding that same was necessary under Pennsylvania statute.

The part which a person takes in the war constitutes the overt act, and the constitution has made the proof of overt acts necessary to conviction. *United States v. Burr*, 4 Cranch, appx., 470, 473; 2 Burr's Trial, 401.

24. Confession in open court.—*Ex parte Bollman*, 4 Cranch 75, 127, 2 L. Ed. 554. See the title CONFESSIONS, vol. 3, p. 1018.

25. Biased juror—New trial.—On the trial of an indictment for treason a new trial was granted on the ground that one of the jurors had made declarations, as well in relation to the prisoner personally, as to the general question of the insurrection, which manifested a bias, or pre-determination, that ought never to be felt by a juror. *United States v. Fries*, 3 Dall. 515, 518, 1 L. Ed. 701.

26. Peremptory challenge.—Section 30 of the Crime's Act of 1790, at Large, 119, provided that persons indicted for treason against the United States shall have the right of peremptory challenge of the number of thirty-five jurors. The right of challenge in the case specified in the act of 1790, in respect to the number of jurors, is derived from the common law, which allowed thirty-five in cases of treason. *United States v. Shackelford*, 18 How. 588, 590, 15 L. Ed. 495; 4 Bl. Com. 354, 355; *United States v. Marchant*, 12 Wheat. 480, 483, 6 L. Ed. 700.

27. Bail.—*United States v. Hamilton*, 3 Dall. 17, 1 L. Ed. 490, cited with approval in *Ex parte Watkins*, 3 Pet. 193, 207, 7 L. Ed. 650. See, generally, the title BAIL AND RECOGNIZANCE, vol. 2, p. 765.

28. In *United States v. Stewart*, 2 Dall. 343, 345, 1 L. Ed. 408, the court said: "The circumstances must be very strong, which will, at any time, induce us to admit a person to bail to who stands charged with high treason."

29. Nothing excuses joining enemy.—*Respublica v. McCarty*, 2 Dall. 86, 87, 1 L. Ed. 300.

See *United States v. Vigol*, 2 Dall. 346, 347, 1 L. Ed. 409, wherein the court held that the apprehension of any loss of property, by waste or fire, or even an apprehension of a slight or remote injury to the person, furnish no excuse for participating in an insurrection, as the fear, which the law recognizes as an excuse for the perpetuation of an offense, must proceed from an immediate and actual danger, threatening the very life of the party.

30. Estates forfeitable.—In the case of *James' Claim*, 1 Dall. 47, 1 L. Ed. 31, it was held that an estate under a will which

Jurisdiction—Judgment.—The inferior court of common pleas for the county of Hunterdon, in the state of New Jersey, in May, 1779, had a general jurisdiction in all cases of inquisition for treason, and its judgment, although erroneous, was not void, inasmuch as the court had jurisdiction of the cause.³¹

Confiscation of Property.—See footnote.³²

IX. Misprision of Treason.

In General.—Words charged as amounting to misprision of treason must be spoken with a malicious and mischievous intention, in order to render them criminal.³³

Indictment Charging Misprision of Treason.—See footnote.³⁴

TREASURY NOTES.—As to payment in United States treasury notes, see the title PAYMENT, vol. 9, p. 325. As to state taxation of United States treasury notes, see the title CONSTITUTIONAL LAW, vol. 4, p. 197. As to right of United States to recover for moneys paid out in redeeming spurious treasury notes, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 351.

TREASURY DEPARTMENT.—See the title UNITED STATES.

TREASURY NOTES AND WARRANTS.—As medium of payment, see the title PAYMENT, vol. 9, pp. 325, 327.

was construed to be an estate tail was forfeited for attainder of treason.

In *Pemberton v. Hicks*, 3 Dall. 479, 1 L. Ed. 687, and *Pemberton v. Hicks*, 4 Dall. 168, 1 L. Ed. 785, it was held that a tenant by the curtesy initiate did not have such an estate as would be forfeited for attainder for treason.

Same—Estates in fee tail.—See the title ESTATES, vol. 5, p. 911.

31. Jurisdiction—Judgment.—*Kempe v. Kennedy*, 5 Cranch 173, 3 L. Ed. 70.

32. Constitutionality of act confiscating property.—In *Cooper v. Telfair*, 4 Dall. 14, 19, 1 L. Ed. 721, it was held that the law of Georgia passed on May 4, 1782, entitled "an act inflicting penalties on and confiscating the estate of such persons as are therein declared guilty of treason," was not repugnant to the state constitution. The power of confiscation and banishment is so inherent in the legislature that it cannot be divested or transferred, without an express provision of the constitution.

Confiscation under act of 1860.—Proceedings under the confiscation act of July 17, 1860, were not, in their nature, a punishment for treason. *Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193. See, generally, the title WAR.

Confiscation under Spanish law.—By the provision of the Spanish law in force in Mexico in 1814, 1817, confiscation of property as a punishment for the crime of treason could only be effected by regular judicial proceedings. *Sabariego v. Maverick*, 124 U. S. 261, 285, 31 L. Ed. 430.

Same—Presumption as to confiscation.

—Where land in Mexico was confiscated and sold for the treason of its owner, which facts were recited in the instruments of conveyance and officers certified that the land had been confiscated, it was held that no presumption that proceedings had been taken for the confiscation of the land was raised. *Sabariego v. Maverick*, 124 U. S. 261, 31 L. Ed. 430.

33. Necessity for malicious intent.—*Republica v. Weidle*, 2 Dall. 88, 90, 1 L. Ed. 301.

A mere loose and idle conversation, without any wickedness of heart, may be indiscreet and reprehensible, but ought not to be construed into misprision of treason. *Republica v. Weidle*, 2 Dall. 88, 90, 1 L. Ed. 301.

34. Defendant was indicted for misprision of treason, in speaking the following words: "That he had lived six years in London, nine years in Ireland; and never lived happier in his life, than he had done under the English government; and that the King of England is our King, and will be yours." The indictment was founded on the 4th section of the act of assembly (1 Dall. Laws 728). Held: "The words spoken tended to excite resistance to the government of this commonwealth, to persuade the audience to return to a dependence upon the crown of Great Britain, and to favor the enemy; which are distinct and substantive charges of misprision of treason." *Republica v. Weidle*, 2 Dall. 88, 89, 90, 91, 1 L. Ed. 301.

TREATIES.

BY T. B. BENSON.

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CROSS REFERENCES.

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As to jurisdiction to determine validity of treaty, see the title **APPEAL AND ERROR**, vol. 1, p. 464. As to jurisdiction of suits arising under treaties, see the title **COURTS**, vol. 4, pp. 904, 934. As to jurisdiction of court of claims arising under treaties, see the title **COURTS**, vol. 4, p. 1027. As to treaty stipulations concerning contraband of war, see the title **WAR**.

I. Definition.

A treaty is a compact made between two or more nations,¹ entered into for the common advancement of their interests and the interests of civilization, the securing of peace and the avoidance of war.² In its essence, it is a contract,³

1. *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. Ed. 138; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798; *In re Cooper*, 143 U. S. 472, 501, 36 L. Ed. 232.

A treaty is an agreement or contract between two or more nations or sovereigns, entered into by agents appointed for that purpose, and duly sanctioned by the supreme power of the respective parties. This definition is applicable to treaties with Indian nations. *Cherokee Nation v. Georgia*, 5 Pet. 1, 60, 8 L. Ed. 25.

"A treaty" implies political relations. *Marks v. United States*, 161 U. S. 297, 302, 40 L. Ed. 706.

2. *Tucker v. Alexandroff*, 183 U. S. 424, 46 L. Ed. 264.

3. *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *Head Money Cases*, 112 U. S. 580, 28 L. Ed. 798.

"It differs from an ordinary contract only in being an agreement between independent states instead of private parties." *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 182, 46 L.

and not a legislative act.⁴ However, under the provision of the constitution of the United States, which declares a treaty to be the law of the land, it is to be regarded in courts of justice as equivalent to a legislative act, whenever it operates of itself without the aid of any legislative provision.⁵

II. Treaty-Making Power.

A. Constitutional Provision.—The treaty-making clause of the constitution is retroactive as well as prospective in its operation.⁶

B. Of United States—1. **IN GENERAL.**—The power therein granted is unlimited,⁷ except by those restraints which are found in the constitution upon the action of the government or its departments, and those arising from the nature of the government itself and of that of the states.⁸

2. **IN WHOM VESTED.**—A treaty is negotiated and made by the president with the consent of two-thirds of the senators present.⁹ This power extends to the making of a treaty with an Indian tribe.¹⁰ The power of the senate is limited

Ed. 138, Mr. Justice Brown, concurring.

A treaty, when made, represents a compact between the governments, and each government holds the other responsible for everything done by their respective citizens under it. Their citizens are not parties to the convention. *Frelinghuysen v. Key*, 110 U. S. 63, 71, 28 L. Ed. 71.

4. *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415; *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798; *Cherokee Nation v. Georgia*, 5 Pet. 1, 44, 8 L. Ed. 25; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. Ed. 425.

5. *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. Ed. 425; *United States v. Lee Yen Tai*, 185 U. S. 213, 220, 46 L. Ed. 878; *Whitney v. Robertson*, 124 U. S. 190, 31 L. Ed. 386; *Chew Heong v. United States*, 112 U. S. 536, 28 L. Ed. 770; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846.

"Under the constitution, a treaty between the United States and a foreign nation is to be considered in two aspects—as a compact between the two nations, and as a law of our country." *Baldwin v. Franks*, 120 U. S. 678, 702, 30 L. Ed. 766.

6. This clause applies alike to treaties "made and to be made." The treaty with Great Britain of 1783, which terminated the war of the American Revolution, made while the articles of confederation subsisted, is within the clause. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568.

The same rule applies to the treaty with France of 1778. *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234; *Cherokee Nation v. Georgia*, 5 Pet. 1, 44, 8 L. Ed. 25. See the title CONSTITUTIONAL LAW, vol. 4, p. 50.

7. "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other

nations is clear." *Geofroy v. Riggs*, 133 U. S. 258, 266, 33 L. Ed. 642. See, also, *Holmes v. Jennison*, 14 Pet. 540, 569, 10 L. Ed. 579.

The power to make treaties with the Indian tribes is coextensive with that to make treaties with foreign nations. *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 197, 23 L. Ed. 846.

The treaty-making power of the United States, whether exercised with a foreign nation or an Indian tribe, extends to all questions of boundary and to the exercise of this power, neither the rights of a state, nor of an individual, can be interposed. *Lattimer v. Poteet*, 14 Pet. 4, 10 L. Ed. 328.

It extends to the making of extradition treaties. See the title EXTRADITION, vol. 6, p. 217.

8. *Geofroy v. Riggs*, 133 U. S. 258, 267, 33 L. Ed. 642; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 541, 29 L. Ed. 264.

Congress did not intend by the act of June 30, 1834, to invest the president or the head of a department, or any officer of the government, with unrestricted authority in the making of treaties with Indians. No officer of the government was authorized to bind the United States by any contract for the subsistence of Indians not based upon appropriations made by congress. *United States v. McDougall*, 121 U. S. 89, 100, 30 L. Ed. 861.

9. *De Lima v. Bidwell*, 182 U. S. 1, 195, 45 L. Ed. 1041; *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 182, 46 L. Ed. 138; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Worcester v. Georgia*, 6 Pet. 515, 581, 8 L. Ed. 483; *Prigg v. Pennsylvania*, 16 Pet. 539, 619, 10 L. Ed. 1060.

10. The treaty with the Cherokee Indians of December 29, 1835, was made by the president and senate by virtue of their treaty-making power under the constitution and not by virtue of the act or congress of May 28, 1830, authorizing an exchange of land west of the Mississippi for territory occupied by Indian tribes within the limits of a state of

to the ratification of such terms as have already been agreed upon between the president and the representatives of the other contracting nation.¹¹

C. Of States.—The treaty-making power has been surrendered by the different states to the United States;¹² but a state has power to enter into an agreement with another state of the Union.¹³

D. Of Indian Nations.—Although subject to legislative authority of congress, an Indian tribe is capable under the constitution of entering into a treaty with the United States.¹⁴ The fact that the chiefs and head men did not represent a tribe in the execution of a treaty cannot be judicially inquired into after the treaty has been executed and ratified by the president and senate.¹⁵

III. Form.

It seems a treaty must be in writing¹⁶ It must contain the whole compact between the contracting nations;¹⁷ but a written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provision had been inserted in the body of the treaty itself.¹⁸

IV. Validity.

The power to declare a treaty void rests with the government and not with an individual citizen.¹⁹ After the lapse of more than forty years since a treaty with an Indian tribe has been solemnly ratified by the general government, it is too late to deny its binding force.²⁰ It seems that a treaty cannot be set aside on the ground of mistake.²¹

V. Publication.

Where the records of the senate show that a treaty was made subject to a proviso, but in the official publication and announcement of the treaty the proviso does not appear, it is not to be regarded as a part of the treaty.²²

VI. Time of Taking Effect.

In respect to the rights of either government, a treaty takes effect from the date of signing, and the exchange of ratifications has relation back to such date;²³

territory. *Holden v. Joy*, 17 Wall. 211, 21 L. Ed. 523.

11. "The senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty." *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 182, 46 L. Ed. 138. See *New York Indians v. United States*, 170 U. S. 1, 21, 42 L. Ed. 927; *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 50 L. Ed. 1149.

12. See the title CONSTITUTIONAL LAW, vol. 4, p. 150.

13. *Holmes v. Jennison*, 14 Pet. 540, 571, 10 L. Ed. 579. See the title STATES, ante, p. 40.

14. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488, 43 L. Ed. 1041; *Wiggan v. Conolly*, 163 U. S. 56, 41 L. Ed. 69.

15. *Fellows v. Blacksmith*, 19 How. 366, 15 L. Ed. 684.

16. *Holmes v. Jennison*, 14 Pet. 540, 571, 10 L. Ed. 579.

17. *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 182, 46 L. Ed. 138.

18. *Doe v. Braden*, 16 How. 635, 14 L. Ed. 1090.

19. *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568.

As to jurisdiction of United States supreme court where state court decides against validity of treaty, see the title APPEAL AND ERROR, vol. 1, p. 546.

20. *Worcester v. Georgia*, 6 Pet. 515, 583, 8 L. Ed. 483.

21. *Rhode Island v. Massachusetts*, 14 Pet. 210, 277, 10 L. Ed. 423.

"No treaty, as said by this court, has been held void on the ground of misapprehension of fact, by either or both of the parties." *Virginia v. Tennessee*, 148 U. S. 503, 527, 37 L. Ed. 537.

22. It was so held in regard to the treaty with the New York Indians, June 15, 1838, announced by a proclamation of the president, which made no allusion to a proviso. *New York Indians v. United States*, 170 U. S. 1, 21, 42 L. Ed. 927.

23. *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571; *United States v. D'Auvergne*, 10 How. 609, 623, 13 L. Ed. 560; *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *Davis v. Police Jury*, 9 How. 280, 13 L. Ed. 138; *United States v. Pillerin*, 13 How. 9, 14 L. Ed. 28; *United States v. Rillieux*, 14 How. 189, 14 L. Ed. 381; *United States v. Ducros*, 15 How. 38, 14 L. Ed. 591; *United States v. Lynde*, 11 Wall. 632, 643, 20 L. Ed. 230; *Montault*

but, in respect to the rights of individuals, the principle of relation back does not apply, and the treaty takes effect from the date of exchange of ratifications.²⁴ A treaty may be made to go into effect on a date set by the proclamation of the president.²⁵

VII. Modification and Abrogation.

A. By Subsequent Treaty.—A treaty with an Indian tribe which provides, that it shall terminate at the expiration of five years from its ratification and that the members of the tribe shall become citizens of the United States and the tribe be dissolved, is abrogated by a subsequent treaty made while the tribal organization continues.²⁶

B. By Subsequent Statute.—In so far as a treaty is the subject of judicial cognizance in the courts of the United States, it may be abrogated or modified by a subsequent act of congress.²⁷ The consequences in all such cases

v. United States, 12 How. 47, 13 L. Ed. 887.

"Any act or proceeding, therefore, between the signing and the ratification of a treaty, by either of the contracting parties, in contravention of the stipulations of the compact, would be a fraud upon the other party, and could have no validity consistently with a recognition of the compact itself." *United States v. D'Au-terive*, 10 How. 609, 623, 13 L. Ed. 560.

When territory is ceded, the national character continues for commercial purposes, until actual delivery; but between the time of signing the treaty and the actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition. *Davis v. Police Jury*, 9 How. 280, 13 L. Ed. 138.

The treaty of St. Ildefonso, between Spain and the French Republic, and that of Paris, between France and the United States, should be construed as binding on the parties thereto, from the respective dates of those treaties. *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *Davis v. Police Jury*, 9 How. 280, 13 L. Ed. 138.

With respect to the tract of country between the Mississippi and Perdido rivers, south of the thirty-first degree of north latitude, the authorities of Louisiana had no right to make grants of land after the time of signing the treaty, by which it was ceded to Great Britain. That treaty having been signed on the 10th of February, 1763, a grant of land in the above tract of country, issued by the French governor of Louisiana, on the 11th of March, 1763, was void. *Montault v. United States*, 12 How. 47, 13 L. Ed. 887.

Although the proposition to change the treaty of July 16, 1862, providing that the Ottawas should cease to be a nation, was not accepted by the United States until after July 16, 1867, yet when accepted the acceptance related back to the date of the proposition. *Wiggan v. Conolly*, 163 U. S. 56, 60, 41 L. Ed. 69.

^{24.} *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571; *Dooley v. United States*, 182 U. S. 222, 230, 45 L. Ed. 1074; *United States v. Sibbald*, 10 Pet. 313, 9 L. Ed. 437; *United States v. Arredondo*, 6 Pet. 691, 743, 8 L. Ed. 547; *United States v. Kingsley*, 12 Pet. 476, 9 L. Ed. 1163; *Hijo v. United States*, 194 U. S. 315, 48 L. Ed. 994.

^{25.} The treaty between the United States and Cuba of December 11, 1902, took effect December 27, 1903, the date proclaimed by the respective presidents of the United States and Cuba. *United States v. American Sugar Ref. Co.*, 202 U. S. 563, 50 L. Ed. 1149.

^{26.} The treaty with the Ottawa Indians of July 16, 1867, was abrogated by the treaty negotiated in February 23, 1867, ratified and proclaimed October 14, 1868. *Wiggan v. Conolly*, 163 U. S. 56, 60, 41 L. Ed. 69.

^{27.} *La Abra Silver Min. Co. v. United States*, 175 U. S. 423, 460, 44 L. Ed. 223; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Whitney v. Robertson*, 124 U. S. 190, 194, 195, 31 L. Ed. 386; *Chinese Exclusion Case*, 130 U. S. 581, 600, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 721, 37 L. Ed. 905; *Chew Heong v. United States*, 112 U. S. 536, 550, 565, 28 L. Ed. 770; *Horner v. United States*, No. 2, 143 U. S. 570, 36 L. Ed. 266; *Kelly v. Hedden*, 124 U. S. 196, 31 L. Ed. 389; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Johnson v. Browne*, 205 U. S. 309, 51 L. Ed. 816; *Botiller v. Dominguez*, 130 U. S. 238, 32 L. Ed. 926; *United States v. Lee Yen Tai*, 185 U. S. 213, 220, 222, 46 L. Ed. 878; *The Cherokee Tobacco*, 11 Wall. 616, 20 L. Ed. 227; *Ward v. Race Horse*, 163 U. S. 504, 511, 41 L. Ed. 244; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566, 47 L. Ed. 299; *Thomas v. Gay*, 169 U. S. 264, 270, 42 L. Ed. 740; *Spalding v. Chandler*, 160 U. S. 394, 405, 40 L. Ed. 469; *Missouri, etc., R. Co. v. Roberts*, 152 U. S. 114, 117, 38 L. Ed. 377; *United States v. McBratnev*, 104 U. S. 621, 623, 26 L. Ed. 869; *Hijo v. United States*, 194 U. S. 315, 324, 48 L. Ed. 994; *United States v. Kagama*, 118 U. S. 375, 30 L. Ed. 228; *Brown v. Walker*, 161 U.

give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance.²⁸

C. By War.—A treaty is abrogated by the outbreak of war between the signatory nations.²⁹ The treaty is not, however, ipso facto extinguished, but provisions for a permanent arrangement of territorial and other national rights are, at most merely suspended during the war and revived at its close, unless waived by the parties or abrogated by a subsequent treaty. Rights of property already vested are not divested.³⁰

D. By Admission of Territory as State.—The treaty of cession of Louisiana, which provided for the protection of the rights of the inhabitants of the ceded territory, was abrogated when Louisiana was admitted to the Union.³¹ By the admission of Colorado a treaty with an Indian tribe for the reservation within its territory was impliedly repealed.³²

E. Presumption.—The continuance in force of a treaty is to be presumed.³³

F. Effect.—By the abrogation of a treaty rights vested thereunder are not affected.³⁴

VIII. Construction.³⁵

A. By Whom Construed—1. BY BOTH NATIONS.—When two nations differ about the meaning of any clause, sentence or word in a treaty, neither has an exclusive right to decide it. Each has a right to retain its own interpretation until a reference be had to the mediation of other nations, an arbitration or the fate of war.³⁶

2. BY JUDICIARY.—The construction of a treaty is the peculiar province of the judiciary; and, except in cases purely political, congress has no constitutional power to settle the rights under it, or to affect titles already granted by the treaty itself.³⁷ Its meaning cannot be controlled by subsequent explanations of some of the senators who may have voted to ratify it.³⁸

B. Construed According to Language Used.—In the construction of a treaty its language must control and cannot be varied by any notion of justice

S. 591, 607, 40 L. Ed. 819; *Stephens v. Cherokee Nation*, 174 U. S. 445, 486, 43 L. Ed. 1041. See the titles CHINESE EXCLUSION ACTS, vol. 3, p. 769; CONSTITUTIONAL LAW, vol. 4, p. 234; STATUTES, ante, p. 62.

Although the authority of congress to do that cannot be questioned, it is the duty of the courts not to construe an act of congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. *Lem Moon Sing v. United States*, 158 U. S. 538, 549, 39 L. Ed. 1082. See, also, *Chew Heong v. United States*, 112 U. S. 536, 28 L. Ed. 770; *United States v. Gue Lim*, 176 U. S. 459, 465, 44 L. Ed. 544.

28. *The Cherokee Tobacco*, 11 Wall. 616, 621, 20 L. Ed. 227; *Thomas v. Gay*, 169 U. S. 264, 271, 42 L. Ed. 740.

29. *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798; *Leighton v. United States*, 161 U. S. 291, 296, 40 L. Ed. 703.

30. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

31. *New Orleans v. De Armas*, 9 Pet. 224, 9 L. Ed. 109; *Pollard v. Kibbe*, 14 Pet. 353, 395, 10 L. Ed. 490; *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71.

32. *Draper v. United States*, 164 U. S.

240, 243, 41 L. Ed. 419. See the title CONSTITUTIONAL LAW, vol. 4, p. 137.

33. *Marks v. United States*, 161 U. S. 297, 301, 40 L. Ed. 706.

34. *Carneal v. Banks*, 10 Wheat. 181, 6 L. Ed. 298. See the title ALIENS, vol. 1, p. 235.

35. See the titles CONSTITUTIONAL LAW, vol. 4, p. 234; INTERPRETATION AND CONSTRUCTION, vol. 7, p. 257; STATUTES, ante, p. 62.

36. *Respublica v. Cobbett*, 3 Dall. 467, 473, 1 L. Ed. 683. See, also, *Lattimer v. Poteet*, 14 Pet. 4, 10 L. Ed. 328.

37. *Jones v. Meehan*, 175 U. S. 1, 32, 44 L. Ed. 49; *Wilson v. Wall*, 6 Wall. 83, 89, 18 L. Ed. 727; *Reichart v. Felps*, 6 Wall. 160, 18 L. Ed. 849; *Smith v. Stevens*, 10 Wall. 321, 327, 19 L. Ed. 933; *Holden v. Joy*, 17 Wall. 211, 247, 21 L. Ed. 523; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547.

38. The action of the senate alone, by a majority, but not two-thirds of a quorum, in the passage of a joint resolution in respect to the intention of the senate in the ratification of a treaty, is not controlling upon its construction. *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. Ed. 138.

or convenience.³⁹ If an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule.⁴⁰ Where no exception is made in terms, none can be made by mere implication or construction.⁴¹

C. Construed According to Intention.—In the construction of a treaty the intention of contracting nations is to be followed,⁴² and such construction given it as to give effect to that intention.⁴³

D. Construed Liberally.—A treaty is to be liberally construed.⁴⁴

E. Construed as Private Contract.—The meaning of a treaty is to be ascertained by the same rules of construction as are applicable to the interpretation of a private contract.⁴⁵

F. Construed as Whole.—In the construction of a treaty the entire instrument is to be considered,⁴⁶ and that construction given it which gives a sensible meaning to all of its provisions.⁴⁷

G. Construed as Prospective or Retrospective.—A treaty is to be construed favorably to prospective and against retrospective operation upon individual rights;⁴⁸ but, in cases of great national concern, this rule does not prevail.⁴⁹

H. Construed with Reference to Justice and Convenience.—The provisions of a treaty are not to be construed as to provide the means for perpetrating and protecting frauds.⁵⁰

I. Construed According to Ordinary Meaning of Terms.—A compact between nations, like those between individuals, is to be interpreted according to the natural, fair and received acceptance of the terms in which it is expressed.⁵¹

39. *The Amiable Isabella*, 6 Wheat. 1, 71, 72, 5 L. Ed. 191; *Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 751, 23 L. Ed. 634; *United States v. Choctaw Nation*, 179 U. S. 494, 533, 45 L. Ed. 291; *Rhode Island v. Massachusetts*, 14 Pet. 210, 277, 10 L. Ed. 423; *Lattimer v. Pooteet*, 14 Pet. 4, 10 L. Ed. 328; *The Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49; *The Phoebe Anne*, 3 Dall. 319, 1 L. Ed. 618. See post, "Treaties with Indians," VIII, M, 4. And as to construction of treaty with France, see the title WAR.

The commissioners appointed by the signatory nations under the treaty with Russia of March 30, 1867, for the transfer of Alaska to the United States, had no power to vary the language of the treaty. *Kinkead v. United States*, 150 U. S. 483, 37 L. Ed. 1152.

40. The stipulation in a treaty that free ships shall make free goods does not imply the converse proposition, that enemy ships shall make enemy goods. *The Ne-reide*, 9 Cranch 388, 3 L. Ed. 769. See the title WAR.

41. *Rhode Island v. Massachusetts*, 12 Pet. 657, 722, 9 L. Ed. 1233; *United States v. Choctaw Nation*, 179 U. S. 494, 535, 45 L. Ed. 291.

42. *United States v. Texas*, 162 U. S. 1, 36, 40 L. Ed. 867; *Chew Heong v. United States*, 112 U. S. 536, 540, 28 L. Ed. 770; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. Ed. 264; *Dorr v. United States*, 195 U. S. 138, 49 L. Ed. 128.

43. *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. Ed. 264; *In re Ross*, 140 U. S. 453, 35 L. Ed. 581.

44. *Shanks v. Dupont*, 3 Pet. 242, 7 L. Ed. 666; *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. Ed. 628; *Ward v. Race Horse*, 163 U. S. 504, 517, 41 L. Ed. 244; *Chew Heong v. United States*, 112 U. S. 536, 540, 549, 28 L. Ed. 770; *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. Ed. 264.

45. *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. Ed. 264; *United States v. Arredondo*, 6 Pet. 691, 710, 8 L. Ed. 547; *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *United States v. D'Auterive*, 10 How. 609, 622, 13 L. Ed. 560. But see ante, "Definition," I; post, "As Law," X, A.

46. *United States v. Texas*, 162 U. S. 1, 36, 40 L. Ed. 867.

47. *Geofroy v. Riggs*, 133 U. S. 258, 270, 33 L. Ed. 642; *In re Ross*, 140 U. S. 453, 35 L. Ed. 581.

48. *The Peggy*, 1 Cranch 103, 2 L. Ed. 49.

The treaty with France of 1853, which places Frenchmen as regards property rights upon the same footing as citizens of the United States, has no effect upon a succession tax on the property of a person who died in 1848, imposed by the laws of Louisiana upon persons not citizens of any state or territory. *Prevost v. Greneaux*, 19 How. 1, 15 L. Ed. 572.

49. *The Peggy*, 1 Cranch 103, 109, 2 L. Ed. 49.

50. *The Amistad*, 15 Pet. 518, 591, 595, 10 L. Ed. 826. See ante, "Construed According to Language Used," VIII, B.

51. *United States v. D'Auterive*, 10 How. 609, 623, 13 L. Ed. 560; *United States v. Reynes*, 9 How. 127, 13 L. Ed. 74; *Davis v. Police Jury*, 9 How. 280, 13

J. Construed with Reference to War and Peace.—Stipulations in treaties, having sole reference to the exercise of the rights of belligerents in the time of war, cannot, upon any reasonable principles of construction, be applied to govern cases exclusively of another nature, and belonging to a state of peace.⁵²

K. Aids to Construction—1. **CONTEMPORANEOUS AND PRACTICAL CONSTRUCTION.**—The contemporaneous and practical construction placed upon a treaty by the governmental officers of the United States is to be considered by the courts.⁵³ Such construction by the officers of the United States is to be followed in its courts in preference to that of the officers of the other contracting nation.⁵⁴

2. **SURROUNDING FACTS AND CIRCUMSTANCES.**—A treaty is to be construed in the light of the facts and circumstances surrounding its making.⁵⁵

3. **CONTRACTING PARTIES AND SUBJECT MATTER.**—A treaty is to be construed with reference to the contracting parties, the subject matter and the persons on whom it is to operate.⁵⁶

4. **OTHER TREATIES.**—In the construction of the provisions of a particular treaty the courts may resort to similar provisions of other treaties.⁵⁷

5. **STATUTES.**—When a statute and a treaty relate to the same subject matter, they are to be construed so as to give effect to both, if that can be done without violating the language of either.⁵⁸

6. **MAPS.**—A map to which the contracting parties refer is to be given the same effect as if it were expressly made a part of a treaty settling a boundary dispute.⁵⁹ But this is not the rule where the map is used as the basis of an agreement, but the treaty leaves the boundary line to be subsequently fixed by representatives of the contracting parties.⁶⁰

L. Construction of Particular Words, Phrases and Clauses—1. **IN GENERAL.**—See elsewhere.⁶¹

L. Ed. 138; *Ware v. Hylton*, 3 Dall. 199, 245, 1 L. Ed. 568.

52. *The Marianna Flora*, 11 Wheat. 1, 49, 6 L. Ed. 405.

53. *Geofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642; *United States v. Lynde*, 11 Wall. 632, 20 L. Ed. 230.

54. *Foster v. Neilson*, 2 Pet. 253, 254, 299, 7 L. Ed. 415; *United States v. Arredondo*, 6 Pet. 691, 711, 8 L. Ed. 547.

55. *In re Ross*, 140 U. S. 453, 35 L. Ed. 581; *Owings v. Norwood*, 5 Cranch 344, 347, 3 L. Ed. 120; *Harden v. Fisher*, 1 Wheat. 300, 4 L. Ed. 96; *Blight v. Rochester*, 7 Wheat. 535, 5 L. Ed. 516; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142. See the title *ALIENS*, vol. 1, p. 237.

56. *United States v. Arredondo*, 6 Pet. 691, 710, 8 L. Ed. 547; *Geofroy v. Riggs*, 133 U. S. 258, 269, 33 L. Ed. 642.

A convention which is operative upon both contracting nations and intended for their mutual protection, is to be interpreted in a spirit of *uberrima fides*. *Tucker v. Alexandroff*, 183 U. S. 424, 437, 46 L. Ed. 264.

The 4th article of the Spanish treaty of 1795, which prohibits the citizens or subjects of the respective contracting parties from taking commissions, etc., to cruise against the other, under the penalty of being considered as pirates, is confined to private armed vessels, and does not extend to public ships. *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

57. *Baldwin v. Franks*, 120 U. S. 678, 703, 30 L. Ed. 766; *Frevall v. Bache*, 14 Pet. 95, 10 L. Ed. 369; *United States v. Arredondo*, 6 Pet. 691, 717, 8 L. Ed. 547.

The treaties with Great Britain of 1783 and 1794 are in *pari materia* and are to be construed together. *Shanks v. Dupont*, 3 Pet. 242, 7 L. Ed. 666.

But the treaty of 1867 with the Ottawa Indians is to be considered as an entirety in its relations to the treaty of 1862. *Wiggan v. Conolly*, 163 U. S. 56, 61, 41 L. Ed. 69. See ante, "Time of Taking Effect," VI.

58. *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386. See the title *STATUTES*, ante, p. 62.

They are to be construed as having the same meaning where there is a mere immaterial difference in their wording. *Frevall v. Bache*, 14 Pet. 95, 10 L. Ed. 369.

59. *United States v. Texas*, 162 U. S. 1, 37, 40 L. Ed. 867.

60. The treaty between the United States and Spain of 1819 was based upon the Melish map, but the reference of the parties to the 100th meridian, was held to mean the 100th meridian as astronomically located and not as located on the Melish map. *United States v. Texas*, 162 U. S. 1, 40 L. Ed. 867.

61. See words and phrases throughout this work, as *GRANT*, vol. 6, p. 578; *PROPERTY*, vol. 9, p. 813; *LAW*, vol. 7, p. 846, etc.

2. WORDS DENOTING TENSE.—In a treaty of cession, the words "shall be" ratified and confirmed, in reference to private titles, are to be construed as in the present tense and to mean "are" ratified and confirmed.⁶²

3. MOST FAVORED NATION CLAUSE.—The treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which the United States has extended to the Hawaiian Islands in exchange for valuable concessions.⁶³ The treaty with the Ottoman Empire of 1862 gives the United States equal commercial rights with other Christian nations.⁶⁴

M. Construction of Particular Treaties—1. TREATIES IN TWO LANGUAGES.—Where a treaty is in the languages of both the contracting nations, and each is declared an original, the one neither controls nor is to be preferred to the other. If the words of the treaty do not convey the same meaning in both languages, extraneous circumstances may be resorted to.⁶⁵

2. BOUNDARY TREATIES.⁶⁶—The United States acquired no title to land within the limits of Alabama by a treaty with Spain settling the boundary between the United States and Florida.⁶⁷

3. TREATIES OF CESSION⁶⁸—a. *Territory Ceded*.—A treaty of cession must be construed as attempting to cede only such territory as is in the power of the ceding nation to cede.⁶⁹ It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain, by the treaty of peace. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limits, were as much theirs, at the Declaration of Independence, as at this hour.⁷⁰ The United States acquired the territory to the west of the Perdido river under the treaty of cession of Louisiana and not under the treaty of cession of Florida.⁷¹

b. *Rights of Nation*.—Under the treaty of 1783 with Great Britain, the United States succeeded to all the rights, in that part of old Canada which

"Laid-off."—See the title INDIANS, vol. 6, p. 940.

"Forgery."—See the title FORGERY AND COUNTERFEITING, vol. 6, p. 381.

62. *United States v. Wiggins*, 14 Pet. 334, 349, 10 L. Ed. 481; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547.

63. *Bartram v. Robertson*, 122 U. S. 116, 30 L. Ed. 1118; *Whitney v. Robertson*, 124 U. S. 190, 31 L. Ed. 386.

64. *Dainese v. Hale*, 91 U. S. 13, 23 L. Ed. 190.

65. *United States v. Arredondo*, 6 Pet. 691, 737, 8 L. Ed. 547; *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415; *United States v. Percheman*, 7 Pet. 51, 88, 8 L. Ed. 604.

66. See the titles BOUNDARIES, vol. 3, p. 474; CONSTITUTIONAL LAW, vol. 4, p. 96.

67. The treaty construed in this case was that of October 27, 1795. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Hickey v. Stewart*, 3 How. 750, 11 L. Ed. 814; *United States v. King*, 3 How. 773, 787, 11 L. Ed. 824; *Robinson v. Minor*, 10 How. 627, 644, 13 L. Ed. 568; *La Roche v. Jones*, 9 How. 155, 170, 13 L. Ed. 85.

68. See the titles CONSTITUTIONAL LAW, vol. 4, p. 96; PUBLIC LANDS, vol. 10, p. 52. And see ante, "Boundary Treaties," VIII, M, 2; post, "Of Treaties of Cession," X, D.

69. Great Britain could not by the treaty signed at San Lorenzo el Real, on the 27th of October, 1795, without a breach of faith, cede to Spain what she had acknowledged to be the territory of the United States; no general words ought to be so construed. *Henderson v. Poindexter*, 12 Wheat. 530, 535, 6 L. Ed. 718.

70. *Harcourt v. Gaillard*, 12 Wheat. 523, 527, 6 L. Ed. 716.

71. *Foster v. Neilson*, 2 Pet. 253, 254, 7 L. Ed. 415; *Garcia v. Lee*, 12 Pet. 511, 9 L. Ed. 1176; *Pollard v. Files*, 2 How. 591, 11 L. Ed. 391.

By the treaty of cession with Louisiana, made with France April 30, 1803, the United States acquired the territory to the west of the Perdido River although the Spanish government kept possession of it under claim of sovereignty until 1810, when the United States took forcible possession. *United States v. Lynde*, 11 Wall. 632, 20 L. Ed. 230.

The treaty of October 27, 1795, between the United States and Spain was not a treaty of cession but a settlement of a boundary of dispute. Under it the United States obtained no cession of the territory constituting the state of Alabama. *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547.

now forms the state of Michigan, that existed in the King of France prior to its conquest from the French by the British.⁷² By the cession of Alaska the United States government obtained ownership of buildings previously erected on land belonging to the Russian government.⁷³

c. Rights of Individuals—(1) *As to Grantor Nation*.—See elsewhere.⁷⁴

(2) *As to Grantee Nation*.—In a treaty ceding territory it is usual to stipulate for the protection of the property of the inhabitants of such territory.⁷⁵ Such a provision is to be construed as affording to the property as much protection under the laws of a republican form of government as were previously afforded under those of a monarchy.⁷⁶ Under the treaties of cession of Florida⁷⁷ and of Louisiana, every species of property was protected.⁷⁸ A similar provision is found in the treaty of cession with Mexico,⁷⁹ but the provision is inapplicable to persons, who, previous to the Revolution in Texas, had been citizens of Mexico, and who, by that revolution, had been separated by it.⁸⁰ Such provision is merely declaratory of a well settled principle of international law.⁸¹

4. TREATIES WITH INDIANS.—A treaty between the United States and an Indian tribe is not to be construed according to its technical and critical sense, but in the sense that it is understood by an unlettered people.⁸² But no con-

72. Among these rights, with that of dealing with the seigniorial estate of lands granted out as seigniories by the said king, after a forfeiture had occurred for nonfulfillment of the conditions of the fief. *United States v. Repentigny*, 5 Wall. 211, 18 L. Ed. 627.

73. In 1845 the Russian American Company erected a warehouse at its own expense in Sitka on land belonging to the Russian government. The warehouse was the property of the Russian government. By the treaty of cession of Alaska of March 30, 1867, it was transferred to the United States government, and the company which had erected it had no power to transfer it. *Kinhead v. United States*, 150 U. S. 483, 37 L. Ed. 1152.

74. See the title INTERNATIONAL LAW, vol. 7, p. 251.

75. *Henderson v. Poindexter*, 12 Wheat. 530, 6 L. Ed. 718; *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *United States v. Ritchie*, 17 How. 525, 15 L. Ed. 236; *United States v. Chaves*, 159 U. S. 452, 457, 40 L. Ed. 215; *United States v. Percheman*, 7 Pet. 51, 86, 8 L. Ed. 604.

76. *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *United States v. Kingsly*, 12 Pet. 476, 9 L. Ed. 1163.

77. *United States v. Percheman*, 7 Pet. 51, 88, 8 L. Ed. 604.

78. *Choteau v. Marguerite*, 12 Pet. 507, 9 L. Ed. 1174; *Smith v. United States*, 10 Pet. 326, 9 L. Ed. 442; *Delassus v. United States*, 9 Pet. 117, 9 L. Ed. 71; *Strother v. Lucas*, 12 Pet. 410, 436, 9 L. Ed. 1137; *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938. See PROPERTY, vol. 9, p. 813.

79. The right of property, to which the 8th section of the treaty with the republic of Mexico of the 2d of February, 1848 (9 Stats. at Large, 923), called the treaty of Guadalupe Hidalgo, was designed to afford a guarantee, extended to property

of every kind which, at its date, belonged to Mexican citizens ("now belonging to Mexicans") not established within the territories then ceded to the United States. *McKinney v. Saviego*, 18 How. 235, 240, 15 L. Ed. 365. See *United States v. Moreno*, 1 Wall. 400, 17 L. Ed. 633; *Townsend v. Greeley*, 5 Wall. 326, 18 L. Ed. 547; *Beard v. Federy*, 3 Wall. 478, 18 L. Ed. 88; *Knight v. United States Land Ass'n*, 142 U. S. 161, 184, 35 L. Ed. 974; *United States v. Chaves*, 159 U. S. 452, 40 L. Ed. 215.

The same provision is found in the Gadsden treaty. *Astiazaran v. Santa Rita*, etc., Min. Co., 148 U. S. 80, 81, 37 L. Ed. 376.

80. *McKinney v. Saviego*, 18 How. 235, 240, 15 L. Ed. 365.

81. *Soulard v. United States*, 4 Pet. 511, 7 L. Ed. 938; *United States v. Percheman*, 7 Pet. 51, 87, 8 L. Ed. 604; *Strother v. Lucas*, 12 Pet. 410, 436, 9 L. Ed. 1137; *United States v. Repentigny*, 5 Wall. 211, 260, 18 L. Ed. 627; *Knight v. United States Land Ass'n*, 142 U. S. 161, 184, 35 L. Ed. 974. See the title INTERNATIONAL LAW, vol. 7, p. 248.

82. *The Kansas Indians*, 5 Wall. 737, 760, 18 L. Ed. 667; *Choctaw Nation v. United States*, 119 U. S. 1, 27, 28, 30 L. Ed. 306; *Jones v. Meehan*, 175 U. S. 1, 11, 12, 44 L. Ed. 49; *United States v. Choctaw Nation*, 179 U. S. 494, 531, 532, 45 L. Ed. 291; *Minnesota v. Hitchcock*, 185 U. S. 373, 396, 46 L. Ed. 954; *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 140, 48 L. Ed. 646; *Matter of Heff*, 197 U. S. 488, 499, 49 L. Ed. 848; *United States v. Winans*, 198 U. S. 371, 380, 381, 49 L. Ed. 1089; *United States v. Kagama*, 118 U. S. 375, 383, 384, 30 L. Ed. 228; *Worcester v. Georgia*, 6 Pet. 515, 551, 582, 8 L. Ed. 483; *Cherokee Nation v. Georgia*, 5 Pet. 1, 8 L. Ed. 25; *Lattimer v.*

struction can be given such a treaty which is inconsistent with the clear import of its words.⁸³

5. **TREATIES FOR INDEMNITY.**—The indemnity treaty with France of 1867 was construed to indemnify only French citizens, not citizens of the United States.^{83a}

N. Effect of Construction.—The construction given a treaty by a state court is binding on the federal courts, where it has become a rule of property in the state.⁸⁴

IX. Enforcement.

A. Executory Provisions.—To the extent that a treaty operates as a compact between the signatory nations, it depends for its enforcement on the good faith and honor of such nations,⁸⁵ and to carry into effect some of its provisions may require legislative action.⁸⁶ The constitution does not in positive terms confer power upon congress to make laws to carry the stipulations of treaties into effect; but it has been supposed to result from the duty of the national government to fulfill all the obligations of treaties.⁸⁷ For any infractions of its stipulations importing a contract, the courts can afford no redress except as provided by such legislation.⁸⁸ Its provisions are to be en-

Poteet, 14 Pet. 4, 10 L. Ed. 328; United States v. 43 Gallons of Whiskey, 93 U. S. 188, 193, 23 L. Ed. 846.

"The language used in treaties with the Indians shall never be construed to their prejudice." Worcester v. Georgia, 6 Pet. 515, 582, 8 L. Ed. 483.

Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence, a provision in an Indian treaty which exempts their lands from "levy, sale, and forfeiture," is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but is to be extended to levy and sale by county officers also, for nonpayment of taxes. The Kansas Indians, 5 Wall. 737, 18 L. Ed. 667.

The sense in which a treaty is understood by an Indian tribe is to be gathered from the circumstances. United States v. Winans, 198 U. S. 371, 49 L. Ed. 1089.

83. The treaty with the Choctaw and Chickasaw nations of 1866 cannot be varied by construction from the clear import of its express provisions in order to extend to them privileges equal to those extended to the Seminoles and Creek Nations. United States v. Choctaw Nation, 179 U. S. 494, 541, 45 L. Ed. 291. See ante, "Construed According to Language Used," VIII, A.

83a. A claim for injury to the property of a citizen of France in Louisiana, by reason of its being occupied by the United States army during the Civil War, was refused under the act of February 21, 1867, 14 Stat. 397, c. 57. But after his death it was allowed to his executor by commissioners under the claims convention with France. Two of the legatees, citizens of France, claimed the whole of such allowance, while other legatees, citizens of the United States, contended that they had the right to participate in the

distribution. Evidence was admitted to show that only the claims of the French legatees were before the commission. It was held, that the French legatees were entitled to the whole award, as it would be a remarkable thing for the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers. Burthe v. Denis, 133 U. S. 514, 520, 33 L. Ed. 768.

84. See the title COURTS, vol. 4, p. 1121.

85. Baldwin v. Franks, 120 U. S. 678, 702, 30 L. Ed. 766; Tucker v. Alexandroff, 183 U. S. 424, 437, 46 L. Ed. 264; Chew Heong v. United States, 112 U. S. 536, 540, 28 L. Ed. 770; Kinkead v. United States, 150 U. S. 483, 511, 37 L. Ed. 1152; The Marianna Flora, 11 Wheat. 1, 49, 6 L. Ed. 405; Frelinghuysen v. Key, 110 U. S. 63, 73, 28 L. Ed. 71; Head Money Cases, 112 U. S. 580, 28 L. Ed. 798. See the title CONSTITUTIONAL LAW, vol. 4, p. 234.

86. Baldwin v. Franks, 120 U. S. 678, 30 L. Ed. 766; United States v. Arredondo, 6 Pet. 691, 8 L. Ed. 547; Foster v. Neilson, 2 Pet. 253, 314, 7 L. Ed. 415; United States v. Rauscher, 119 U. S. 407, 418, 30 L. Ed. 425.

Congress has power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the president by and with the advice and consent of the senate to insert in a treaty with a foreign power. Neely v. Henkel, No. 1, 180 U. S. 109, 121, 45 L. Ed. 448.

87. Prigg v. Pennsylvania, 16 Pet. 539, 619, 10 L. Ed. 1060.

88. Baldwin v. Franks, 120 U. S. 678, 30 L. Ed. 766; The Cherokee Tobacco, 11 Wall. 616, 20 L. Ed. 227; Head Money Cases, 112 U. S. 580, 598, 28 L. Ed. 798; Whitney v. Robertson, 124 U. S. 190, 195,

forced by such means as may be deemed advisable by the executive departments of the two nations.⁸⁹

B. Executed Provisions—1. IN GENERAL.—The provisions of a treaty which confer rights upon individual citizens, may be enforced in a court of justice in the same manner as the provisions of a statute.⁹⁰

2. IN STATE COURT.—The provisions of the treaty by which Louisiana was ceded to the United States, and in which was a guarantee of the property of persons residing at the time of the cession within the territory of Louisiana, may be enforced in the courts of the state of Missouri.⁹¹ But no equitable and inchoate title to land in Missouri, arising under the treaty with France, can be tried in the state court.⁹²

X. Operation and Effect.

A. As Law.—A treaty that operates of itself without the aid of legislation is equivalent to an act of congress, and while in force constitutes a part of the supreme law of the United States.⁹³ It overrules all conflicting state laws and constitutions.⁹⁴ A treaty is placed on the same footing with and of like obligation to an act of congress. Neither has superior sanctity to the other. Both are declared by the constitution to be the supreme law of the land.⁹⁵

31 L. Ed. 386; *Frelinghuysen v. Key*, 110 U. S. 63, 28 L. Ed. 71; *Boynton v. Blaine*, 139 U. S. 306, 35 L. Ed. 183.

"This court * * * has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard." *Botiller v. Dominguez*, 130 U. S. 238, 247, 32 L. Ed. 926.

Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in this rule. *Terlinden v. Ames*, 184 U. S. 270, 288, 46 L. Ed. 534. See the title EX-TRADITION, vol. 6, p. 217.

^{89.} *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766; *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386; *Kelly v. Hedden*, 124 U. S. 196, 31 L. Ed. 389.

"Its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war." *Head Money Cases*, 112 U. S. 580, 593, 28 L. Ed. 798, quoted in *In re Cooper*, 143 U. S. 472, 501, 36 L. Ed. 232.

^{90.} *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798; *In re Cooper*, 143 U. S. 472, 501, 36 L. Ed. 232; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. Ed. 425; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415; *Baldwin v. Franks*, 120 U. S. 678, 702, 30 L. Ed. 766; *Dainese v. Hale*, 91 U. S. 13, 18, 23 L. Ed. 190; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 196, 23 L. Ed. 846.

"It is * * * to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. Ed. 425.

"A treaty may also contain provisions which confer certain rights upon the citi-

zens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens." *Head Money Cases*, 112 U. S. 580, 598, 28 L. Ed. 798, quoted in *In re Cooper*, 143 U. S. 472, 501, 36 L. Ed. 232.

^{91.} *Choteau v. Marguerite*, 12 Pet. 507, 9 L. Ed. 1174.

^{92.} *Burgess v. Gray*, 16 How. 48, 14 L. Ed. 839.

^{93.} See the title CONSTITUTIONAL LAW, vol. 4, p. 64.

An Indian treaty, after it has been executed and ratified by the proper authorities of the government, becomes the supreme law of the land. *Fellows v. Blacksmith*, 19 How. 366, 372, 15 L. Ed. 684; *Cherokee Nation v. Georgia*, 5 Pet. 1, 44, 8 L. Ed. 25; *The Kansas Indians*, 5 Wall. 737, 18 L. Ed. 667; *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483; *Chirac v. Chirac*, 2 Wheat. 259, 4 L. Ed. 234.

^{94.} See the title CONSTITUTIONAL LAW, vol. 4, p. 214.

^{95.} *Whitney v. Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386; *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798.

"If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war." *Head Money Cases*, 112 U. S. 580, 599, 28 L. Ed. 798.

B. As Grant.—See elsewhere.⁹⁶

C. Of Treaties with Indians.—Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory than treaties with foreign nations. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them.⁹⁷

D. Of Treaties of Cession.—See elsewhere.⁹⁸

E. On Rights of Signatory Nation.—An obligation of a treaty is not the less imperative and binding, because entered into by the government.⁹⁹

F. On Rights of Ally Nation.—An agreement between one of several allied nations and their common enemy, if within the purposes of the alliance, binds the other allies.¹

G. On Rights of State of Union.—A treaty between the United States and a foreign country cannot divest rights of property already vested in a state.²

H. On Succeeding Sovereigns.—A treaty with a sovereign as such enures to his successors in the government of the country.³

I. On Property Rights.—See elsewhere.⁴

J. On Extraterritorial Jurisdiction.—See elsewhere.⁵

K. Territorial Extent of.—The treaty of Guadalupe Hidalgo with Mexico has no relation to property included within the state of Texas.⁶

L. Effect of Treaty of Peace.—See elsewhere.⁷

XI. Pleading Treaties.

A treaty need not be specially pleaded.⁸

96. See the titles INDIANS, vol. 6, p. 906; PUBLIC LANDS, vol. 10, pp. 53, 268.

97. The Cherokee Tobacco, 11 Wall. 616, 621, 20 L. Ed. 227. See ante, "As Law," X, A.

98. See ante, "Treaties of Cession," VIII, M, 3. And see the titles INTERNATIONAL LAW, vol. 7, p. 246; PUBLIC LANDS, vol. 10, pp. 50, 298, 356.

99. Crews v. Burcham, 1 Black 352, 356, 17 L. Ed. 91.

1. The stipulations of capitulation of a British ship made between the United States and Great Britain were binding upon France, the ally of the United States. The Resolution, 2 Dall. 19, 24, 1 L. Ed. 271.

2. The laws of Louisiana impose a tax of ten per cent on the value of all property inherited in that state by any person not domiciliated there, and not being a citizen of any state or territory of the United States. In 1853, a treaty was made between the United States and France, by which Frenchmen were

placed, as regards property, upon the same footing as citizens of the United States, in all the states of the Union whose laws permit it. This treaty has no effect upon the succession of a person who died in 1848. Prevost v. Greneaux, 19 How. 1, 15 L. Ed. 572.

3. "If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding." The Sapphire, 11 Wall. 164, 168, 20 L. Ed. 127.

4. See the titles ALIENS, vol. 1, p. 235; CONSTITUTIONAL LAW, vol. 4, p. 415.

5. See the titles ADMIRALTY, vol. 1, p. 131; INTERNATIONAL LAW, vol. 7, p. 244.

6. Basse v. Brownsville, 154 U. S. 610, 22 L. Ed. 420.

7. See the titles PRIZE, vol. 9, p. 750; WAR.

8. Hickie v. Starke, 1 Pet. 94, 98, 7 L. Ed. 67.

TREES AND TIMBER.

CROSS REFERENCES.

See the titles **LICENSE (REAL PROPERTY)**, vol. 7, p. 866; **STATUTES**, ante, p. 62; **TRESPASS**; **WASTE**.

As to jurisdiction of suits by assignees upon claims for trespass for cutting and removing timber, see the title **COURTS**, vol. 4, p. 970. As to the recovery of nominal damages for unlawfully cutting of timber on public lands, see the titles **DAMAGES**, vol. 5, p. 160; **PUBLIC LANDS**, vol. 10, p. 57. As to discharge of guarantor by fraud and false representations in contract for sale of timber lands see the title **GUARANTY**, vol. 6, p. 581. As to timber rights of Indians, see the title **INDIANS**, vol. 6, p. 927. As to tenant's liability for destroying trees, see the title **LANDLORD AND TENANT**, vol. 7, p. 834. As to cutting timber for military purposes, see the title **MILITARY LAW**, vol. 8, p. 344. As to cutting timber for mining purposes, see the title **MINES AND MINERALS**, vol. 8, p. 404. As to timber being subject to mortgage, see the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 469. As to liability for cutting timber on public lands, see the title **PUBLIC LANDS**, vol. 10, pp. 54, 58. As to maintaining replevin for timber served from realty, see the title **REPLEVIN**, vol. 10, p. 719. As to trees in highway, see the title **STREETS AND HIGHWAYS**, ante, p. 259. As to maintaining trover for timber wrongfully cut and converted, see, generally, the title **TROVER AND CONVERSION**.

Standing timber is a part of the realty and goes with its title or right of possession. When severed from the soil, its character as realty is changed; it has become personalty, but the title to it continues as before.¹ A peaceful possession under an equitable title is sufficient to maintain an action of trespass for cutting plaintiff's trees.² In an action of trespass for timber felled and carried away, the court held if plaintiff was entitled to recover at all he was entitled to recover damages for all cutting and carrying away of timber from the disputed premises up to the time he actually sold the property.³

Revocation of License to Cut Trees and Timber.—By the conveyance of lands, a license to cut trees and timber therefrom is necessarily terminated.⁴

Injunction to Protect Timber.—Where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the cutting down of timber, an injunction will be issued to prevent it, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title.⁵

1. Trees severed from land become personalty.—*Northern Pac. Railroad v. Paine*, 119 U. S. 561, 564, 30 L. Ed. 513; *Hutchins v. King*, 68 U. S. 53, 60, 17 L. Ed. 544; *United States v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *Wooden-Ware Co. v. United States*, 106 U. S. 432, 27 L. Ed. 230; *United States v. Loughrey*, 172 U. S. 206, 215, 43 L. Ed. 420; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551.

2. Peaceful possession under an equitable title is sufficient to maintain trespass.—Where plaintiff actually entered upon property and enjoyed for a length of time a peaceable possession, improving it, by first erecting a cabin, then a house and afterwards a barn and by clearing and cultivating two acres of meadow, forty acres of arable land, the court held the proof of these facts sufficient to maintain an action of trespass;

for the plaintiff had not only an actual but a legal possession; and on payment of the purchase money to the former proprietaries, his legal title to the premises would have been perfected. *McCurdy v. Potts*, 2 Dallas 97, 98, 1 L. Ed. 305. See, generally, the title **TRESPASS**.

3. Damages.—*Schraeder Min., etc., Co. v. Packer*, 129 U. S. 688, 700, 32 L. Ed. 760.

4. License to cut trees terminated by conveyance of land.—*Northern Pac. Railroad v. Paine*, 119 U. S. 561, 30 L. Ed. 513. See, generally, the title **LICENSE (REAL PROPERTY)**, vol. 7, p. 866.

5. An injunction may be issued to prevent the cutting down of timber.—*Erhardt v. Boaro*, 113 U. S. 537, 539, 28 L. Ed. 113. See the titles **INJUNCTIONS**, vol. 6, p. 1022; **WASTE**.

TRESPASS.

BY GORDON NELSON.

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See the titles ANIMALS, vol. 1, p. 316; ASSAULT AND BATTERY, vol. 2, p. 546; FALSE IMPRISONMENT, vol. 6, p. 242; MALICIOUS PROSECUTION, vol. 7, p. 1080; NEGLIGENCE, vol. 8, p. 873; NUISANCES, vol. 8, p. 933; TRESPASS TO TRY TITLE; TROVER AND CONVERSION.

I. Definitions.

Trespass, from the very nature of the term, transgressio, imports a going beyond what is right.¹

II. Distinctions.²

Nice distinctions were formerly drawn between actions of trespass and case, but it was never supposed that an error in that particular affected the jurisdiction of the court, or could be drawn in question collaterally.³ The distinction between trespass and disseisin may be modified as properly by statute as it may be established by common law.⁴ An action to recover for the value of land taken by a railroad for its right of way, and for damages to adjacent lands, houses, fences and property, incident to the taking is in the nature of an action of trespass on land.⁵

III. Different Writs of Trespass.⁶

An action for recovery of damages for a negligent act on the part of the defendant, committed on the defendant's own land, and causing in its results

1. *Respublica v. Sparhawk*, 1 Dall. 357, 362, 1 L. Ed. 174.

2. See the title TROVER AND CONVERSION. As to distinction from ouster, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 961, 962.

3. *Insley v. United States*, 150 U. S. 512, 515, 37 L. Ed. 1163.

4. *Soper v. Lawrence Co. Bros.*, 201 U.

S. 359, 367, 50 L. Ed. 788. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 911, 912.

5. *Huling v. Kaw Val. R., etc., Co.*, 130 U. S. 559, 32 L. Ed. 1045. See the title EMINENT DOMAIN, vol. 5, p. 792.

6. See post, "The Action of Trespass on the Case," X.

the burning up and destruction of certain wood of the plaintiff is more accurately and properly described as an action of trespass on the case than of trespass de bonis asportatis.⁷ The *latitat* and *clausum fregit* are both writs of trespass, yet, by the course of the courts of king's bench and common pleas, the plaintiff may ground upon them declarations in any personal actions.⁸

IV. Constituent Elements of Trespass.

A. Intent.—An intent to do damage is not a necessary ingredient of an action of trespass.⁹ Until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass, cannot be made a trespasser for so passing; although the wharf or platform is now no longer used for the purpose of passage.¹⁰

B. Force.—In an action for a marine trespass force and immediate injury are usually essential elements; but, in some cases, the action lies where the only force is that of the winds and tides.¹¹

V. Trespass to Property.

A. Personal Property—1. **INTEREST SUBJECT TO TRESPASS**—a. *In General.*—A count in trespass de bonis asportatis for the taking and detaining of personal property, can only be supported upon the theory that plaintiff was either the owner of the property, or entitled of right to its possession at the time of the trespass complained of.¹²

b. *Interest of Consignee of Goods.*—Where goods are shipped to consignees, under an agreement that they shall sell them to pay a draft drawn against them, and, if there is any surplus remaining after this is done, to apply it in liquidation of the advances previously made for the consignors, the title to and right of property in the goods becomes vested in the consignees as soon as they were delivered to the carrier and the consignees can maintain an action of

7. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 373, 40 L. Ed. 1002.

8. But when the declaration is in assumpsit (for instance), a writ of trespass, issued within the six years, could not be presumed to be a writ that issued in that cause, unless it was further shown in the replication that it was taken out with an intention to declare in that action; and as evidence of that intention, that the continuances were entered, from the time of issuing it, to filing the bill or declaration. *Schlusser v. Leshner*, 1 Dall. 411, 412, 1 L. Ed. 200.

9. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 343, 344, 430, 12 L. Ed. 465.

10. *Railroad Co. v. Hanning*, 15 Wall. 649, 659, 21 L. Ed. 220.

11. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 343, 344, 430, 12 L. Ed. 465. See the titles *COLLISION*, vol. 3, p. 876; *MASTERS OF VESSELS*, vol. 8, p. 310; *SHIPS AND SHIPPING*, vol. 10, p. 1164.

12. *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 44, 38 L. Ed. 627; *United States v. Loughrey*, 172 U. S. 206, 212, 43 L. Ed. 420. See the title *TROVER AND CONVERSION*.

The doctrine is quite clearly established that an action of trespass de bonis as-

portatis does not technically involve the question of title. It relates to the possession only of personal property, and it is brought to recover for the injury to that possession. In such action it is held that an allegation of the ownership of the property is not material and that it need not be made, or if made that it need not be proved. Proof of possession simply is sufficient upon the theory that possession is *prima facie* evidence of some kind of rightful ownership or title. Therefore, it is held that proof of title to property in a stranger with whom the defendant does not connect himself in any way is no defense to the action as the injury is to the possession. Trespass de bonis asportatis assumes a taking of the property by the defendant out of the possession of the plaintiff, and if the title be in a stranger with which the defendant does not connect himself, that fact is no answer to the cause of action. The possession of the plaintiff is enough under such circumstances against a wrongdoer. If the defendant cannot connect himself with the title in the third person, he is as to the plaintiff a wrongdoer, having no right to disturb the possession of the plaintiff. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 372, 40 L. Ed. 1002. See the title *PUBLIC LANDS*, vol. 10, p. 54, et seq.

trespass against creditors of the consignors who levy a writ of attachment against the goods and take and sell them.¹³

c. *Interest of Importer of Goods Held for Duty*.—Property of an importer taken by the United States to enforce a lien for duties is not in the exclusive possession of the United States but in a concurrent and mixed possession for the joint benefit of both parties. It leaves the importer's right to the immediate possession perfect, the moment the lien for the duties is discharged; and if he tenders the duties, or the proper security therefor, and the collector refuses the delivery of the goods, it is a tortious conversion of the property, for which an action of trespass or trover will lie.¹⁴

2. ACTS AMOUNTING TO TRESPASS.—See elsewhere.¹⁵

B. Real Property—1. PROPERTY SUBJECT TO TRESPASS.—See elsewhere.¹⁶

2. INTEREST SUBJECT TO TRESPASS—a. *Legal Title*.—Where the peaceable possession of property is disturbed by such means as constitute a breach of the peace, if, in the employment of force and violence, personal injury arises therefrom to the person or persons thus in peaceable possession, the party using such unnecessary force and violence is liable in damages, without reference to the question of legal title or right of possession.¹⁷ In an action of trespass under the statute of Iowa which makes an occupant of land, who, under color of title thereto, and in good faith, has made valuable improvements thereon, the owner of the improvements, the question as to the ownership of the land is immaterial.¹⁸

b. *Equitable Title*.—Possession under an equitable title is sufficient to maintain trespass.¹⁹

c. *Possession*.—In trespass *quare clausum fregit*, actual possession of the land by the plaintiff is sufficient evidence of title to authorize a recovery against a mere trespasser.²⁰

d. *Time of Existence of Interest*.—A person having no right to the possession

13. *Halliday v. Hamilton*, 11 Wall. 560, 20 L. Ed. 214.

14. *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392.

15. See post, "Process," VII, B, 3, d.

16. As to trespass upon land of the United States, see the title PUBLIC LANDS, vol. 10, pp. 53, 54.

17. *Denver, etc., Railway v. Harris*, 122 U. S. 597, 607, 30 L. Ed. 1146. See, also, *Iron Mountain, etc., Railroad v. Johnson*, 119 U. S. 608, 611, 30 L. Ed. 504.

18. If, therefore, the title to the land had been shown to be in the defendants, the proof would not have affected the right of the plaintiff to recover compensation for willful or negligent destruction of the buildings and lumber. Nor could it have changed the degree of prudence and care which the defendants were bound to exercise in order to guard against injury to that property. The plaintiff is not to be regarded as a mere trespasser, wantonly thrusting himself or his property in the way of danger,—a trespasser to whom the defendants owed a less degree of caution than would have been due if he had been the undisputed owner of the fee simple of the land on which the mill stood. *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 469, 471, 24 L. Ed. 256.

19. In the year 1767, Hugh McCurdy, the plaintiff, having obtained a location

for 200 acres, desired that a survey might be made by the proper officer; who, accordingly, surveyed the tract in question, amounting to 157 acres. On this tract, the plaintiff actually entered, and enjoyed, for a length of time, a peaceable possession. He also improved it, by first erecting a cabin, then a house; and afterwards a barn; and by clearing and cultivating two acres of meadow, forty acres of arable land, and an orchard with 40 or 50 apple trees in it. The proof of these facts is certainly sufficient to maintain an action of trespass; for the plaintiff had not only an actual, but a legal possession; and on payment of the purchase money to the former proprietaries, his legal title to the premises would have been perfected. *McCurdy v. Potts*, 2 Dall. 98, 1 L. Ed. 305.

20. *Christy v. Pridgeon*, 4 Wall. 196, 202, 18 L. Ed. 322; *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Campbell v. Rankin*, 99 U. S. 261, 262, 25 L. Ed. 435; *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. Ed. 735; *Glacier Mountain Silver Min. Co. v. Willis*, 127 U. S. 471, 481, 32 L. Ed. 172; *Haws v. Victoria Cooper Min. Co.*, 160 U. S. 303, 317, 40 L. Ed. 436. See the titles EJECTMENT, vol. 5, p. 699, et seq.; EVIDENCE, vol. 5, p. 1031.

In trespass *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor, prior to his eviction, is *prima facie* evidence of

of land at the time of the commission of a trespass cannot recover damages therefor.²¹ In an action brought to recover the value of timber cut by trespassers from indemnity lands selected by the agent of certain railroad companies, intermediate to the application for selection and the patenting of the lands, to permit a recovery, it was held that the title evidenced by the patent related back at least to the date of the application for selection.²²

e. *Interests of Particular Persons*—(1) *Agents*.—Where a landowner entrusts another with the possession of his lands, either by lease, by contract to sell, or otherwise, the right of action for trespass committed during such tenancy belongs to the latter, and except under special circumstances an action for a trespass, such as the cutting of timber, will not lie in favor of the landowner.²³

(2) *Assignees*.—A deed of land does not carry with it a right of action for prior trespasses. Such right of action is now assignable by the statutes of most of the states, but it only passes with a conveyance of the property itself where the language is clear and explicit to that effect.²⁴

(3) *Disseisees*.—By the ancient law, where there was an entire disseisin, the estate was deemed out of the disseisee for the time being, and no intrusion upon the land was a trespass against him; and, therefore, a grantee of the disseisor, or a second disseisor, was not responsible to the true owner at all, who had to look at his immediate disseisor for damages in an assize. But the modern action for mesne profits only lies against the tenant in possession who is cast in an action of ejectment; and where no ejectment has been brought the actual trespasser on the land is the person amendable to an action of trespass quare clausum fregit, or assumpsit for use and occupation, where the trespass is waived.²⁵

(4) *Landlords and Tenants*.—See elsewhere.²⁶

(5) *Trustees*.—See elsewhere.²⁷

3. ACTS AMOUNTING TO TRESPASS—a. *Cutting Timber*.—An action of trespass quare clausum fregit can be maintained to recover for timber felled and carried away.²⁸

b. *Taking Ore*.—See elsewhere.²⁹

c. *Taking Gravel*.—An action of trespass may be maintained for the taking of gravel from the plaintiff's land.³⁰

d. *Permitting Animals to Stray*.—See elsewhere.³¹

title, on which he can recover against a mere trespasser. *Burt v. Panjaud*, 99 U. S. 180, 25 L. Ed. 451.

21. In this case the United States, having no title to the lands at the time of the cutting of timber and no right to the possession of the timber, are in no position to maintain suit. *United States v. Loughrey*, 172 U. S. 206, 211, 43 L. Ed. 420.

A person whose interest in the land did not exist at the time of a trespass made before eminent domain proceedings commenced cannot entertain an action. *Searl v. School District*, No. 2, 133 U. S. 553, 33 L. Ed. 740, citing *Secombe v. Railroad Co.*, 23 Wall. 108, 23 L. Ed. 67.

22. *United States v. Anderson*, 194 U. S. 394, 400, 48 L. Ed. 1035. See the title PUBLIC LANDS, vol. 10, p. 123.

23. *United States v. Loughrey*, 172 U. S. 206, 212, 43 L. Ed. 420.

24. *United States v. Loughrey*, 172 U. S. 206, 211, 43 L. Ed. 420. See, generally, the title ASSIGNMENTS, vol. 2, p. 549.

Where there was a claim for damages caused to land by the construction of a

canal, and where the land had been subsequently conveyed to a third person, it was held by the supreme court of Pennsylvania that such purchaser was not entitled to recover. *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 10, 39 L. Ed. 873. See the title ESTOPPEL, vol. 5, pp. 959, 960.

25. *New Orleans v. Gaines*, 131 U. S. 191, 210, 33 L. Ed. 99. See the title EJECTMENT, vol. 5, pp. 717, 718.

26. See the title LANDLORD AND TENANT, vol. 7, pp. 835, 836.

27. See the title TRUSTS AND TRUSTEES.

28. *Schraeder Min., etc., Co. v. Packer*, 129 U. S. 688, 689, 32 L. Ed. 760. See the titles INDIANS, vol. 6, p. 927, et seq.; MILITARY LAW, vol. 8, p. 344; PUBLIC LANDS, vol. 10, pp. 54, 208, 209; TREES AND TIMBER, ante, p. 648.

29. See the title MINES AND MINERALS, vol. 8, p. 411.

30. *District of Columbia v. Robinson*, 180 U. S. 92, 45 L. Ed. 440.

31. See the titles ANIMALS, vol. 1, p. 320; FENCES, vol. 6, p. 272.

VI. Trespass to Persons.

See elsewhere.³²

VII. Rights and Liabilities of Trespassers.

A. Rights—1. AS TO ACQUISITION OF PROPERTY.—As a general rule no one can initiate a right by means of a trespass.³³

2. AS TO PROTECTION FROM INJURY.³⁴—It is said the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.³⁵ A railroad company in the discharge of its duties, and in the exercise of its right to protect its property from injury to which it is exposed by the unlawful act or neglect of another, is bound to use ordinary care to avoid injury even to a trespasser.³⁶ Where the plaintiff was injured by the spring guns set in the defendant's grounds, it was held that, although the plaintiff was a trespasser, the defendant was liable.³⁷ The fact that a child was a trespasser at the time he was injured does not seem to be a defense to an action to recover for such injury.³⁸

B. Liabilities—1. PERSONS LIABLE—*a. Sureties*.—The taking by the marshal upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.³⁹

b. Persons Suing Out Attachment.—The effect of giving an indemnity bond by the plaintiffs in an attachment suit is to make them principals in the transaction, and so far as the action of the sheriff after that is a trespass, it is directed by them, and is for their benefit.⁴⁰

2. EXTENT OF LIABILITY—*a. Trespasser Ab Initio*.—It has been held the mere not doing a thing cannot make a party a trespasser ab initio, because not doing

32. See the titles ASSAULT AND BATTERY, vol. 3, p. 546; FALSE IMPRISONMENT, vol. 6, p. 242; HUSBAND AND WIFE, vol. 6, p. 731.

As to liability for marine torts generally, see the titles SEAMEN, vol. 10, p. 1082; SHIPS AND SHIPPING, vol. 10, p. 1164.

33. *Clipper Min. Co. v. Eli Min., etc.*, Co., 194 U. S. 220, 230, 48 L. Ed. 944, citing *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Trenouth v. San Francisco*, 100 U. S. 251, 25 L. Ed. 626; *Haws v. Victoria Cooper Min. Co.*, 160 U. S. 303, 40 L. Ed. 436. See the titles IMPROVEMENTS, vol. 6, p. 898; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 961, et seq.; MINES AND MINERALS, vol. 8, p. 396.

As to trespass to land constituting a cloud on the title, see the title QUIETING TITLE, vol. 10, p. 442.

As to rights acquired by estoppel, see the title ESTOPPEL, vol. 5, pp. 959, 960.

34. See the titles NEGLIGENCE, vol. 8, pp. 881, 885, et seq.; RAILROADS, vol. 10, p. 477.

35. *Railroad Co. v. Stout*, 17 Wall. 657, 660, 21 L. Ed. 745.

36. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 471, 23 L. Ed. 356, followed in *Texas, etc., R. Co. v. Watson*, 190 U. S. 287, 47 L. Ed. 1057. See the title RAILROADS, vol. 10, p. 477.

37. *Railroad Co. v. Stout*, 17 Wall. 657, 661, 21 L. Ed. 745.

38. "In the well-known case of *Lynch*

v. Nurdin (1 Adolphus & Ellis, new series, 29), the child was clearly a trespasser in climbing upon the cart, but was allowed to recover. * * * In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser." *Railroad Co. v. Stout*, 17 Wall. 657, 662, 21 L. Ed. 745. See the title NEGLIGENCE, vol. 8, p. 886, et seq.

39. "A seizure of the goods of A. under color of process against B. is official misconduct in the officer making the seizure; and is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*." *Lammon v. Feusier*, 111 U. S. 17, 21, 28 L. Ed. 337.

40. Where an action of trespass was brought against the plaintiff in an attachment suit who had given the levying officer an indemnity bond, it was held, that the legal facts necessary to enable plaintiff to recover are, first, his title to the goods which had been converted; second, the value of those goods; and, third, the participation of the defendants in the conversion. The latter point is established by the indemnifying bond to the sheriff. *Lovejoy v. Murray*, 3 Wall. 1, 18, 18 L. Ed. 129. See the titles ATTACHMENT AND GARNISHMENT, vol. 2, p. 690; INDEMNITY, vol. 6, p. 902.

is no trespass.⁴¹ It seems that if an act is legally done, it cannot be made illegal ab initio, unless by some positive act incompatible with the exercise of the legal right to do the first act.⁴² Although the bringing of a ship to, for the purpose of inquiring whether she belongs to a friend or an enemy, may be lawful, the seizers by unlawful acts subsequently committed may become trespassers ab initio and be liable for all the injuries sustained.⁴³

b. *Joint Trespassers*—(1) *In General*.—Every one of the parties to a trespass, who participates in it, is a trespasser, and an action will lie against him as a principal; for there can be no accessory to a trespass.⁴⁴ Persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.⁴⁵ No matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause. Nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment.⁴⁶

(2) *Contribution*.—Where the owners of a vessel are answerable in damages for the misconduct of the master, in trespass to a third person the master is accountable over to them. The amount of damages rests in the discretion of the court and less than the full amount may be decreed.⁴⁷

3. JUSTIFICATION AND EXCUSE—*a. In General*.—Many acts which would otherwise amount to a trespass are justifiable when done for the public benefit and safety.⁴⁸

b. *Accident*.—See elsewhere.⁴⁹

41. "If the lessor distrains for his rent and thereupon the lessee tenders him the rent and arrears, and requires his beasts again, and the lessor will not deliver them, this not doing cannot make him a trespasser, and that rule was affirmed in the case of *West v. Nibbs*, 4 Manning, Granger, and Scott, 185, by the whole court." *Averill v. Smith*, 17 Wall. 82, 91, 21 L. Ed. 613.

42. *Averill v. Smith*, 17 Wall. 82, 91, 21 L. Ed. 613.

43. *Purviance v. Angus*, 1 Dall. 180, 184, 1 L. Ed. 90.

44. *Purviance v. Angus*, 1 Dall. 180, 183, 1 L. Ed. 90; *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 30 L. Ed. 1235.

If one does a trespass, and others do nothing but come in aid, yet all are principal trespassers. If A. comes in aid of B., who beats me, yet he is a trespasser as well as B. *Purviance v. Angus*, 1 Dall. 180, 184, 1 L. Ed. 90.

45. *Lovejoy v. Murray*, 3 Wall. 1, 11, 18 L. Ed. 129.

But it was held in *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535, 536, 537, 542, 543, 30 L. Ed. 1235, that if one is liable, all are liable, and the judgment, if in favor of the plaintiffs, will be a

joint judgment against all the defendants.

46. *Lovejoy v. Murray*, 3 Wall. 1, 10, 18 L. Ed. 129; *Birdsell v. Shaliol*, 112 U. S. 485, 489, 28 L. Ed. 768. See the title RES ADJUDICATA, vol. 10, p. 755.

The judgment against his cotrespasser does not affect the defendant so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his cotrespasser or a release to his cotrespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages. *Lovejoy v. Murray*, 3 Wall. 1, 17, 18 L. Ed. 129.

47. *Purviance v. Angus*, 1 Dall. 180, 185, 1 L. Ed. 90. See the title CONTRIBUTION AND EXONERATION, vol. 4, p. 595.

48. *Respublica v. Sparhawk*, 1 Dall. 357, 1 L. Ed. 174. See post, "Of Justification," VIII, A, 4, b, (2); "Burden of Proof," VIII, A, 10.

49. See the title NEGLIGENCE, vol. 8, p. 877.

c. *War*.—See elsewhere.⁵⁰

d. *Process*—(1) *Ministerial Acts*.—If the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face,⁵¹ showing no departure from the law,⁵² or defect of jurisdiction over the person or property affected,⁵³ then, and in such cases, the order or process will give full and entire protection to the ministerial officer⁵⁴ in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued.⁵⁵ The duties of the officer are ministerial where the process points out specifically the property or thing to be seized.⁵⁶

(2) *Discretionary Acts*.—Where the officer is commanded to make or levy certain sums of money, out of property of a party named, he must determine for himself whether the property which he proposes to seize under the process, is legally liable to be so taken, and the court can afford him no protection against the consequences of an erroneous exercise of his judgment in that determination. He is liable to suit for injuries growing out of such mistakes in any court of competent jurisdiction.⁵⁷ The officer has a very large and important field for the exercise of his judgment and discretion. First, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed;⁵⁸ secondly, that it is property which,

50. See the title WAR.

51. See the title PUBLIC OFFICERS, vol. 10, p. 426, et seq.

A writ of attachment issued by a court of general jurisdiction, with authority to issue such process and to compel its enforcement at the hands of its own officer, in a case where the cause of action and the parties to it are before the court and are within its jurisdiction, cannot be absolutely void by reason of errors or mistakes in the affidavit which precede its issue, and when in the hands of the officer who is bound to obey it, with the seal of the court and everything else on its face to give it validity, if he did obey it, and is guilty of no error in this act of obedience, it must stand as his sufficient protection for that act in all other courts. *Matthews v. Densmore*, 109 U. S. 216, 219, 27 L. Ed. 912.

52. "It has been ruled that where an officer knows of facts aliunde his process, which render the proceedings void, he is not protected." *Stutsman County v. Wallace*, 142 U. S. 293, 310, 35 L. Ed. 1018. See the title TAXATION, ante, p. 356.

53. An action of trespass lies against the officer who makes distress, in order to satisfy a fine assessed upon a justice of the peace, by a court-martial. A court-martial has no jurisdiction over a justice of the peace, as a militiaman; he could never be legally enrolled; and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers. *Wise v. Withers*, 3 Cranch 331, 335, 2 L. Ed. 457. See the

title MILITARY LAW, vol. 8, p. 354.

54. *Buck v. Colbath*, 3 Wall. 334, 335, 18 L. Ed. 257.

55. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Erskine v. Hohnbach*, 14 Wall. 613, 616, 20 L. Ed. 745; *Haffin v. Mason*, 15 Wall. 671, 21 L. Ed. 196; *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 723; *Matthews v. Densmore*, 109 U. S. 216, 219, 27 L. Ed. 912; *Covell v. Heyman*, 111 U. S. 176, 180, 28 L. Ed. 390; *Harding v. Woodcock*, 137 U. S. 43, 46, 34 L. Ed. 580; *Stutsman County v. Wallace*, 142 U. S. 293, 309, 35 L. Ed. 1018.

A county treasurer in making a tax sale under the laws of the Dakota Territory acted ministerially and was protected. *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. Ed. 1018.

56. *Buck v. Colbath*, 3 Wall. 334, 335, 18 L. Ed. 257.

57. *Buck v. Colbath*, 3 Wall. 334, 335, 18 L. Ed. 257; *Sharke v. Doyle*, 102 U. S. 686, 26 L. Ed. 277; *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 723; *Leroux v. Hudson*, 109 U. S. 468, 27 L. Ed. 1000; *Covell v. Heyman*, 111 U. S. 176, 180, 28 L. Ed. 390; *Etheridge v. Sperry*, 139 U. S. 266, 35 L. Ed. 171. See post, "Of State Court," VIII, A, 1, a, (2).

"The court can afford him no protection against the parties so injured; for the court is in nowise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." *North v. Peters*, 138 U. S. 271, 284, 34 L. Ed. 936.

58. *Matthews v. Densmore*, 109 U. S. 216, 27 L. Ed. 912.

A person other than the defendant named in the writ, whose property is

by law, is subject to be taken under the writ; and, thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure.⁵⁹

(3) *Abuse of Process*.—In a case where the officer exceeds his authority in levying a writ of attachment, he may be proceeded against in an action of trespass.⁶⁰

(4) *Process of Court-Martial*.—Where a seamen was charged with deserting, and a court-martial found him guilty of attempting to desert, if the court had jurisdiction over the subject matter, an action of trespass for false imprisonment will not lie against the ministerial officer who executes the sentence for attempting to desert.⁶¹

e. *Eminent Domain Proceedings*.—If a railroad company occupy land before condemnation without the consent of the owners, and without any law authorizing it, it is liable in trespass to the persons who own the land.⁶²

f. *Statute*—(1) *Unconstitutional Law*.—The mandate of a statute of a state affords no justification for a trespass by the invasion of rights secured by the constitution of the United States.⁶⁴

(2) *Revenue Law*.—See elsewhere.⁶⁵

g. *Military Order*.—See elsewhere.⁶⁶

h. *License*.—A railroad may license the erection, within the lines of its roadway, of buildings for its convenience even though they may also be for the convenience of others, and persons erecting buildings under such license are not trespassers.⁶⁷

wrongfully taken, may indeed sue the marshal, like any other wrongdoer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshal nor the writ of attachment, affords him any defense to such an action. *Day v. Gallup*, 2 Wall. 97, 17 L. Ed. 855; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337. See the titles ATTACHMENT AND GARNISHMENT, vol. 2, pp. 680, 689; SHERIFFS AND CONSTABLES, vol. 10, p. 1133.

By the terms of the writs of attachment the sheriff was commanded to levy upon and attach personal property belonging to P. M. Lund & Co. Those writs did not authorize him to seize the property of any other person; and when he did seize other property he became a trespasser, and was not protected by the law. *North v. Peters*, 138 U. S. 271, 283, 34 L. Ed. 936.

59. *North v. Peters*, 133 U. S. 271, 284, 34 L. Ed. 936; *Buck v. Colbath*, 3 Wall. 334, 335, 18 L. Ed. 257.

60. *North v. Peters*, 138 U. S. 271, 284, 34 L. Ed. 936.

61. *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838.

62. *Searl v. School District*, No. 2, 133 U. S. 553, 564, 33 L. Ed. 740; *Secombe v. Railroad Co.*, 23 Wall. 108, 118, 23 L. Ed. 67.

A railroad company authorized to ac-

quire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. If the governing board directed the act, the corporation can be sued for the tort, in an action of trespass. *Salt Lake City v. Hollister*, 118 U. S. 256, 260, 30 L. Ed. 176. See the title EQUITY, vol. 5, p. 815.

64. *Virginia Coupon Cases*, 114 U. S. 269, 270, 292, 29 L. Ed. 185. See the title CONSTITUTIONAL LAW, vol. 4, p. 60.

A state cannot deprive an aggrieved person of the right to bring an action of trespass for acts done by a state officer under an act void because it impairs the obligation of contract. *Virginia Coupon Cases*, 114 U. S. 269, 270, 302, 29 L. Ed. 185. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 786, 788.

65. See the title REVENUE LAWS, vol. 10, p. 1002.

66. See the titles ARMY AND NAVY, vol. 2, pp. 522, 523; FALSE IMPRISONMENT, vol. 6, p. 242.

67. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 469, 23 L. Ed. 356. See the title RAILROADS, vol. 10, p. 455.

VIII. Civil Action.

A. At Law—1. JURISDICTION AND VENUE—*a. Jurisdiction*—(1) *In General*.—See elsewhere.⁶⁸

(2) *Of State Court*.—A state court has jurisdiction of an action of trespass against a United States marshal acting under a writ from a United States court where he has acted in excess of his authority.⁶⁹

(3) *Of Justices of Peace*.—Justices have no jurisdiction of an action of trespass for taking the plaintiff's goods.⁷⁰

b. Venue.—See elsewhere.⁷¹

2. PARTIES.—It is not essential that the plaintiffs in a writ of execution be joined as parties defendant in an action of trespass against the officer making the levy, where it does not appear, either from the pleadings or the proofs, that they advised or directed him to seize the particular property, as the property of their judgment debtor.⁷²

3. SUMMONS AND PROCESS.—The privilege of freeholders to be sued by summons extends to actions of trespass *vi et armis*.⁷³

4. PLEADINGS—*a. Declaration*.—In an action of trespass to recover damages for the entering upon lands and digging up and carrying away a quantity of ore, the declaration may contain three counts, two *quare clausum fregit*, and one *de bonis asportatis*.⁷⁴

b. Plea—(1) *In General*.—A plea to a declaration in trespass, which does not contain a denial of what is alleged nor a showing of authority for doing the acts alleged, is bad.⁷⁵

(2) *Of Justification*.—A license from the plaintiff, or a justification under an incorporeal right, or an excuse of the trespass founded on fault of the plaintiff, or an entry by authority of law, with or without process, must be pleaded specially to an action of trespass.⁷⁶ But in trespass to real property, a

68. As to jurisdiction of state court in action of trespass for wrongful seizure of property under process issuing from federal court, see the title COURTS, vol. 4, p. 1173. See, also, the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 667.

As to jurisdiction of suits by assignee for trespass for cutting and removing timber, see the title COURTS, vol. 4, p. 970.

69. *McKee v. Rains*, 10 Wall. 22, 19 L. Ed. 860; *Leroux v. Hudson*, 109 U. S. 468, 478, 27 L. Ed. 1000. See the title REMOVAL OF CAUSES, vol. 10, p. 672.

"It had been supposed by many sound lawyers, after the case of *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749, that no action could be sustained against a marshal of the United States, in any case in a state court, where he acted under a writ of the former court; but in *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, where this class of cases was fully considered, it was held that though the writ be a valid writ, if the officer attempt to seize property under it which does not belong to the debtor against whom the writ issued, the officer is liable for the wrongful seizure of property not subject to the writ." *Matthews v. Densmore*, 109 U. S. 216, 218, 27 L. Ed. 912.

70. *Lawrence v. Doublebower*, 2 Dall. 73, 1 L. Ed. 294. See, generally, the title

JUSTICES OF THE PEACE, vol. 7, p. 782.

71. See the title VENUE.

72. *North v. Peters*, 138 U. S. 271, 284, 34 L. Ed. 936.

73. *Hudson v. Howell*, 1 Dall. 310, 1 L. Ed. 151.

74. *New Jersey Zinc Co. v. Trotter*, 108 U. S. 564, 27 L. Ed. 828. See the title APPEAL AND ERROR, vol. 1, p. 842.

75. Where a declaration charges a defendant with overflowing the plaintiff's land by raising the water in a lake, a plea containing neither a denial of what is alleged nor authority for doing it is bad. *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557.

In an action of trespass, for taking goods, a plea which does not deny that the property seized is the property of the plaintiff, nor aver that it is liable to the writ under which it was seized, is bad in any court. *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257.

In *Scott v. Sadford*, 19 How. 393, 571, 15 L. Ed. 691, it was said by Judge Curtis, dissenting: "If, in an action of trespass *quare clausum*, the defendant were to plead that he was lawfully seized of the locus in quo, one month before the time of the alleged trespass, I should have no doubt it would be a bad plea. (See *Mullen v. Torrance*, 9 Wheat. 537, 6 L. Ed. 154.)"

76. *Cooley v. O'Connor*, 12 Wall. 391, 399, 20 L. Ed. 446.

freehold, or mere possessory right in the defendant, may be given in evidence under the general issue, though it is often advisable to plead *liberum tenementum*.⁷⁷ Where the declaration in trespass alleges the taking, detaining and converting of property, a plea of justification for the taking and detaining is sufficient. If the plaintiff relies on the conversion, he should reply by way of new assignment.⁷⁸

c. *Replication*.—See elsewhere.⁷⁹

5. *ISSUE*.—A plea of the general issue in trespass does not necessarily put the title to the property in issue.⁸⁰

6. *LIMITATION OF ACTIONS*.—The two year limitation of the act of congress governing actions for injuries by acts done under authority of the president or congress during the Civil War applies to wrongs to the estate as well as to the arrest and imprisonment of the person of the plaintiff.⁸¹ An action of trespass for the willful cutting wood upon another man's land and refusing to account for the same when accused of the act and an action for the illegal and wrongful seizure of the defendant's property by virtue of an execution against another party, whereby much of the property was lost or destroyed, are prescribed by the one year provision of the Louisiana statute.⁸²

7. *CHANGING FORM OF ACTION*.—In an action of trespass *de bonis asportatis* the plaintiff cannot, without at least an amendment of his complaint, recover as upon an account for money had and received.⁸³

8. *REMOVAL OF CAUSE*.—See elsewhere.⁸⁴

9. *PRESUMPTIONS*.—In an action for a continuous trespass to real property, where the wrongful and exclusive possession of the trespasser is proved as of a certain date, the presumption is that such possession continued.⁸⁵

10. *BURDEN OF PROOF*.⁸⁶—The burden of proof of justification rests in the defendant.⁸⁷ A party who has been shown to be *prima facie* guilty of a tres-

A plea, alleging a seizure for a forfeiture as a justification, should not only state the facts relied on to establish the forfeiture, but aver that thereby the property became and was actually forfeited, and was seized as forfeited. *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

In a suit of trespass *de bonis asportatis*, against C. (a sheriff) and D., (the plaintiff in a writ of attachment executed by the said sheriff), a plea contains all the averments essential to a justification when it alleges sufficiently, that the chattels mentioned in the declaration were the property of B. on the 4th of May, 1867, that on the 3d of the same May a writ of attachment was issued out of the court of a county named in favor of D., directed to the sheriff of the said county, commanding him to attach so much of the personal and real estate of said B. as should be sufficient to satisfy a sum specified; that on the said 3d of May, the said C. was sheriff of the county named; that on the said day the writ of attachment was delivered to him to execute; and that on the 4th of said May, he levied upon the said goods and chattels as the property of the said B., by virtue of the said writ, and that these were the supposed trespasses. And this is so, even though the plea do not allege that D. was a creditor of B., nor that the attachment was otherwise regularly issued, nor that D. did the acts com-

plained of under the direction of the sheriff, nor that the attachment had been returned. However informal such a plea may be, the informality is not such as that, after a traverse of its allegations, issue, and trial, it can be taken advantage of on error. The plaintiff should have demurred. *Deutsch v. Wiggins*, 15 Wall. 539, 21 L. Ed. 228.

77. *Cooley v. O'Connor*, 12 Wall. 391, 399, 20 L. Ed. 446.

78. *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381.

79. See ante, "Of Justification," VIII, A, 4, b, (2).

80. *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639.

81. *Harrison v. Myer*, 92 U. S. 111, 23 L. Ed. 606; *Mitchell v. Clark*, 110 U. S. 633, 644, 28 L. Ed. 279; *Cutler v. Kouns*, 110 U. S. 720, 728, 28 L. Ed. 305.

82. *Case v. Bank*, 100 U. S. 446, 449, 450, 451, 25 L. Ed. 695. See Rev. Code of Louisiana, § 3536.

83. *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 47, 38 L. Ed. 627.

84. See the title *REMOVAL OF CAUSES*, vol. 10, pp. 671, 672.

85. *Lazarus v. Phelps*, 156 U. S. 202, 39 L. Ed. 397.

86. See the title *EJECTMENT*, vol. 5, p. 713.

87. *Marble Co. v. Ripley*, 10 Wall. 339, 19 L. Ed. 955.

pass, and relies upon a license, must exhibit his license and prove that his acts were justified by it.⁸⁸

11. EVIDENCE.—*a. In General.*—In an action of trespass evidence which, in connection with other evidence offered, tends to make out a defense, is properly receivable, though it may not itself prove all the facts necessary to constitute a defense.⁸⁹

b. Of Ownership.—In an action of trespass *de bonis asportatis*, where the issue involves the question as to where the ownership of the property was, evidence tending directly to show that an alleged sale, which the plaintiff relied on as the basis of his action, was a fraudulent sale, is pertinent to the issue; and the rejection of it is error.⁹⁰

c. Of Value.—In an action of trespass brought by the United States against a defendant for cutting and carrying away timber from the public lands, the United States is entitled to a verdict for at least nominal damages upon proof that the timber had commanded a certain price, where the defendant admitted the cutting and carrying away.⁹¹

12. VARIANCE.—A declaration consisting of a single count, alleging a continuing trespass upon the land and the cutting and conversion of timber growing thereon, states a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and cannot be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate.⁹²

13. OPENING AND CLOSING ARGUMENT.—Where an action of trespass *quare clausum fregit* was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open and close the argument, this ruling of the court is not a proper subject for a bill of exceptions.⁹³

14. VERDICT.—See elsewhere.⁹⁴

15. JUDGMENT.—See elsewhere.⁹⁵

16. DAMAGES⁹⁶—*a. Right to Damages.*—In trespass *quare clausum fregit*, damages were always given at common law.⁹⁷

b. Elements of Damages—(1) *Expenses of Suit.*—See elsewhere.⁹⁸

(2) *Consequential Damages.*—See elsewhere.⁹⁹

(3) *Rents and Profits.*—See elsewhere.¹

c. Measure of Damages—(1) *In General.*—The measure of damages in an action of trespass cannot exceed the value of the property seized, with interest

88. In an action by the United States to recover for the conversion of logs cut from government lands, the burden of proof rests upon the defendant to show the cutting of timber for a proper purpose. The practical injustice of a different rule is manifest. It would require the plaintiff not only to establish a negative, that is, that the timber was not cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 91, 48 L. Ed. 106.

89. *Deutsch v. Wiggins*, 15 Wall. 539, 21 L. Ed. 228.

90. *Deutsch v. Wiggins*, 15 Wall. 539, 21 L. Ed. 228.

91. *United States v. Mock*, 149 U. S. 273, 277, 37 L. Ed. 732, citing *Wooden-Ware Co. v. United States*, 106 U. S. 432, 27 L. Ed. 230; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 36 L. Ed. 762.

92. *Cotton v. United States*, 11 How.

229, 13 L. Ed. 675; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 108, 39 L. Ed. 913.

93. *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 182.

94. See the titles RES ADJUDICATA, vol. 10, p. 784; VERDICT.

95. As to right of assignee of judgment in trespass, see the title JUDGMENTS AND DECREES, vol. 7, p. 601.

96. See the title DAMAGES, vol. 5, p. 157.

As to measure of damages for cutting and carrying away timber from public lands, see the title PUBLIC LANDS, vol. 10, p. 57.

97. *Green v. Biddle*, 8 Wheat. 1, 77, 5 L. Ed. 547.

98. See the title COSTS, vol. 4, p. 802.

99. See the title DAMAGES, vol. 5, p. 163.

1. See the titles DAMAGES, vol. 5, p. 179; EJECTMENT, vol. 5, p. 717.

thereon from the date of the seizure.² The difference between the value of goods illegally seized, at the place where they were taken and the place where they were returned to the owners, is the proper measure of damages.³ Where a declaration claims damages for injury done to an entire tract of land, damages may be recovered with respect to such part as, in fact, the plaintiff owned.⁴

(2) *Compensatory*.—In an action of trespass the plaintiff is limited to actual and compensatory damages, unless the act is accompanied with malice or other aggravating circumstances.⁵

(3) *Punitive*.—See elsewhere.⁶

d. *Mitigation of Damages*.—(1) *In General*.—In an action of trespass in taking the plaintiff's shares it is proper to allow the defendant to give in evidence a judgment against the plaintiff as principal and himself as surety, and his own payment of that judgment in mitigation of damages.⁷

(2) *Where Goods Returned*.—See elsewhere.⁸

e. *In Marine Trespass*.—See elsewhere.⁹

B. In Equity—1. *IN GENERAL*.—The owner of property may resort to equity for the purpose of enjoining the continuance of a trespass thereto, where he has no adequate and complete remedy at law,¹⁰ where he would otherwise suffer irreparable injury¹¹ or where a multiplicity of suits at law to recover damages would be necessary.¹² In such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance.¹³

2. *CONTINUING TRESPASS*.—See elsewhere.¹⁴

3. *TRESPASS BY OFFICER*.—Where an officer exceeds his authority he may be proceeded against by injunction.¹⁵

IX. Criminal Action.

Many trespasses are also public offenses, by common law, or are made so by statute. But the punishment of the public offense is no bar to the remedy

2. *North v. Peters*, 138 U. S. 271, 281, 34 L. Ed. 936.

3. *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

4. *Hetzel v. Baltimore, etc., R. Co.*, 169 U. S. 26, 34, 35, 42 L. Ed. 648.

5. *Dow v. Humbert*, 91 U. S. 294, 298, 23 L. Ed. 363.

6. See the title *EXEMPLARY DAMAGES*, vol. 6, p. 194.

7. *McAfee v. Crofford*, 13 How. 447, 455, 14 L. Ed. 217.

8. See the title *DAMAGES*, vol. 5, p. 193.

9. See the title *SHIPS AND SHIP-PING*, vol. 10, p. 1165.

10. *Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273.

In these cases equitable relief was refused because there was an adequate complete remedy at law. *United States v. Bitter Root, etc., Co.*, 200 U. S. 451, 471, 50 L. Ed. 550. See the title *EQUITY*, vol. 5, p. 815.

No case can be found of an injunction granted, to protect the proprietor of a franchise, against the commission of a mere trespass, where the party could have redress in damages, and where the trespass would not interfere with the fran-

chise, further than every wrong interferes with the right of the individual upon whom it is inflicted. *Osborn v. United States Bank*, 9 Wheat. 738, 749, 6 L. Ed. 204.

11. *North v. Peters*, 138 U. S. 271, 281, 34 L. Ed. 936; *Watson v. Sutherland*, 5 Wall. 74, 78, 79, 18 L. Ed. 580; *Shelton v. Platt*, 139 U. S. 591, 35 L. Ed. 273; *Kirwan v. Murphy*, 189 U. S. 35, 53, 47 L. Ed. 698.

12. *New York City v. Pine*, 185 U. S. 93, 104, 46 L. Ed. 820. See the title *MULTIPLICITY OF SUITS*, vol. 8, p. 541.

13. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay, the injunction issues. *New York City v. Pine*, 185 U. S. 93, 104, 46 L. Ed. 820.

14. See the titles *INJUNCTIONS*, vol. 6, p. 1040; *MULTIPLICITY OF SUITS*, vol. 8, p. 541.

15. See the titles *PUBLIC OFFICERS*, vol. 10, p. 426; *SHERIFFS AND CONSTABLES*, vol. 10, p. 1132.

As to injunction to restrain trespass

for the private injury.¹⁶

X. The Action of Trespass on the Case.

A. Definitions.—See elsewhere.¹⁷

B. Nature.—An action of trespass on the case for consequential damages, and those caused by gross neglect, and not a mere breach of contract, sounds *ex delicto* as much as trespass itself.¹⁸

C. Distinctions.—The action of trespass on the case embraces the action of *assumpsit*.¹⁹

D. Constituent Elements.—Neither an intent to do wrong²⁰ nor force and immediate injury²¹ are essential elements of an action of trespass on the case.

E. Causes of Action—1. **IN GENERAL.**—Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie.²²

2. **INVASION OF RELATIVE RIGHTS.**—See elsewhere.²³

3. **NUISANCE.**—See elsewhere.²⁴

4. **BREACH OF DUTY BY PUBLIC OFFICER.**—See elsewhere.²⁵

5. **INJURIES TO REALTY.**—See elsewhere.²⁶

F. Jurisdiction.—See elsewhere.²⁷

G. Pleading.—The plea of the general issue in actions of trespass on the case does not necessarily put the title in issue.²⁸

H. Burden of Proof.—The possession of a wharf by the defendant under color and with claim of title is sufficient to put the plaintiff, in an action on the case for obstructing him in its use, upon proof of a better title to the wharf, or of an equal right with the defendant to its use.²⁹

I. Damages—1. **ELEMENTS OF DAMAGES.**—See elsewhere.³⁰

2. **CONSEQUENTIAL DAMAGES.**—See elsewhere.³¹

3. **PUNITIVE DAMAGES.**—See elsewhere.³²

TRESPASSERS.—As to negligent injuries to, see the titles **NEGLIGENCE**, vol. 8, p. 881; **RAILROADS**, vol. 10, p. 477.

TRESPASSING ANIMALS.—See the title **FENCES**, vol. 6, p. 272.

TRESPASS ON THE CASE.—See the title **TRESPASS**, ante, p. 649.

in levying execution, see the titles **EQUITY**, vol. 5, p. 822; **EXECUTIONS**, vol. 6, p. 108. As to injunction to restrain trespass in collecting tax, see the title **TAXATION**, ante, p. 356.

16. *Cotton v. United States*, 11 How. 229, 232, 13 L. Ed. 675.

17. As to definition of "case," see the title **ACTIONS**, vol. 1, p. 98. See, also, **CASE**, vol. 3, p. 644.

18. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 343, 344, 428, 12 L. Ed. 465.

19. *Carroll v. Green*, 92 U. S. 509, 513, 23 L. Ed. 738. See ante, "Distinctions," II; "Different Writs of Trespass," III. See the title **ASSUMPSIT**, vol. 2, p. 637.

20. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 343, 344, 430, 12 L. Ed. 465.

21. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 343, 344, 432, 12 L. Ed. 465. See the titles **COLLISIONS**, vol. 3, p. 876; **SHIPS AND SHIP-PING**, vol. 10, p. 1164.

22. *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 14, 38 L. Ed. 55. See the title **CONTRACTS**, vol. 4, p. 552.

23. See the title **HUSBAND AND WIFE**, vol. 6, p. 731.

24. See the title **NUISANCES**, vol. 8, p. 944.

25. As to action on the case against executors of deceased marshal for false returns on executions, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, pp. 22, 23.

26. As to action of case for injuries to real property under eminent domain proceedings, see the title **EMINENT DOMAIN**, vol. 5, p. 772.

27. See the title **ADMIRALTY**, vol. 1, p. 129, n. 22.

28. *Richardson v. Boston*, 19 How. 263, 267, 15 L. Ed. 639. See the titles **NUISANCES**, vol. 8, p. 944; **RES ADJUDICATA**, vol. 10, p. 784.

29. *Linthicum v. Ray*, 9 Wall. 241, 19 L. Ed. 657.

30. As to counsel fees as element of damage, see the title **DAMAGES**, vol. 5, p. 190.

31. See the title **DAMAGES**, vol. 5, p. 188, n. 20.

32. See the title **EXEMPLARY DAMAGES**, vol. 6, pp. 194, 196, n. 14.

TRESPASS TO TRY TITLE.

BY GORDON NELSON.

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- II. Nature of Action, 664.**
- III. Title to Support Action, 664.**
 - A. In General, 664.
 - B. Legal Title, 665.
 - C. After-Acquired Title, 665.
 - D. Title Derived from Common Source, 665.
 - E. Possession, 665.
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 - A. Possessory Right, 665.
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- VI. Summons and Process, 665.**
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 - C. Conclusiveness, 666.

CROSS REFERENCES.

See the titles EJECTMENT, vol. 5, p. 695; TRESPASS, ante, p. 642.

I. General Consideration.

It is provided by statute in Texas¹ and Alabama² that the method of trying title to lands, tenements or other real property shall be by action of trespass to try title.

II. Nature of Action.

An action of trespass to try title, though dealing entirely with the realty, is not an action in rem in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property.³

III. Title to Support Action.

A. In General.—The maxim that the plaintiff must recover on the strength

1. *Stanley v. Schwalby*, 162 U. S. 255, 271, 40 L. Ed. 960. See § 4784, Rev. Stat. of Texas.

2. In 1821 an act was passed by the legislature of Alabama to abolish fictitious proceedings in ejectment; and to substitute in their place the action of

trespass, for the purpose of trying the title to lands and recovering the possession. *Sears v. Eastburn*, 10 How. 187, 189, 13 L. Ed. 381.

3. *Freeman v. Alderson*, 119 U. S. 185, 190, 30 L. Ed. 372.

of his own title, and not on the weakness of the defendant's, is applicable to an action of trespass to try title. He cannot set up an outstanding title.⁴

B. Legal Title.—By a statute of Texas, actions of trespass to try title can be maintained upon certificates for head rights or other equitable titles. But the federal supreme court has decided that, in the courts of the United States, suits for the recovery of lands can only be maintained upon a legal title. A plaintiff in the court below, who had nothing more than an incipient equity, could not therefore maintain this action.⁵

C. After-Acquired Title.—The plaintiff in an action of trespass to try title cannot avail himself of a title acquired, or which did not subsist in him until after he commenced suit. The title at the beginning of the action is the question to be tried.⁶

D. Title Derived from Common Source.—By statute in Texas it is not necessary for the plaintiff to deraign title beyond a common source.⁷ It is sufficient to throw the burden of disproving his case, upon the defendant for him to show a better right or superior title under the common source.⁸

E. Possession.—If the plaintiff had actual possession of the land at the time of entry, he may recover it from a mere trespasser who entered without any title.⁹

IV. Defenses.

A. Possessory Right.—In trespass to real property brought to try the title, a freehold or a mere possessory right in the defendant may be given in evidence under the general issue.¹⁰

B. Power of Attorney.—A power of attorney given by a married woman to her husband for the sale of her separate estate not privily signed and acknowledged cannot be set up in defense of an action to recover the land brought by the husband and wife.¹¹

V. Parties.

In Texas where a married woman is made a codefendant with her husband in an action of trespass to try title, her interest under a deed to her husband must be presumed to be in community, and a personal judgment, in damages for use and occupation, under the statute, and for costs, cannot be rendered against her, so as to subject her separate estate to such a liability.¹²

VI. Summons and Process.

The service of citation by publication in an action of trespass to try title may suffice for the exercise of the jurisdiction of the court over the property so far as to try the right to its possession, and to decree its partition; but it could

4. *Sabariego v. Maverick*, 124 U. S. 261, 297, 31 L. Ed. 430. See the title *EJECTMENT*, vol. 5, p. 699.

5. *Sheirburn v. Cordova*, 24 How. 423, 16 L. Ed. 741.

6. *Hollingsworth v. Flint*, 101 U. S. 591, 596, 25 L. Ed. 1028.

7. *Cooke v. Avery*, 147 U. S. 375, 392, 37 L. Ed. 209; *Cox v. Hart*, 145 U. S. 376, 36 L. Ed. 741.

In an action of trespass to try title, "where a common source was shown a party could not go back of the common source to impeach the deed for forgery," and the defendants, having themselves offered the deed in evidence, were concluded on the question of common source and estopped to deny the genuineness, it was immaterial whether said deed was genuine or not. *Cox v. Hart*, 145 U. S. 376, 382, 36 L. Ed. 741.

8. *Cox v. Hart*, 145 U. S. 376, 384, 36 L. Ed. 741.

9. *Campbell v. Rankin*, 99 U. S. 261, 262, 25 L. Ed. 435; *Sabariego v. Maverick*, 124 U. S. 261, 297, 31 L. Ed. 430. See the title *EJECTMENT*, vol. 5, p. 699, et seq.

10. *Cooley v. O'Connor*, 12 Wall. 391, 20 L. Ed. 446.

A certificate signed by only two of the direct tax commissioners appointed under the act of congress of June 7th, 1862, that land charged with the tax had been sold to the United States, is admissible in evidence in an action brought to try title to the land. *Cooley v. O'Connor*, 12 Wall. 391, 20 L. Ed. 446.

11. *Mexia v. Oliver*, 148 U. S. 664, 37 L. Ed. 602.

12. *Cooke v. Avery*, 147 U. S. 375, 395, 37 L. Ed. 209.

not authorize the creation of any personal demand against the defendant, even for costs, which could be satisfied out of his other property.¹³

VII. Premature Suit.

Until the land of the plaintiff was trespassed upon, this action of trespass to try title could not be maintained.¹⁴

VIII. Limitation of Actions.

See elsewhere.¹⁵

IX. Pleading.

When a party, either plaintiff or defendant, in an action of trespass to try title, pleads his title specially, he gives his adversary notice that he rests his case upon the title so pleaded, and it is to be presumed that he relies upon no other.¹⁶

X. Evidence.¹⁷

Proof of a common source of title may be made by the plaintiff by certified copies of the deeds showing defendants' chain or claim of title emanating from such common source.¹⁸

XI. Instructions.

In an action to try title to land where the evidence is found to be conflicting as to the boundary, it is not error for the court to instruct the jury, that if they find from the evidence, after applying the evidence to the calls of the patent, that some or any of the natural objects called for are uncertain or doubtful, and some are certain, the certain ones will govern in establishing the boundaries of the land.¹⁹

XII. Judgment.

A. For Title and Possession.—In an action of trespass to try title, under the laws of Texas, a judgment for the plaintiff is not restricted to the possession, but may be for title also. This judgment may be enforced by a writ of possession.²⁰

B. For Improvements.—See elsewhere.²¹

C. Conclusiveness.—A judgment against a plaintiff in an action of trespass to try title is conclusive, unless he commence a second action for the property within a year.²²

13. *Freeman v. Alderson*, 119 U. S. 185, 190, 30 L. Ed. 372.

14. *White v. Burnley*, 20 How. 235, 251, 15 L. Ed. 886. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1018.

15. See the titles EJECTMENT, vol. 5, p. 710; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 934, 941, 961.

16. *Cooke v. Avery*, 147 U. S. 375, 393, 37 L. Ed. 209.

17. As to admission of extrinsic evidence to identify property conveyed by deed, see the title PAROL EVIDENCE, vol. 9, p. 26.

18. *Cooke v. Avery*, 147 U. S. 375, 392, 37 L. Ed. 209.

19. *New York, etc., Land Co. v. Votaw*, 150 U. S. 24, 29, 37 L. Ed. 983. See the title BOUNDARIES, vol. 3, p. 492, 493.

20. *Stanley v. Schwalby*, 162 U. S. 255, 271, 40 L. Ed. 960.

21. See the title IMPROVEMENTS, vol. 6, p. 896.

22. The law which gives to the dissatisfied party a right within one year to re-litigate a second time a controversy respecting land in Texas, does not bar him or his grantees from setting up his or their claim, if within the required period a similar suit respecting the same land is commenced against him or them by the former defendant. *Brownsville v. Cavazos*, 100 U. S. 138, 144, 25 L. Ed.

TRIAL.

CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; AGREED CASE, vol. 1, p. 204; AMBASSADORS AND CONSULS, vol. 1, p. 273; APPEAL AND ERROR, vol. 1, p. 333; APPEARANCES, vol. 2, p. 429; ARBITRATION AND AWARD, vol. 2, p. 464; ARGUMENT OF COUNSEL, vol. 2, p. 489; CERTIORARI, vol. 3, p. 651; CONTEMPT, vol. 4, p. 531; CONTINUANCES, vol. 4, p. 543; COSTS, vol. 4, p. 802; COURTS, vol. 4, p. 861; DEPOSITION, vol. 5, p. 321; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 5, p. 356; DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 396; DUE PROCESS OF LAW, vol. 5, p. 499; EJECTMENT, vol. 5, p. 695; EMINENT DOMAIN, vol. 5, p. 746; EQUITY, vol. 5, p. 803; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 1; GRAND JURY, vol. 6, p. 570; HABEAS CORPUS, vol. 6, p. 610; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 961; INSTRUCTIONS, vol. 7, p. 26; ISSUES TO JURY, vol. 7, p. 526; JUDGES, vol. 7, p. 538; JURISDICTION, vol. 7, p. 738; JURY, vol. 7, p. 748; JUSTICES OF THE PEACE, vol. 7, p. 780; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; MANDAMUS, vol. 8, p. 1; MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 97; MILITARY LAW, vol. 8, p. 342; NEW TRIAL, vol. 8, p. 907; PARTIES, vol. 9, p. 34; PLEADING, vol. 9, p. 418; REHEARING, vol. 10, p. 624; REMOVAL OF CAUSES, vol. 10, p. 663; REPLEVIN, vol. 10, p. 717; RES ADJUDICATA, vol. 10, p. 729; REVENUE LAWS, vol. 10, p. 838; SENTENCE AND PUNISHMENT, vol. 10, p. 1090; SEPARATE TRIALS, vol. 10, p. 1111; SUMMONS AND PROCESS, ante, p. 299; SUPERSEDEAS AND STAY OF PROCEEDINGS, ante, p. 333; VENUE; VERDICT; WAR; WITNESSES.

As to trial in particular actions or proceedings, see the particular titles. As to constitutional rights of one on trial, see the title CONSTITUTIONAL LAW, vol. 4, p. 495, et seq. As to evidence on trial, see the titles BEST AND SECONDARY EVIDENCE, vol. 3, p. 214; DOCUMENTARY EVIDENCE, vol. 5, p. 431; EVIDENCE, vol. 5, p. 1004; EXPERT AND OPINION EVIDENCE, vol. 6, p. 200; HEARSAY EVIDENCE, vol. 6, p. 686; PAROL EVIDENCE, vol. 9, p. 12; RES GESTÆ, vol. 10, p. 827. As to trial in criminal proceedings, see the title CRIMINAL LAW, vol. 5, p. 113, et seq. See, also, the specific criminal titles. As to right to trial by jury, see the title JURY, vol. 7, p. 748. As to pleading on trial, see the title PLEADING, vol. 9, p. 418, and particular titles. As to directing verdict, see the title VERDICT. As to inspection and physical examination, see the title INSPECTION AND PHYSICAL EXAMINATION, vol. 7, p. 14. As to place of trial, see the title VENUE.

Definition and General Consideration.—A trial is defined in the Ohio statute to be “a judicial examination of the issues, whether of law or fact, in an action or proceeding.”¹ A trial is a thing that must be in the face of the country.² The crown will not be forced to bring on a trial without some appearance of oppression.³

Notice of Trial.—Where a cause was not included in the general trial list, and the defendant had not received express or implied notice of trial, a motion to bring it on was refused.⁴

1. Trial defined.—Rev. Stat., Ohio (1880), § 5127; *Babbitt v. Clark*, 103 U. S. 606, 607, 26 L. Ed. 507.

Hearing before commissioner as a “trial.”—*Hess v. Reynolds*, 113 U. S. 73, 80, 28 L. Ed. 927.

Hearing before master.—*Carson v. Hyatt*, 118 U. S. 279, 289, 30 L. Ed. 167.

“Trial” within meaning of removal acts.—*Gregory v. Hartley*, 113 U. S. 742, 28 L. Ed. 1150, affirming *Alley v. Nott*, 111

U. S. 472, 475, 28 L. Ed. 491; *Scharff v. Levy*, 112 U. S. 711, 28 L. Ed. 825. See, also, *Laidly v. Huntington*, 121 U. S. 179, 181, 30 L. Ed. 883.

2. Publicity.—*McKegg v. Crawford*, 1 Dall. 347, 1 L. Ed. 169.

3. *King v. Haas*, 1 Dall. 9, 1 L. Ed. 14.

4. Notice of trial.—*Cecil v. Lebenstone*, 2 Dall. 95, 1 L. Ed. 304, wherein the court said: “In England, the proof of actual notice is required; but with us, * * *

Time of Trial.—See footnote.⁵

Trial de Medietate Linguae.—See the title JURY, vol. 7, p. 752.

Special Court.—See footnote.⁶

TRIAL BY JURY.—See the title JURY, vol. 7, p. 751, et seq. As to form of proceeding on appeals from territorial courts being dependent upon whether or not there has been a trial by jury, see the title APPEAL AND ERROR, vol. 1, p. 389.

TRIAL DE NOVO.—See the title APPEAL AND ERROR, vol. 2, p. 283.

TRIAL TERM.—"In all the states there is by law or rule a trial term—i. e., a term at which a cause may for the first time be called for trial."¹

TRIBE.—See the title INDIANS, vol. 6, p. 911.

TRIMMING.—See note 2.

TRIMMINGS.—See the title REVENUE LAWS, vol. 10, p. 896.

the rigor of that rule is not imposed; still, however, a reasonable notice of trial must be given to the party, not merely to his attorney; and after all, the rules for bringing on causes must be influenced by a trial discretion, applicable to the peculiar circumstances of every case."

5. Time of trial.—An action brought by the Bank of Alexandria, upon a promissory note made negotiable therein, is entitled to trial at the return term of the writ under the act of 1792 incorporating said bank. This case was intended by the legislature of Virginia to be an exception to the general rule that the appearance day for all process was the day after the term. *Young v. Bank of Alexandria*, 5 Cranch 45, 3 L. Ed. 32.

6. When special court not granted.—In Pennsylvania, where it would be doing manifest injustice to hurry a trial on, the rule for a special court will be discharged. *Williams v. Geheogan*, 1 Dall. 267, 268, 1 L. Ed. 131.

When special court granted.—Attorney moved for a special court to try various actions in which H. was defendant, jointly with D. and P.; but it was objected by opposite counsel that the reason of the act of assembly, for granting special courts, did not apply to cases

where there were partners, who could remain during the usual course of proceeding to defend the causes, and who did not join in the application. Held: "The objection is not sufficient to justify a refusal of a motion for a special court. The legislature intended to relieve defendants, who were ready and willing to proceed to trial. * * * The rule for a special court must, therefore, be granted." *Ex parte Holker*, 2 Dall. 111, 1 L. Ed. 311.

1. Trial term.—*Pullman Palace Car Company v. Speck*, 113 U. S. 84, 87, 28 L. Ed. 925, quoting *J. McCrary in Murray v. Holder*, 1 McCrary 341.

2. Trimming.—Where a statute provided that certain vessels and canal boats in handling grain by elevators should only be required to pay the actual cost of **trimming** or shoveling to the leg of the elevator when unloading, and **trimming** cargo when loading, the court said that **trimming** spoken of in the statute was shovelling the grain from one place to another, and was done by longshoremen with scoops or shovels; that **trimming** the ship's cargo when loading was stowing it and securing it for the voyage. *Budd v. New York*, 143 U. S. 517, 529, 36 L. Ed. 247.

TROVER AND CONVERSION.

BY W. F. SOUDER.

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I. Distinguished from Other Actions.

Trespass Distinguished.—Although the distinction between the actions of trespass and trover is well settled, the former being founded on possession, the latter on property, yet they are concurrent remedies to the extent that, whenever trespass will lie for the unlawful taking and conversion of personal property, trover may also be maintained.¹

II. When Action Lies.

A. In General.—At law, if property be tortiously taken or converted, the tortfeasor may be sued in trover.²

B. What Constitutes Conversion.—Retaining possession of property after repudiating the contract by virtue of which it was acquired,³ wrongfully using an indorsed certificate for the purpose of transferring stock,⁴ or any sale of timber on mortgaged land by the mortgagee after the amount due on the mortgage is paid by the mortgagor,⁵ or a purchase by an agent of property he was directed to sell to another,⁶ are all instances of a wrongful conversion for which the action lies.

C. Necessity for Demand and Refusal.—The conversion occurs when there has been a demand by plaintiff and refusal by the defendant.⁷

III. Title to Sustain Action.

A. Ownership or Right of Possession.—To sustain an action of trover there must be an immediate right of possession, when the conversion took place.⁸ Accordingly, if goods are shown to be in the lawful possession of another by lease or similar contract, the plaintiff cannot maintain trover for them.⁹ The action of trover is not grounded upon the mere possession,¹⁰ but

1. **Trespass distinguished.**—United States *v.* Loughrey, 172 U. S. 206, 212, 43 L. Ed. 420.

2. **When action lies.**—May *v.* Le Claire, 11 Wall. 217, 235, 20 L. Ed. 50.

3. **Retaining property after denying contract.**—Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 78, 35 L. Ed. 107.

4. **Wrongful using stock certificate.**—McAllister *v.* Kuhn, 96 U. S. 87, 89, 24 L. Ed. 615.

5. **Sale of timber by mortgagee.**—Hutchins *v.* King, 1 Wall. 53, 17 L. Ed. 544.

6. **Purchase by agent in violation of instruction.**—Where a bank was found to have itself purchased notes, which the owner had authorized it to sell to a third party, it was held liable for their value as for a conversion, even though it was not within the power of the bank to sell them as the owner's agent. First Nat. Bank *v.* Anderson, 172 U. S. 573, 576, 43 L. Ed. 558.

Purchasers who fraudulently purchased, in breach of the trust, are liable in trover. Kitchen *v.* Bedford, 13 Wall. 413, 20 L. Ed. 637.

7. **Demand and refusal.**—Arkansas, etc., Cattle Co. *v.* Mann, 130 U. S. 69, 79, 32 L. Ed. 854; Tome *v.* Dubois, 6 Wall. 548, 18 L. Ed. 943.

8. **Plaintiff must prove right of possession.**—United States *v.* Loughrey, 172 U. S. 206, 215, 43 L. Ed. 420; Northern Pac. Railroad *v.* Paine, 119 U. S. 561, 564, 30 L. Ed. 513.

Chose in action.—In the case of a tort-

ious taking, or wrongful detention of a chose in action against the right or title of the assignee, the injury is one to the right of the property in the thing, and it is therefore unimportant as it respects the derivation of the title; it is sufficient if it belongs to the party bringing the suit at the time of the injury. Deshler *v.* Dodge, 16 How. 622, 630, 14 L. Ed. 1084.

Where a bank was the owner of wheat when S. undertook to ship it to the defendant, and when the defendants received it and converted it to their use, the right of the bank to recover in an action of trover was incontrovertible. Dows *v.* National Exchange Bank, 91 U. S. 618, 637, 23 L. Ed. 214.

Title dependent upon ownership of freehold.—The right, to recover for what is severed from the freehold depends upon the right to the freehold itself. If the plaintiff is in possession, he is presumed to be lawfully so, having the right of possession, and, therefore, entitled to what is severed. If he is out of possession, he must show a title to the land, or right to its possession. Northern Pac. Railroad *v.* Paine, 119 U. S. 561, 564, 30 L. Ed. 513.

9. **Effect of loss of possession.**—United States *v.* Loughrey, 172 U. S. 206, 43 L. Ed. 420.

10. **Possession alone not sufficient.**—Northern Pac. R. Co. *v.* Lewis, 162 U. S. 366, 373, 40 L. Ed. 1002. See post, "Defenses," V, B.

Possession alone, without claim of

is founded upon a right or title in the plaintiff upon the strength of which he must recover.¹¹ The rule that in an action of trover a mere trespasser cannot defeat the plaintiff's right to possession by showing a superior title to a third person without showing himself in privity or connecting himself with such third person is applied only to those cases where the plaintiff is either in possession of the property or entitled to its immediate possession, and thus showing a prima facie right thereto. It has no application to cases wherein the plaintiff has shown no such right to bring the action.¹²

B. Nature of Title Required.—A naked legal title is sufficient to sustain an action of trover.¹³ But a mere equitable claim, which a court of equity may enforce, will not sustain an action at law, in trover for anything severed from land.¹⁴ So also a contingent remainder would be an insufficient title for an action of trover.¹⁵ And one whose title to a vessel depends on a contract in fraud of the registry laws of the United States, cannot maintain trover for the same.¹⁶

IV. Against Whom Action Lies.

A. Infants.—An action of trover may be maintained against an infant,¹⁷ because conversion is in its nature a tort.¹⁸

B. Liability of Agent.—It is true ordinarily that in case of a conversion of the goods of another, in which both principal and agent are concerned, both are severally liable in an action of trover.¹⁹

C. Public Officers.—The rule stated above as to the liability of agents has its limitations, and does not apply even in cases of private persons exercising a public employment, when the act complained of is in the discharge of a duty to the public incident thereto.²⁰ Thus, where a sheriff levied an attachment and made a sale of goods belonging to a person who in the meantime was declared a bankrupt, the sheriff was not liable to the owner's assignee, as he was a public officer acting upon an order of a court of proper jurisdiction.²¹

V. Pleading and Practice.

A. Declaration.—A declaration in an action for trover is sufficient for the

ownership, will not sustain the action. *Walker v. Reister*, 102 U. S. 467, 471, 26 L. Ed. 220.

11. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 373, 40 L. Ed. 1002.

12. **Plaintiff's right to possession defeated by trespasser.**—*United States v. Loughrey*, 172 U. S. 206, 219, 43 L. Ed. 420.

13. **Naked legal title sufficient.**—Where a husband has not parted with the legal title to bonds of which he may have made an equitable gift for his wife's benefit, he can call any person to account in an action of trover who unlawfully converts them. *Kitchen v. Bedford*, 13 Wall. 413, 20 L. Ed. 637.

14. **Mere equitable claims not sufficient.**—*Northern Pac. Railroad v. Paine*, 119 U. S. 561, 565, 30 L. Ed. 513.

15. **Contingent remainder.**—The fact that nothing remained of an original grant by the United States but the possibility of a reversion, a contingent remainder, it would be an insufficient title for an action of trover. *United States v. Loughrey*, 172 U. S. 206, 215, 43 L. Ed. 420; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551.

16. **Contract in fraud of registry laws.**—*Duncanson v. McLure*, 4 Dall. 308, 1 L. Ed. 845.

17. **An infant is liable in trover**, although the goods were delivered to him under a contract, and although they were not actually converted to his own use. *Vasse v. Smith*, 6 Cranch 226, 3 L. Ed. 207. See, generally, the title **INFANTS**, vol. 6, p. 1012.

18. **Infancy affords no protection to an action of trover.**—Infancy is a bar to an action by an owner against his supercargo, for breach of instructions; but not to an action of trover for the goods. Still, however, infancy may be given in evidence, in an action of trover, upon the plea of not guilty; not as a bar, but to the nature of the act which is supposed to be a conversion. *Vasse v. Smith*, 6 Cranch 226, 3 L. Ed. 207.

19. **Agent liable to conversion.**—*Conner v. Long*, 104 U. S. 228, 229, 26 L. Ed. 723. See the title **PRINCIPAL AND AGENT**, vol. 9, p. 685.

20. **Act with discharge of duty incident to public.**—*Conner v. Long*, 104 U. S. 228, 229, 26 L. Ed. 723. See the title **PUBLIC OFFICERS**, vol. 10, p. 426.

21. **Sheriff not liable to an assignee in**

purpose of pleading if it states the ultimate fact to be proven.²² But the circumstances which tend to prove that fact have no place in the pleadings.²³

B. Defenses.—A plaintiff's consent to a wrongful conversion is a bar to an action of trover,²⁴ but where a defendant converts goods by selling them, he cannot defend upon the ground that he acted under authority from another, who had himself no authority to dispose of the goods.²⁵

Title in Third Party as a Defense.—The rule in trover is said to be, that, since the action is not grounded on the mere possession, but is founded upon a right or title in the plaintiff upon the strength of which he must recover, title in a third party may be a defense, even though the defendant is not in any way connected with it.²⁶

C. Evidence.—1. **BURDEN OF PROOF.**—A plaintiff in an action of trover, upon establishing his ownership and an asportation of the property, its value and subsequent possession by the defendant, is entitled to rest.²⁷ And where a defendant justifies his wrongful acts by an act of congress, the burden of producing evidence to establish the fact is upon him.²⁸ He cannot shift that burden by employing an agent to do the work.²⁹

2. **ADMISSIBILITY.**—In actions of trover, the general rules as to the admissibility of collateral facts apply.³⁰ And where a model of a mine was offered in evidence, the witness not swearing to its correctness nor stating that it would illustrate the subject about which he was testifying, it was properly excluded from evidence.³¹ So where the witness did not know personally any-

bankruptcy for wrongful levy of execution.—*Connor v. Long*, 104 U. S. 228, 229, 26 L. Ed. 723.

22. **Declaration stating ultimate fact to be proven.**—*McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

23. **Circumstances to prove facts have no place in pleading.**—*McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

24. **Consent bars action.**—Where an action of trover is founded on the alleged wrongful acts of the defendant in selling the bonds and using the proceeds to pay the notes of H. it follows that, if H. consented to such acts, and if, by the arrangement between H. and G. the former had authority to consent to such acts, and if the plaintiff, having full knowledge of the transactions, ratified and confirmed what was done, he could not maintain this action. *Hathaway v. First Nat. Bank*, 134 U. S. 494, 499, 33 L. Ed. 1004.

25. *Conner v. Long*, 104 U. S. 228, 26 L. Ed. 723.

Illegal seizure by military officer.—Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians for wrongs committed in time of peace under orders emanating from a source which is itself without authority in the premises. Hence, a military officer, seizing liquors supposed to be in Indian country when they are not, is liable to an action of trover as a trespasser. *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

26. **Title in third party as a defense to action.**—*Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 373, 40 L. Ed. 1002. See ante, "Ownership or Right of Possession," III, A.

27. **Prima facie case.**—*United States v. Denver, etc., R. Co.*, 191 U. S. 84, 89, 48 L. Ed. 106.

28. **Burden of proof on defendant.**—In an action of trover by the United States against the railroad company for the value of certain logs cut on the plaintiff's lands, the defendant admitted taking the logs but justified itself by an act of congress giving it the right to take from the public lands material for the construction and repair of its railway and telegraph line. The court held, the burden of producing evidence that the logs were taken in accordance with the statute rested upon the defendant. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366, 40 L. Ed. 1002; *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 85, 48 L. Ed. 106.

29. **Shifting burden.**—Where the burden of proof rests upon the defendant to show that the cutting of timber was for a proper purpose, evidently he cannot shift that burden upon the plaintiff by employing an agent to do the work, the court holding that, although a presumption of this kind may attach to the public officer, they knew of no case holding that a party sued for a conversion by his agent acted within the scope of his authority. *United States v. Denver, etc., R. Co.*, 191 U. S. 84, 91, 48 L. Ed. 106.

30. **Collateral facts.**—*National Steamship Co. v. Tugman*, 143 U. S. 28, 29, 36 L. Ed. 63. See the title EVIDENCE, vol. 5, p. 1015.

31. **Model of mine excluded from evidence.**—In an action to recover damages for the value of certain mineral ores taken from a mining claim of the plaintiff's, by defendant, who owned an adjoining claim, and who had broken into

thing about the property converted, his testimony was properly rejected.³²

D. Laches.—Laches bars an action of trover.³³

E. Parties.—Plaintiff.—Plaintiffs named in a declaration must have a joint interest in the property sued for, or suit is not maintainable.³⁴

F. Damages—1. MEASURE AND ELEMENTS—*a. In General.*—The value of property, with such damages as must necessarily be supposed to flow from the conversion, with interest down to the time of trial, is the true measure.³⁵ And in case of injury, the diminution in value, by reason of the injury, with interest thereon, affords the true measure for estimating damages in such a case.³⁶

b. Computation of Recovery—(1) *As of What Time.*—In the case of ordinary goods being converted the measure of damages is their value at the time of conversion, or, in case of sale and purchase, at the time fixed for their delivery.³⁷ But the jury is not limited to finding the mere value of the property at the time of conversion; but may find, as damages, the value at a subsequent time, at their discretion.³⁸ They may also give the highest value up to the

the vein of the plaintiff's, a witness called by defendant to testify as to the value and quantity of the ore taken out of plaintiff's mine was asked if he had a model of the mine, but the witness was not asked about its correctness, and he did not say that it would illustrate the subject about which he was testifying. The plaintiff objected to the production of the model, and the objection was sustained by the court. There being no model produced in the court, it was held to be properly excluded from evidence. *Patrick v. Graham*, 132 U. S. 627, 628, 629, 630, 33 L. Ed. 460.

32. Witness not knowing personally about property converted.—*Patrick v. Graham*, 132 U. S. 627, 631, 33 L. Ed. 460.

33. Laches for eight years bars an action for after-acquired property under mortgage.—*Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 457, 37 L. Ed. 799. See the title LACHES, vol. 7, p. 799.

34. Plaintiffs must have joint interest.—*Warner v. Norton*, 20 How. 448, 458, 15 L. Ed. 950.

Thus where the owner had the general property in the logs and the sheriff a special property in them, and the logs having been taken by the defendant from the possession of the sheriff under the attachment against owner, it was proper for both to join in the suit. The damages found to have been sustained by each may be added together and awarded to them as plaintiffs. *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379, 389, 27 L. Ed. 157. See, generally, the title PARTIES, vol. 9, p. 34.

35. Measure of damages.—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 477, 42 L. Ed. 1111; *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392; *Watson v. Sutherland*, 5 Wall. 74, 79, 18 L. Ed. 580. See, generally, the title DAMAGES, vol. 5, p. 157.

In actions of trover for simple conver-

sion of domestic animals intended for sale and consumption, the plaintiff receives adequate compensation when allowed damages equal to the value of the property at the time of conversion, with interest, at the established legal rate, from that date. *Arkansas, etc., Cattle Co. v. Mann*, 130 U. S. 69, 79, 32 L. Ed. 854.

Increase on property.—In an action of trover for the conversion of cattle the defendant's liability as for conversion extended, at least, to such of the calves, the increase of plaintiff's cows, as were in existence at the time of demand and conversion. *Arkansas, etc., Cattle Co. v. Mann*, 130 U. S. 69, 78, 32 L. Ed. 854. See the title ANIMALS, vol. 1, p. 319.

36. In case of injury.—*The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456.

Wrongful detention of teas.—In an action for the wrongful detention of teas the court held that the plaintiffs were entitled to recover such damages as they had proved themselves entitled to, on account of the actual injury sustained by the seizure and detention of the goods; and in ascertaining what these damages were, the plaintiffs had a right to recover the value of the goods at the time of the levy, with interest from the expiration of the usual credit on extensive sales. *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392.

37. Time of computing.—*Galigher v. Jones*, 129 U. S. 193, 200, 32 L. Ed. 658.

Stock transactions.—In stock transactions, where there has been a conversion, the measure of damages is the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock. *Galigher v. Jones*, 129 U. S. 193, 200, 201, 32 L. Ed. 658. See, generally, the title STOCK AND STOCKHOLDERS, ante, p. 182.

38. Finding of damages in discretion of jury.—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 477, 42 L. Ed. 1111.

time of trial.³⁹

And if the property has been sold the damages are not limited to the price received but the jury, if they find for the plaintiff, are bound to give the actual value of the property.⁴⁰

(2) *As of What Place.*—The difference between the value of goods illegally seized, at the place where they were taken and the place where they were returned to the owners, is the proper measure of damages.⁴¹ And where timber was unlawfully cut by a railroad company, there being no intention on the part of it to violate any law, the place of estimating the damages was the place where the timber was cut.⁴²

c. *Benefits.*—The real value of the property is not always the sole measure of damages; if the conversion of it is (or may reasonably supposed to be) productive of any benefit to the defendant, the jury may give additional damages for it.⁴³ But where the defendant acquires no gain to himself by the conversion, he is not answerable for any damages above the real value of the thing converted.⁴⁴

d. *Vindictive Damages.*—A jury cannot give vindictive damages in an action of trover.⁴⁵

e. *Consequential Damages.*—Loss of trade, destruction of credit and failure of business prospects cannot be recovered in an action of trover where malice or bad faith was not an ingredient, because such damages were collateral or consequential as regards a seizure of personal property, and could only be recovered at law where the issue of bad faith was involved.⁴⁶

2. **MITIGATION OF DAMAGES**—a. *Return of Property.*—Power to tender back the property in trover, where the gist of the action is conversion, is certainly vested in the defendant, and its exercise is a matter of frequent occurrence, where it appears that the property is in the same condition as when taken.⁴⁷

b. *Where Value of Property Wrongfully Held Is Increased by Labor.*—Where the value of property is increased by labor performed thereon by a willful trespasser, such wrongdoer, in accounting for the value of property thus

39. **Highest value at time of trial.**—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 477, 42 L. Ed. 1111.

40. **Jury must give actual damages.**—*Duncanson v. McLure*, 4 Dall. 308, 314, 1 L. Ed. 845.

41. **Place of estimating.**—*Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471.

42. **Timber wrongfully cut.**—*United States v. St. Anthony R. Co.*, 192 U. S. 524, 542, 48 L. Ed. 548. See, generally, the title *TREES AND TIMBER*, ante, p. 648.

43. **When defendant benefited, additional damages recoverable.**—Thus where trover is brought for money in a bag, interest ought to be allowed by way of damages for the detention; so, where negroes had not been delivered, damages could be given for the labor of the negroes; for the use of money or negroes is a certain benefit to the party who converts them, and he ought to pay it. *Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 475, 42 L. Ed. 1111.

Conversion of infant's assets.—Where infant's assets were converted by the defendant, the court did not err to the prejudice of the defendant in the matter of charging him with interest at six per cent on the amount of the assets con-

verted by him. The interest is charged by reason of his conversion of the whole assets of the estate. It is not a mere mingling of the funds with his own, while recognizing his liability to repay them and having them at the same time ready to respond when demanded. It is a wholesome conversion of the entire assets. *Harrison v. Perea*, 168 U. S. 311, 324, 42 L. Ed. 478. See, generally, the title *GUARDIAN AND WARD*, vol. 6, p. 599.

44. **Defendant acquiring no gain.**—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 475, 42 L. Ed. 1111.

45. **Vindictive damages not recoverable.**—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 42 L. Ed. 1111. See the title *EXEMPLARY DAMAGES*, vol. 6, p. 193.

46. **Consequential damages not recoverable.**—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 480, 42 L. Ed. 1111; *Watson v. Sutherland*, 5 Wall. 74, 79, 18 L. Ed. 580. See the title *DAMAGES*, vol. 5, p. 166.

47. **Return of property.**—Such a right may doubtless be exercised where the charge is conversion or a wrongful taking even after action brought, if it be accompanied with a tender of costs and

taken, will not be credited with the enhanced value which he has placed on the property.⁴⁸ Where, however, the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern;⁴⁹ or if the conversion sued for was after value had been added to the property by the work of the defendant, he should be credited with this addition.⁵⁰ And the rule is not changed when the owner finds his property in hands but one removed from the willful trespasser.⁵¹

G. Election of Remedies.—Where there has been an unlawful taking either trespass or trover will lie; but if the party proceeds in trover, he waives the tort, except as it is evidence of a conversion.⁵² And where money has been misappropriated, the general rule is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested, or to recover the money.⁵³

H. Judgment.—A judgment in an action of trover where there is a recovery of the full value of the property to which the action relates, transfers the plaintiff's title ipso facto to the defendant.⁵⁴ But where there is a judgment without satisfaction, the title does not vest in the defendant.⁵⁵

TRUE.—See note 1.

intervening damages. *Colby v. Reed*, 99 U. S. 560, 566, 25 L. Ed. 484.

48. Value enhanced by trespasser.—*Wooden-Ware Co. v. United States*, 106 U. S. 432, 436, 27 L. Ed. 230; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 36 L. Ed. 762; *Pine River Logging Co. v. United States*, 186 U. S. 279, 293, 46 L. Ed. 1164.

Thus where logs were enhanced in value by the labor of a willful trespasser in cutting them, and the expense of transporting them to market, the rightful owner is entitled to recover the enhanced value, that is, he is entitled to recover the full value at the time and the place of the trespasser's sale of property. *Wooden-Ware Co. v. United States*, 106 U. S. 432, 436, 27 L. Ed. 230.

49. Trespass resulting from inadvertence or mistake.—*Wooden-Ware Co. v. United States*, 106 U. S. 432, 436, 27 L. Ed. 230; *Pine River Logging Co. v. United States*, 186 U. S. 279, 46 L. Ed. 1164.

50. Value added before conversion.—*Wooden-Ware Co. v. United States*, 106 U. S. 432, 436, 27 L. Ed. 230.

Thus where the owners of saw-logs which in a freshet had floated far down a river, and coming thus as waifs to persons along the river, had been saved and sawed by them into boards, affirmed the acts of such persons in saving and sawing them, the salvors, on a claim by the owners to the value of the lumber, are entitled to a just compensation for their work and expenses in saving it. *Tome v. Dubois*, 6 Wall. 548, 18 L. Ed. 943.

51. Property in hands of third party.—*Wooden-Ware Co. v. United States*, 106

U. S. 432, 436, 27 L. Ed. 230.

52. Waiver of tort.—*Vance v. Vandercook Co.*, No. 2, 170 U. S. 468, 475, 42 L. Ed. 1111.

53. Money misappropriated.—*Smith v. Vodges*, 92 U. S. 183, 186, 23 L. Ed. 481; *Oliver v. Piott*, 3 How. 333, 401, 11 L. Ed. 622; *May v. LeClaire*, 11 Wall. 217, 235, 20 L. Ed. 50.

54. Plaintiff's title transferred to defendant.—*The Falcon*, 19 Wall. 75, 80, 22 L. Ed. 98.

55. Judgment without satisfaction does not vest title.—*Lovejoy v. Murray*, 3 Wall. 1, 16, 18 L. Ed. 129; *Birdsell v. Shaliol*, 112 U. S. 485, 489, 28 L. Ed. 768. As to effect of judgment in trover against one of two joint tortfeasors, see the title *RES ADJUDICATA*, vol. 10, p. 755.

1. True answers.—As to what is meant by true and untrue answers in the law of insurance, see the title *INSURANCE*, vol. 7, p. 153.

True value.—The words "true value," in the 11th section of the duty act of the 20th of April, 1818, c. 361, mean the actual cost of the goods to the importer, at the place from which they were imported, and not the current market value of the goods at such place. *United States v. Tappen*, 11 Wheat. 419, 6 L. Ed. 509.

True cash value.—A statute requiring that "railroad property" be assessed at its "true cash value," meant to require that it should be assessed at the value which it had as used and by reason of its use. *Pittsburgh, etc., Ry. Co. v. Backus*, 154 U. S. 421, 430, 31 L. Ed. 1031.

TRULY.—As to a condition in a cashier's bond to "well and truly" execute the duties of the office, see the title **BANKS AND BANKING**, vol. 3, p. 99.

TRUST.—See the titles **MONOPOLIES AND CORPORATE TRUSTS**, vol. 8, p. 431; **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452; **TRUSTS AND TRUSTEES**.

TRUST COMPANIES.—See the title **LOAN, TRUST AND SAFE DEPOSIT COMPANIES**, vol. 7, p. 1057.

TRUST DEEDS.—See the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452.

TRUSTS AND TRUSTEES.

BY A. P. WALKER.

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As to covenants to stand seized to uses, see the title ESTATES, vol. 5, p. 907, note 22.

I. Definition and Nature.

A trust is where there are rights, titles, and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked. Interests in real estate, purely contingent, may be made the subjects of contract and equitable cognizance, as between the proper parties.¹

II. Creation, Classification and Validity.

A. Creation—1. USE OF TECHNICAL LANGUAGE—a. *In General*.—It is an

1. Definition and nature.—Seymour v. Freer, 8 Wall. 202, 214, 19 L. Ed. 306.

Trusts are the mere creatures of confidence between party and party, totally distinct in almost every quality from those legal estates which are the subjects of tenure. They are in their nature independent of tenure, and therefore not the object of those laws which are founded in the nature of tenure. They are rights arising solely out of the intent of the party who created them, and therefore such intent could be the only guide in the execution of them. *Green v. Green*, 23 Wall. 486, 490, 23 L. Ed. 75.

The words "in trust," in a will, may be construed to create a use, if the intention of the testator, or the nature of the devise requires it; but the ordinary sense of the term is descriptive of a fiduciary estate or technical trust; and the sense ought to be retained, until the other sense is clearly established to be that intended by the testator. *King v. Mitchell*, 8 Pet. 326, 352, 8 L. Ed. 962. See post, "Under Statute of Trusts and Uses," III, D, 1. See, also, the title WILLS.

In the present case, there are strong reasons for construing the words to be a technical trust; the devise looked to the issue of a person not then in being, and of course, if such issue should come in esse, a long minority must follow; during this period, it was an object with the tes-

tator, to uphold the estate in the father, for the benefit of his issue; and this could be better accomplished by him, as a trustee, than a guardian. If the estate to the issue were a use, it would vest the legal estate in them, as soon as they came in esse; and if the first-born children should be daughters, it would vest in them, subject to being divested by the subsequent birth of a son; a trust estate would far better provide for these contingencies than a legal estate; there is then no reason for deflecting the words from their ordinary meaning. *King v. Mitchell*, 8 Pet. 326, 8 L. Ed. 962.

The words "in trust" in the chancery act of Illinois, Hurd's Rev. Stat., ch. 22, § 49 as used in the exceptions or proviso, cannot have a more restricted meaning than the same words in the enacting clause. *Potter v. Couch*, 141 U. S. 296, 320, 35 L. Ed. 721; *Spindle v. Shreve*, 111 U. S. 542, 546, 28 L. Ed. 512.

The terms "substitutions" and *fidei commissum* of the Louisiana law explained and defined. See *McDonough v. Murdoch*, 15 How. 367, 14 L. Ed. 732, in which the dispositions of property in the will under consideration was held not to be substitutions, or *fidei commissum*.

Application of rule in Shelley's case.—See the title SHELLEY'S CASE (RULE IN), vol. 10, p. 1131.

elementary principle, that no particular form of words is necessary to create a trust.²

b. *Intention of Trustor Governs.*—See ante, "In General," II, A, 1, a.

2. CERTAINTY AND DEFINITENESS.—The trustor must indicate with reasonable certainty an intention to create a trust, and the subject, purpose and beneficiaries of the trust.³

Distinction between a power and a trust.
—See the title POWERS, vol. 9, p. 590.

Credit and trust distinguished.—See the title BANKRUPTCY, vol. 2, p. 922.

Trust distinguished from mortgage.—See *Flagg v. Walker*, 113 U. S. 659, 676, 28 L. Ed. 1072.

2. **Use of technical language.**—*Leavenworth, etc., R. Co. v. United States*, 92 U. S. 733, 750, 23 L. Ed. 634.

No technical language, however, is necessary to the creation of a trust, either by deed or by will. It is not necessary to use the words "upon trust" or "trustees," if the creation of a trust is otherwise sufficiently evident. If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, and impose corresponding duties upon the party receiving the title, if it be capable of lawful enforcement. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument. *Colton v. Colton*, 127 U. S. 300, 310, 32 L. Ed. 138.

Mr. Lewin, in his work on Trusts, thus gives the rules on the subject of the creation of trusts: "On a careful examination the rule appears to be, that whether there was transmutation of possession or not, the trust will be supported, provided it was in the first instance perfectly created. * * * It is evident that a trust is not perfectly created where there is a mere intention or voluntary agreement to establish a trust, the settlor himself contemplating some further act for the purpose of giving it completion. * * * If the settlor purpose to convert himself into a trustee, then the trust is perfectly created, and will be enforced so soon as the settlor has executed an express declaration of trust, intended to be final and binding upon him, and in this case it is immaterial whether the nature of the property be legal or equitable. * * * Where the settlor purposes to make a stranger the trustee, then, to ascertain whether a valid trust has been created or not, we must take the following distinctions: If the subject of the trust be a legal interest and one capable of legal transmutation, as land, or chattels, etc., the trust is not perfectly created unless the legal interest be actually vested in the trustee." *Adams v. Adams*, 21 Wall. 185, 192, 22 L. Ed. 504.

Mr. Hill, in his work on Trusts, lays down the rule in these words, in speaking of a voluntary disposition in trust: "The fact that the deed remains in the possession of the party by whom it is executed, and that it is not acted upon, or is even subsequently destroyed, will not affect its validity, unless there are some other circumstances connected with the transaction which would render it inequitable to enforce its performance." To this he cites many authorities. After quoting many other cases, the author adds: "It would seem to follow from the foregoing decisions that the court will in no case interfere to enforce the performance of a voluntary trust against its author if the legal interest in the property be not transferred or acquired as part of the transaction creating the trust. The doctrine of the court however does not, in fact, appear to be so confined. If a formal declaration of trust be made by the legal owner of the property declaring himself in terms the trustee of that property for a volunteer, or directing that it shall be held in trust for the volunteer, the court will consider such a declaration as a trust actually created and will act upon it as such." The author says again: "It will be seen that it is difficult to define with accuracy the law affecting this subject. The writer conceives that he is warranted in stating the following propositions to be the result of the several decisions: 1. Where the author of a trust is possessed of the legal interest in the property, a clear declaration of trust contained in or accompanying a deed or act which passes the legal estate will create a perfect executed trust, and will be established against its author and all subsequent volunteers claiming under him. 2. A clear declaration or direction by a party that the property shall be held in trust for the objects of his bounty, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust, and will be enforced against the party himself, or representatives, or next of kin after his death." *Adams v. Adams*, 21 Wall. 185, 193, 22 L. Ed. 504.

"A written instrument, though inefficient as a will from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust." *Byers v. McAuley*, 149 U. S. 608, 621, 37 L. Ed. 867.

Letters, telegrams and memorandum agreements.—See post, "Writing," II, A, 3.

3. **Certainty and definiteness.**—*Colton v.*

3. **WRITING.**—At common law the declaration of an express trust could be proven by parol evidence,⁴ and this is the rule in many states,⁵ but under the statute of frauds of 29 Charles II the declaration of an express trust was required to be in writing, and could not be proved by oral testimony,⁶ and this

Colton, 127 U. S. 300, 312, 319, 32 L. Ed. 138.

The language of a bequest was as follows: "I give and bequeath to my wife A. all of my estate real and personal." In direct connection with this the testator adds: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." It was held that the trust thereby created was not incapable of execution by reason of uncertainty as to the form and extent of the provision intended and because it involves the exercise of discretionary power on part of the trustee. There is nothing in this left so vague and indefinite that it cannot by the usual processes of the law, be reduced to certainty. Both the mother and sister are entitled to take a beneficial interest under the will to the extent, out of the estate given by the testator to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. It will be the duty of the court to ascertain after proper inquiry, and thereupon to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it. Colton v. Colton, 127 U. S. 300, 321, 32 L. Ed. 138.

4. **Writing.**—Osterman v. Baldwin, 6 Wall. 116, 123, 18 L. Ed. 730.

Parol evidence to establish a trust must be clear and convincing not doubtful, uncertain, and contradictory. The evidence must consist of something more than loose conversations with third parties. The declarations of the grantor relied upon must be made at the time of his conveyance or whilst he retains an interest in the property, and be so connected with the conveyance as to justify the conclusion that it was made or is held in execution of the purposes declared. Declarations of a purpose to create a trust not carried out are of no value, nor are direct promises to that effect unaccompanied with considerations turning them into contracts. Allen v. Withrow, 110 U. S. 119, 130, 28 L. Ed. 90.

Husband and wife, having no children, conveyed the estate of the wife to A., who reconveyed the estate to them, as joint tenants in fee, under a parol agreement between the husband and wife, that the husband should settle the fee upon the

wife's heirs. The husband having died without settling the estate, it was held, that parol evidence of this agreement was admissible, since there was a breach of trust in the husband. Thomson v. White, 1 Dall. 424, 1 L. Ed. 206.

Consideration.—A promise, without consideration, good or valuable, there being no relationship, by blood or marriage, between the promisor and promisee of a parol donation to be subsequently made, does not impress property in the promisor's hands with a trust which a court of equity can enforce; until executed such promise is in a legal view valueless. Allen v. Withrow, 110 U. S. 119, 128, 28 L. Ed. 90.

A naked promise by one to buy lands in his own name, pay for them with his own money, and hold them for the benefit of another, cannot be enforced in equity, and is void. Howland v. Blake, 97 U. S. 624, 628, 24 L. Ed. 1027.

Evidence in rebuttal.—Parol proof that plaintiff's claim is included in those protected by deed of trust, may be met by proof that the trustee is to be first reimbursed. See Newhall v. LeBreton, 119 U. S. 259, 30 L. Ed. 381.

Estoppel to set up.—In Laughlin v. Mitchell, 121 U. S. 411, 420, 30 L. Ed. 987, it was held that the plaintiff was estopped by her action in respect to the acknowledgment of the lease, placing it on record, and permitting it to remain unquestioned for over twenty-two years, from setting up a parol trust alleged in regard to the property.

5. **North Carolina.**—There not being in North Carolina any statutory provision relating to express trusts, "manifested and proved," similar to the provision in the seventh section of the statute of frauds, such trusts in that state stand as at common law. Olcott v. Bynum, 17 Wall. 45, 21 L. Ed. 570.

Texas.—The courts of Texas hold that such trusts are not embraced in their statute of frauds. Osterman v. Baldwin, 6 Wall. 116, 18 L. Ed. 730.

B. purchased the lots and paid the money for them. H. had no interest in them, but agreed to hold them in trust for B., the object being to place them in the hands of a citizen of Texas, who could pay taxes and protect them. The trust, thus created, is an express trust—not one resulting by implication of law—proved, by parol, but equally efficacious, as if in writing. Osterman v. Baldwin, 6 Wall. 116, 18 L. Ed. 730.

6. **Osterman v. Baldwin,** 6 Wall. 116, 18 L. Ed. 730.

or a similar statute is in force in most of the states,⁷ and in the District of Columbia.⁸

Sufficiency of Writing.—The letters, memorandum agreements and telegrams of the parties may be read together as one instrument for the purpose of establishing a trust.⁹

4. **TRUST CREATED BY DEED OF CONVEYANCE**—a. *In General.*—Where a deed in trust was executed, delivered, and the trusteeship accepted, the deed became a valid instrument as between the parties to it.¹⁰

b. *Assent of Beneficiary.*—Deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed, on the idea that the deed was complete, when executed by the parties to it.¹¹

7. **Florida.**—An agreement creating by parol a trust or interest in lands, cannot be sustained under the statute of frauds. *Howland v. Blake*, 97 U. S. 624, 628, 24 L. Ed. 1027.

Iowa.—Under the statute of frauds of Iowa no trust in relation to real property can be established, except by an instrument in writing executed in the same manner as a deed of conveyance; but so far as personal property is concerned, a trust may be established by parol evidence but such evidence must be clear and convincing, not doubtful, uncertain and contradictory. *Allen v. Withrow*, 110 U. S. 119, 129, 28 L. Ed. 90.

Michigan.—See *Loring v. Palmer*, 118 U. S. 321, 340, 30 L. Ed. 211.

8. **District of Columbia.**—Section 8, Comp. Stat. D. C. 231, requires that all declarations or creations of trust or confidence in respect to real estate shall be manifested and proved by some writing. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793.

9. If upon the face of the correspondence and written agreements of the parties, read and construed together in the light of the circumstances which surrounded the parties at the time, a trust is fully expressed and clearly defined, such trust is established according to the statute of Michigan, 2 Howell's Anno. Stat., § 5573, p. 1448. *Loring v. Palmer*, 118 U. S. 321, 340, 30 L. Ed. 211. And see ante, "Use of Technical Language," II, A. 1.

10. **Trust created by deed of conveyance.**—*Hitz v. National Metropolitan Bank*, 111 U. S. 722, 725, 28 L. Ed. 577.

When on a bill by a wife against her husband to establish a deed of trust to a third party in her favor, and now in the husband's possession, which deed she alleges that he executed and delivered, the husband, in an answer responsive to her bill, denies that he did deliver it, his denial comes to nothing if he admit in the same answer that he signed and sealed it, acknowledged it before a proper magistrate, and put it upon record; facts which of

themselves may, under the circumstances of the case, constitute a delivery. In such a case he denies the law simply. *Adams v. Adams*, 21 Wall. 185, 22 L. Ed. 504.

A deed by husband and wife conveying by formal words, in presenti, a portion of his real property in trust to a third party, for the wife's separate use, signed, sealed and acknowledged by both parties, all in form and put on record in the appropriate office by the husband, and afterwards spoken of by him to her and to other persons as a provision which he had made for her and her children against accident, here sustained as such trust in her favor, in the face of his answer that he never "delivered" the deed, and that owing to the disturbed and revolutionary character of the times (the rebellion then, August, 1861, apparently waxing strong), and the threatened condition of the federal city and other contingencies growing out of the war, he had caused the deed to be made and partially executed, so that upon short notice he could deliver it and make it effectual, retaining in the meantime the control of the title; and that he had himself put it on record, and that it had never been out of his possession except for the time necessary to have it recorded. It was held that, although the person named in the deed as trustee never heard of the deed until years afterwards, when he was called on by the wife, she being then divorced from her husband, she was entitled to assert the trust. *Adams v. Adams*, 21 Wall. 185, 186, 22 L. Ed. 504.

11. **Assent of beneficiary.**—*Brooks v. Marbury*, 11 Wheat. 78, 87, 97, 6 L. Ed. 423; *Tompkins v. Wheeler*, 16 Pet. 106, 119, 10 L. Ed. 903.

Where a trust is created for the benefit of a third party, though without his knowledge at the time, he may upon discovering it, affirm the trust and enforce its execution. *Bank of the Metropolis v. Gutschlick*, 14 Pet. 19, 31, 10 L. Ed. 335; *Felix v. Patrick*, 145 U. S. 317, 328, 36 L. Ed. 719.

The omission of creditors to assent to

c. *Parol Evidence*.—The usual rules of parol evidence are applicable to deeds declaring trusts.¹²

B. Classification—1. **EXECUTED AND EXECUTORY TRUSTS**.—The distinction between trusts executed and executory is this: A trust executed is where, the party has given complete directions for settling his estate with perfect limitations; an executory trust is where the directions are incomplete, and are rather minutes, or instructions for the settlement.¹³

2. **EXPRESS AND IMPLIED TRUSTS**—a. *Distinction*.—Trusts are either express or implied, the former being such as are raised or created by the act of the parties, and the latter being such as are raised or created by presumption or construction of law.¹⁴

b. *Express Trusts*—(1) *In General*.—Express trusts are such as are raised or created by the act of the parties.¹⁵ Express trusts are abolished by statute

the deed, or to claim under it, may, under suspicious circumstances, afford some evidence of fraud. But real bona fide creditors are rarely unwilling to receive their debts from any hand that will pay them. *Tompkins v. Wheeler*, 16 Pet. 106, 119, 10 L. Ed. 903.

12. **Parol evidence**.—Where a conveyance of real estate is made to the grantee, as "trustee," without setting forth for whom or for what purpose he is trustee, parol evidence is admissible to establish the fact. *Railroad Co. v. Durant*, 95 U. S. 576, 24 L. Ed. 391.

The names of the beneficiaries need not be given in the instrument creating the trust, but they may be designated by class as "all parties who have rendered service heretofore in the prosecution of said claim," and are to be rewarded "upon the principles of equity and justice, according to the value of the services so rendered." And if there be any conflict between individuals of such class, a court of equity is the proper tribunal for the adjustment of their respective claims. In such case, where the property is disposed of absolutely, the original assignor or party creating the trust need not be made a party to the bill. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

Consideration.—Where the sum of one dollar is mentioned in the trust deed as the consideration, the true consideration may be shown by parol evidence. It is always understood that the one dollar in such connection is merely nominal and is never actually paid. In this case it means no more than that nothing was paid by the trustees, who took no beneficial interest. It neither contradicts nor varies this statement to show that a valuable consideration passed from the beneficiary to the trustee for his conveyance of his life estate to the trustees for her benefit. *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 727, 28 L. Ed. 577.

13. **Executed and executory trusts**.—*Neves v. Scott*, 9 How. 196, 211, 13 L. Ed. 102. See, also, *Neves v. Scott*, 13 How. 268, 271, 14 L. Ed. 140.

Executed trusts are trusts actually defined and declared. *Neves v. Scott*, 13

How. 268, 271, 14 L. Ed. 140.

"In executed trusts, whether by deed or will, the rule of law must prevail, and the apparent intention must give way to those fundamental rules, which for ages have served as landmarks in the disposition of property." *Adams v. Law*, 17 How. 417, 15 L. Ed. 149.

14. **Distinction**.—*Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.

15. **Express trusts**.—*Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.

Instances of trust.—A declaration of trust by which the parties who execute it declare that they hold the property in trust for themselves and two other persons is an express trust. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 334, 32 L. Ed. 134.

Where a person acknowledged the receipt of "the sum of \$119,000, in bonds" of a railroad company, and of "50,405, dollars of coupons," amounting in the aggregate to "the sum of \$169,405," "which said sum he promised to expend in the purchase of lands" of the same railroad company, "at or near the average price of \$5 per acre;" held, that this was a trust to buy the land with the bonds at or near the price of \$5 an acre; and not to buy them with the proceeds of the bonds after they were sold at a nominal price. *Kitchen v. Bedford*, 13 Wall. 413, 20 L. Ed. 637.

A paper was in the following language: "To whom it may concern: I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself. H. S. McComb." It was held that this paper was an absolute and unqualified declaration of trust given by McComb to Snyder for the amount of this subscription so far as it had been paid. *McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876.

A contract by which a person was to purchase land for another, who was to

sell the property within a limited time, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to such person one-half of the residue, creates an equitable interest in the lands. To the extent of one-half of the residue, the grantee, was a trustee, and such other person a *cestui que trust*, such lands having been purchased and conveyed. The grantee took the legal title in trust for the purposes specified. *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306.

The result is the same as if it were held that the parties were copartners. In that event, *Seymour* would still have held the property as trustee for the firm, according to the rights of the respective members. *Seymour v. Freer*, 8 Wall. 202, 215, 19 L. Ed. 306.

Where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165, citing *Taylor v. Benham*, 5 How. 233, 274, 12 L. Ed. 130; *Barings v. Dabney*, 19 Wall. 1, 22 L. Ed. 90; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 36 L. Ed. 118.

A contract by an attorney to collect a claim for the Choctaw Nation, for 30 per cent of the amount collected, contained a stipulation "to adjust the claims of all persons who have rendered services heretofore in the prosecution of such claim, upon the principles of equity and justice, according to the value of the services so rendered." It was held that this stipulation plainly declares a trust in favor of persons who have rendered such services and was not intended to indemnify the Choctaws against claims therefor, but to satisfy any moral obligation for services which had been performed, but not completed, and to throw the burden of adjusting and paying them upon the attorney. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

A contract for the collection of an Indian claim against the government provided for the payment as a fee of 30 per cent of the amount collected, with further stipulation that 5 per cent upon such 30 per cent should be paid to C., and that the attorneys "should adjust the claims of all parties who had theretofore rendered services in the prosecution of such claim upon the principles of equity and justice, according to the value of the services so rendered." Other attorneys had rendered services in the prosecution of such claim for compensation which was

contingent upon collection and the contract had been annulled before performance. It was held that the fact that no legal claim existed for such services, does not defeat the right to compensation therefor under the trust arising under such stipulation. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

The governing committee of a stock exchange had no personal interest in or title to a fund placed in its possession in the trust and confidence that it would see that the purposes of the deposit were fulfilled and the moneys paid out only in accordance with the terms of the trust under which it was deposited. There can be no question that the fund thereby became a trust fund in the possession of the governing committee and the disposition of which in accordance with the trust those members were called upon to secure. The committee occupied, from the time of the deposit of the funds, a fiduciary relation towards the parties depositing it, and it became a trustee of the fund charged with the duty of seeing that it was applied in conformity with the provision creating it. *Clews v. Jamieson*, 182 U. S. 461, 478, 45 L. Ed. 1183.

Transaction creating a trust rather than a mortgage.—A conveyed to B several tracts of land, one of which was known as "the pasture," and another as "the homestead." "The pasture" was subject to mortgage to C and the other tracts were also encumbered with a mortgage. B agreed verbally to pay to A and wife \$1,500 a year for four years; to dispose of the property so conveyed to him; and to pay A's debts out of the proceeds. He further agreed to divide equally between himself and them all that remained at the end of the four years. A subsequently written agreement substantially setting forth the above agreement further provided that B's liability to C should not exceed the proceeds of the sale of "the pasture;" that the deed to B was absolute for all purposes; and that B was to have the free and unobstructed control and ownership of the property. B remained for some time in possession; paid part of A's debts, advanced him cash for his use and for taxes and repairs. B also bought in the mortgage on "the homestead," and took an assignment of the same to himself. A afterwards resumed possession, and subsequently thereto the mortgage on "the pasture" was foreclosed and the property sold. It was held that the relation of B to A and his wife was not that of mortgagee, but that of trustee, under the original deed and subsequent agreement; and that B was not liable to pay the mortgage debt on "the pasture." *Flagg v. Walker*, 113 U. S. 659, 660, 28 L. Ed. 1072.

Transaction held not to create a trust.—A grantee under a deed conveying an equitable interest only, the consideration

in Louisiana.¹⁶

(2) *Active and Passive Trusts*.—See post, "Under Statute of Trusts and Uses," III, C, 1, b.

c. *Implied Trusts*—(1) *Definition, Classification and Abolition by Statute*.—Implied trusts are such as are raised or created by presumption or construction of law.¹⁷

Classification.—Implied trusts may also be divided into two general classes: First, those that rest upon the presumed intention of the parties. Secondly, those which are independent of any such express intentions, and are forced upon the conscience of the party by operation of law.¹⁸

Abolition by Statute.—In some jurisdictions, statutes abolishing implied and resulting trusts are in force.¹⁹

(2) *Trusts Resting upon Presumed Intention of Parties*—(a) *In General*.—An implied trust is raised or founded upon the presumed though unexpressed intention of the parties who create it, where taking all the circumstances together it is the fair and reasonable interpretation of their acts and transactions.²⁰ Where no trust is declared or contemplated at the time of distinct

of which was an agreement by which the grantee promised to buy up existing judgments against the grantor, to sell the interest conveyed by the deed and to pay to the wife of the grantor one-half of the net proceeds, who in fact bought up some of the judgments only, and sold those again, and never performed his agreement in this or any other particular, is not entitled to the affirmative interposition of a court of equity to obtain the interest included in the deed and perfect his title thereto. *Potter v. Couch*, 141 U. S. 296, 320, 35 L. Ed. 721.

There is no trust created as to property by an arrangement placing a fund in the hands of agents for the payment by him of a debt to another, where that arrangement is stated to have been as an indemnity to the agent against his own personal liability and as a guarantee in favor of another trust. The arrangement cannot be construed into a trust for the benefit of the creditor's estate because there was no privity and no notice, and the arrangement was merely an adjustment, made among the parties thereto for their own convenience, of the accounts between them. *Ware v. Galveston City Co.*, 111 U. S. 170, 174, 28 L. Ed. 393.

¹⁶. *Gaines v. Chew*, 2 How. 619, 649, 11 L. Ed. 402.

¹⁷. **Definition and classification**.—*Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.

¹⁸. **Classification**.—*Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963.

¹⁹. **Abolition by statute**.—*Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793.

There is no statute in force in the District of Columbia putting an end to implied and resulting trusts. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793.

Louisiana.—Article 1507 of the Civil Code of Louisiana abolishes express

trusts, but it does not reach nor affect that trust which the law implies from the fraud of an individual who has, against conscience and right, possessed himself of another's property. In such a case the Louisiana law affords redress as speedily and amply as the law of any other state. There is, therefore, no foundation for the allegation, that an implied trust, which is the creature of equity, has been abrogated in Louisiana. Under another name it is preserved there in its full vigor and effect. Without this principle, justice could not be administered. One man possesses himself wrongfully and fraudulently of the property of another; in equity, he holds such property in trust, for the rightful owner. *Gaines v. Chew*, 2 How. 619, 649, 11 L. Ed. 402.

²⁰. The refusal of creditors to whom money and drafts were remitted by a debtor, with express direction to apply them on a specific debt, so to apply them, does not change the relation of the parties to this fund, or make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by refusal to execute the trust which he had assumed. *Libby v. Hopkins*, 104 U. S. 303, 308, 26 L. Ed. 769.

Where a bill is remitted, with directions to appropriate the proceeds among certain creditors, in designated proportions, the party receiving it becomes a trustee for the creditors, and the money is not liable to be attached as the property of the debtor. *Sharpless v. Welsh*, 4 Dall. 279, 1 L. Ed. 833.

A being indebted to several persons in Philadelphia, remitted a bill to B, in his favor, A saying, at the same time, that in a few days he would send directions about its disposition, which he accordingly did, and apportioned the proceeds of the bill among certain of his creditors;

substantive and unconnected transactions, a court of law cannot undertake to create one in opposition to other legal and meritorious claims.²¹

An adverse possessor is not a trustee.²²

(b) *Resulting Trusts*—aa. *Payment of Purchase Price by Person Other than Grantee*.—It is true as a general proposition that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, by operation of law and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.²³ Such trusts are raised by

subsequently, one of them laid a foreign attachment upon A's funds in the hands of the acceptor of the bill, and of B. Held, that B. became a trustee for the creditors, from the time of receiving A's appropriation, and that the creditors thereupon acquired such an interest in the trust fund, as could not be divested or affected by the attachment. *Sharpless v. Welsh*, 4 Dall. 279, 1 L. Ed. 833.

A trust is not created in favor of the bondholders of a state, in respect to deposits of money in a bank intended to satisfy the interest or principal of stock or bonds of the state. *Manhattan Co. v. Blake*, 148 U. S. 412, 425, 37 L. Ed. 504, distinguishing *Sharpless v. Welsh*, 4 Dall. 279, 1 L. Ed. 833, and *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.

The reservation of the title as security for the payment of the purchase price of a chattel, where negotiable notes are taken as evidence of the same, is not the reservation of anything in favor of the maker but is for the benefit of the payee and all subsequent holders of the papers. *Chicago R., etc., Co. v. Merchants' Bank*, 136 U. S. 268, 284, 34 L. Ed. 349.

The language of a will by which the testator directs the executor to distribute the proceeds of certain property equally between certain minor legatees does not imply a direction to the executor to hold and administer the property for the benefit of the children, and not to pay it over to a lawfully appointed administrator or to one legally authorized to receive. *Darlington v. Turner*, 202 U. S. 195, 238, 50 L. Ed. 992.

A grantee of land conveyed to him simply as security against an obligation of his grantor, which has been satisfied, has no longer any interest in it, and must be regarded as holding in trust for the grantor. *Smith v. Orton*, 131 U. S. appx. lxxv, 18 L. Ed. 62.

The relations of trustees do not arise from an agreement whereby first mortgagees were to receive the crops grown on the mortgage premises and dispose of them, and if any surplus remains after reimbursing themselves for their advances and proper charges, were to pay it over to the junior mortgagees, instead of paying it to the mortgagor. The

senior mortgagees only occupied the possession of factors, legally responsible for any surplus in their hands. For this surplus, if they neglect to pay it over, they were liable in an action at law. This is very different from that of a trustee in the chancery sense of that term. *New Orleans Nat. Banking Ass'n v. LeBreton*, 120 U. S. 765, 774, 30 L. Ed. 821.

Money placed in hands of one to be delivered to another.—See ante, "Express Trusts," II, B, 2, b.

21. There is no express trust nor any ground for an implied trust in favor of a party, who takes a note simply on the credit of an indorsement without contemplating any other security in a mortgage taken by the indorser for his own indemnification. *Peterson v. Willing*, 3 Dall. 506, 1 L. Ed. 698.

22. Adverse possessor not a trustee.—The statute of Maryland of 1791, ch. 45, was not meant to make the adverse possessor, without title, a trustee for the party having title. It only substituted the action of assumpsit for the ordinary legal remedy by ejectment; and the adverse possessor of the land can no more be deemed a trustee of the money than he can be deemed a trustee of the land itself, for the benefit of the rightful owner, against whom he held by an adverse title. *Beatty v. Burnes*, 8 Cranch 98, 108, 3 L. Ed. 500.

23. Payment of purchase price by person other than grantee.—*Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793; *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. Ed. 739; *Schwartz v. Duss*, 187 U. S. 8, 25, 47 L. Ed. 53; *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091; *Jackson v. Jackson*, 91 U. S. 122, 125, 23 L. Ed. 258; *Olcott v. Bynum*, 17 Wall. 45, 59, 21 L. Ed. 570; *Jenkins v. Pye*, 12 Pet. 241, 252, 9 L. Ed. 1070; *Babcock v. Wyman*, 19 How. 289, 300, 15 L. Ed. 644; *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311.

Where the evidence on behalf of one seeking to charge land with a trust in his favor shows clearly that the purchase of the property was made with his money in the hands of the grantee for investment; and that the grantee was his agent and trustee and not his debtor for money lent for the purpose, it is clear that a trust results in his favor which

the law from the presumed intention of the parties,²⁴ and the natural equity that he who furnishes the means for the acquisition of property should enjoy its benefits.²⁵ But this is founded upon a mere implication of laws, and may be rebutted by evidence, showing that such was not the intention of the parties.²⁶ Where the title is conveyed to a wife, child, or other person for whom the one paying the purchase money is under an obligation, legal or moral, to provide, no presumption of a trust arises, but it may nevertheless be shown that a trust was intended.²⁷ The fundamental principles of the doctrine of resulting trust, is to recognize an equity only in them from whom the con-

entitles him to a conveyance of the legal title. *Brainard v. Buck*, 184 U. S. 99, 107, 45 L. Ed. 449.

Husband receiving wife's property to invest and failing to do so.—A husband may be chargeable as trustee with the income of his wife's separate property, and if he have received it from her to invest it for her, and have not invested it, he will be so charged at her suit, whether the income be of property which he has settled upon her, or be income from some other separate property of hers. *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814.

Purchase by agent.—At a sale of public lands in a territory, an agent who purchased for another must account, as trustee, to his employer, although the statutes of the territory have abolished all resulting trusts. *Irvine v. Marshall*, 20 How. 558, 15 L. Ed. 994.

Vesting of title.—Where agent purchases exclusively on credit of principal or makes an absolute appropriation and designation of the property of his principal, see the title *SALES*, vol. 10, p. 1036, last paragraph of note 67.

24. *Jackson v. Jackson*, 91 U. S. 122, 125, 23 L. Ed. 258; *Jenkins v. Pye*, 12 Pet. 241, 252, 9 L. Ed. 1070.

"This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind." *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793. See, to the same effect, *Jenkins v. Pye*, 12 Pet. 241, 252, 9 L. Ed. 1070.

25. *Jackson v. Jackson*, 91 U. S. 122, 125, 23 L. Ed. 258.

26. *Jenkins v. Pye*, 12 Pet. 241, 252, 9 L. Ed. 1070.

The facts may take the case out of the operation of the general rule. *Olcott v. Bynum*, 17 Wall. 45, 59, 21 L. Ed. 570.

27. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 406, 42 L. Ed. 793.

No presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another, can arise where an obligation

exists on his part, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child. The circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to rebut the presumption of a resulting trust, and to create a contrary presumption of an advancement for the grantee's benefit. *Jackson v. Jackson*, 91 U. S. 122, 125, 23 L. Ed. 258.

It is true that when the consideration is paid by a husband and the conveyance made to his wife there is a presumption that such a conveyance was intended for her benefit; but this is not a presumption of law but of fact, and can be overthrown by proof of the real intent of the parties. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793.

Such presumption is subject to overthrow by proof of an agreement that such was not the purpose of the conveyance. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 411, 42 L. Ed. 793.

"Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention, though presumed in the first instance to be a provision and settlement; therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time. 1 *Perry on Trusts* (4th Ed.), § 147." *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793. See the title *ADVANCEMENTS*, vol. 1, p. 198.

"This is in accord with the general proposition so often enunciated, that the statute of frauds was designed to prevent frauds, and courts of equity will not permit it to be used to accomplish that which it was designed to prevent." *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793.

The doctrine of resulting trusts has no application to an investment by a hus-

sideration has proceeded.²⁸ Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It cannot be created by after advances or funds furnished after the time when the purchase is made. The whole consideration must have been paid or secured at the time of or prior to such purchase.²⁹ There must be no uncertainty as to the proportion of the property to which the trust extends.³⁰ But where he furnishes only a part of the amount paid, no trust arises unless his part is some definite portion of the whole, and is paid for some aliquot part of the property, as a fourth, a third, or a moiety.³¹

The existence of an express agreement does not destroy the resulting trust.³²

Parol Evidence.—Where an estate was purchased in the name of one person, and the consideration came from another, a resulting trust may be established by parol evidence.³³

Clear Proof Required.—It is incumbent on one who claims the existence of such a trust to establish it by clear, positive and unequivocal proof.³⁴

band in the name of the wife of the money which the wife had at the time of her marriage, not secured to her by a settlement or contract, and that which she subsequently earns. *Jackson v. Jackson*, 91 U. S. 122, 125, 23 L. Ed. 258.

28. *Schwartz v. Duss*, 187 U. S. 8, 25, 47 L. Ed. 53.

A society whose chief purpose was to establish community of property, by a subsequent agreement provided that all the property of the society should be "now and forever joint and indivisible stock" and that the same rule should apply to all "future contributions." It was held that this provision did not impress the property with a trust for the use of the society as such, which when the society or trust failed from any cause the "corpus of the trust property," by way of resulting trust, reverted to the descendants of members who contributed no property to the society, nor were they entitled to have an accounting. *Schwartz v. Duss*, 187 U. S. 8, 25, 47 L. Ed. 53.

29. *Olcott v. Bynum*, 17 Wall. 45, 59, 21 L. Ed. 570; *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091.

It does not arise upon subsequent payments under a contract by another to purchase. *Olcott v. Bynum*, 17 Wall. 45, 59, 21 L. Ed. 570.

30. *Olcott v. Bynum*, 17 Wall. 45, 59, 21 L. Ed. 570.

31. *Olcott v. Bynum*, 17 Wall. 45, 59, 21 L. Ed. 570.

A resulting trust does not arise in favor of one of two joint purchasers, unless his part is some definite portion of the whole, and what money he pays is paid for some aliquot part of the property as a fourth, third, or a moiety. Nor can it arise in any case for more than the money actually paid. Thus, if B buy land worth \$25,000, and with A's money pay \$5,000 and give his own bond and mortgage for the balance, no trust results for more than the \$5,000 at best.

Olcott v. Bynum, 17 Wall. 45, 21 L. Ed. 570.

32. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 409, 42 L. Ed. 793.

It was not an agreement made by one owning and having the legal title to real estate by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title—an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement and to indicate the disposition which the real owner intended should be made of the property. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 409, 42 L. Ed. 793.

33. **Parol evidence.**—*Babcock v. Wyman*, 19 How. 289, 300, 15 L. Ed. 644; *Olcott v. Bynum*, 17 Wall. 45, 21 L. Ed. 570; *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091.

The nature of this trust may be shown by parol evidence. This is in express accord with the provisions of the statute of frauds. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 407, 42 L. Ed. 793. See *Comp. Stat. Dist. of Columbia*, 231, §§ 8, 9.

There is no doubt that such trust is not within the statute, and that parol evidence is admissible to show whose money is actually paid for the property. *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091; *Olcott v. Bynum*, 17 Wall. 45, 21 L. Ed. 570.

Parol evidence is competent to prove that the consideration actually moved from the cestui que trust. *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091.

34. *Smithsonian Inst. v. Meech*, 169 U. S. 398, 406, 42 L. Ed. 793.

Clear proof is required by a court of equity whenever a trust in real estate is sought to be implied, against the terms of a deed of conveyance, by parol evi-

bb. *Purchase by Direction of or on Behalf of Another.*—Where a party purchases property under the direction of, or on behalf of another, the purchase must be held to be in trust for the benefit of the principal, on repayment of the money advanced by the agent.³⁵

cc. *Purchase of Outstanding Claim or Title by Cotenant.*—See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 7, pp. 535, 536.

dd. *Estate Not Effectually Disposed of by Will.*—Any part of a testator's estate not effectually disposed of by the will results to the heir at law.³⁶

ee. *Grantor or Heirs upon Termination of a Trust.*—See post, "Duration and Termination," III, E.

dence of payment of the price by a third person. *Hopkins v. Grimshaw*, 165 U. S. 342, 352, 41 L. Ed. 739; *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311.

Mere casual remarks of the supposed trustee more than forty years before, falls far short of such proof. *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. Ed. 739.

35. *Purchase by direction of or on behalf of another.*—*Rothwell v. Dewees*, 2 Black 613, 17 L. Ed. 309.

So held as to a tax title acquired by an agent when it was his duty to pay the taxes, and to prevent the sale of the lots. In violation of this duty he permitted the lots to be sold, and himself became the purchaser. Besides his general duty as agent, he had expressly covenanted in writing, that he would, out of his own funds, advance the money and pay the taxes. There is nothing in law or morality plainer than that his purchase must be held to be in trust for the benefit of his principal, on repayment of the sum advanced by him. *Rothwell v. Dewees*, 2 Black 613, 17 L. Ed. 309.

36. Where lands are devised in trust, for objects incapable of taking, there is a resulting trust for the heirs at law. *King v. Mitchell*, 8 Pet. 326, 349, 8 L. Ed. 962.

The title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed of remains to him, and partakes of the old use, as if it had not been directed to be sold. *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460.

But even in cases of resulting trusts, for the benefit of the heir at law, it is settled, that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the

heir at law to a resulting trust is defeated, and the estate is considered to be personal. *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460.

The heir at law has a resulting trust in land devised to trustees, to sell for payment of debts and legacies, so far as it is of value, after the debts and legacies are paid, and he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold, in the first case, and the whole, in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect), results to the heir at law, as the old use not disposed of. *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460.

William King in his will, made the following devise: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King (the appellant), son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue." Upon the construction of the terms of this clause, it was decided by the federal supreme court, in *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701, that William King, the devisee, took the estate upon a condition

(3) *Trusts Independent of Intention of Parties*—(a) *Constructive Trusts or Trustees Ex Maleficio*—aa. *In General*.—Generally, when a party obtains an advantage by fraud, he is to be regarded as trustee of the party defrauded, and compelled to account. But if the party seeks relief in equity he must be able to show that, on his part, there has been honesty and fair dealing.³⁷

Legal or Equitable Interest Is Essential.—See the title FRAUD AND DECEIT, vol. 6, p. 404.³⁸

Trustee Ex Maleficio.—A party who acquires title to property wrongfully may be adjudged a trustee ex maleficio in respect to that property.³⁹

bb. *Legal Title to Which Another Has Better Right than Holder*.—Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and

subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will) immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons; and there had been no marriage between any of them, by which the devise over, upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect. The case was again brought before the court, on an appeal by William King, in whom it had been decided the estate devised was vested in trust; and the court held, that William King did not take a beneficial estate in fee in the premises but a resulting trust for the heirs at law of the testator. *King v. Mitchell*, 8 Pet. 326, 8 L. Ed. 962.

37. Constructive trusts or trustees ex maleficio.—*Wheeler v. Sage*, 1 Wall. 518, 529, 17 L. Ed. 646. And see *Griffith v. Godey*, 113 U. S. 89, 94, 28 L. Ed. 934. See, also, *Garrow v. Davis*, 15 How. 272, 14 L. Ed. 692.

38. Where municipal bonds are issued in excess of a constitutional debt limit, the holders of the bonds and the agents of the municipality are participes criminis in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied assumpsit against a public policy so strongly declared. *Litchfield v. Ballou*, 114 U. S. 190, 194, 29 L. Ed. 132. See the titles MUNICIPAL CORPORATIONS, vol. 8, p. 591; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 721.

39. Trustee ex maleficio.—*Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 26, 38 L. Ed. 55; *United States v. Bitter Root, etc., Co.*, 200 U. S. 451, 474, 50 L. Ed. 550. See, also, *Lockhart v. Leeds*, 195 U. S. 427, 49 L. Ed. 263.

One who by fraudulent misrepresentations obtains a conveyance from the owner of any interest in property, real or personal, is in equity a trustee ex

maleficio for the person defrauded. *Jones v. Van Doren*, 130 U. S. 684, 691, 32 L. Ed. 1077; *Tyler v. Black*, 13 How. 230, 14 L. Ed. 124; *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Moore v. Crawford*, 130 U. S. 122, 32 L. Ed. 878.

In *Pomeroy Eq. Jur.*, § 155, the author says, citing many cases: "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." And again, in § 1053: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed ex maleficio or ex delicto, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 26, 38 L. Ed. 55.

If there is no immoral act on part of the grantee merely taking a void deed,

compel him to convey the legal title.⁴⁰ Whenever a person obtains the legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the lands so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created. It is of no consequence in this connection that the beneficiary was ignorant of the trustee's acts, or of the trust thereby created, since he is at liberty, upon discovering it, to affirm the trust and enforce its execution.⁴¹

equity will not make him a trustee. *Jackson v. Huntington*, 5 Pet. 402, 447, 8 L. Ed. 170.

A mere trespasser, who is also the holder of, permits to cut timber from certain government lands, wrongfully and fraudulently cut and converted to his own use timber from public lands belonging to another, is not a trustee *ex maleficio* as to the timber wrongfully cut, and equity has no jurisdiction on the ground of trusteeship, of a bill to recover the value of the timber. *United States v. Bitter Root, etc., Co.*, 200 U. S. 451, 50 L. Ed. 550.

Party defrauded by means of a forged or fraudulent will.—See post, "Jurisdiction of Equity," VI, B, 1, a, (1). See the title WILLS.

40. Legal title to which another has better right than holder.—*Meador v. Norton*, 11 Wall. 442, 458, 20 L. Ed. 184; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 57, 37 L. Ed. 72. See to the same effect *Cunningham v. Ashley*, 14 How. 377, 14 L. Ed. 462; *Lytle v. Arkansas*, 22 How. 193, 203, 16 L. Ed. 306; *Berthold v. McDonald*, 22 How. 334, 16 L. Ed. 318; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Bohall v. Dilla*, 114 U. S. 47, 29 L. Ed. 61; *Stark v. Starrs*, 6 Wall. 402, 419, 18 L. Ed. 925; *Sturr v. Beck*, 133 U. S. 541, 550, 33 L. Ed. 761; *Silver v. Ladd*, 7 Wall. 219, 19 L. Ed. 138; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Gibson v. Chouteau*, 13 Wall. 102, 20 L. Ed. 534; *Lindsey v. Hawes*, 2 Black 554, 17 L. Ed. 265; *Garland v. Wynn*, 20 How. 8, 15 L. Ed. 801; *Bernier v. Bernier*, 147 U. S. 242, 247, 37 L. Ed. 152; *White v. Cannon*, 6 Wall. 443, 449, 18 L. Ed. 923.

The cases of *Garland v. Wynn*, 20 How. 8, 15 L. Ed. 801, and *Lindsey v. Hawes*, 2 Black 554, 17 L. Ed. 265, are applications of this doctrine. *Stark v. Starrs*, 6 Wall. 402, 419, 18 L. Ed. 925.

Whenever the legal title to property is obtained through means or under circumstances "which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein. *Moore v. Crawford*, 130 U. S. 122, 128, 32 L. Ed. 878.

41. *Felix v. Patrick*, 145 U. S. 317, 329, 36 L. Ed. 719; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19, 31, 10 L. Ed. 335.

A contractor who contracts with a corporation for construction of railroad, may recover payment for that work out of property, the title to which another corporation by wrongdoing has wrested from the contracting company and transferred to itself. In respect to that property the latter became a trustee *ex maleficio*. So held as to a railroad company which wrongfully secured the forfeiture of a grant of land to another company and a subsequent grant of the same to itself. *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 25, 27, 38 L. Ed. 55.

In *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1, 38 L. Ed. 55, lands once vesting in the Portage Company had been taken away by the illegal and wrongful act of the Omaha Company, and that sameland regranted to the Omaha Company, and to reach that particular land the bill was filed. Mr. Justice Brewer, delivering the opinion of this court said: "And when the Omaha Company, by its wrongdoings, secured the full legal title to those lands, equity will hold that the party who has been deprived of payment for his work from the Portage Company, by reason of their having been taken away from it, shall be able to pursue those lands into the hands of the wrongdoer, and hold them for the payment of that claim which, but for the wrongdoings of the Omaha Company, would have been paid by the Portage Company, partially at least, out of the proceeds. * * * These lands were identified, and were found in the hands of the actual wrongdoer, who had acquired them by reason of such wrong." No express trust was affirmed as to the lands. *United States v. Bitter Root, etc., Co.*, 200 U. S. 451, 474, 50 L. Ed. 550.

A sale, far below value, of a railroad, with its franchises, rolling stock, etc., under a decree of foreclosure, set aside as fraudulent against creditors; the sale having been made under a scheme between the directors of the road and the purchasers, by which the directors escaped liability on indorsements which they had made for the railroad company. And the purchasers held to be trustees to the creditors complainant, for the full value of the property purchased, less a

cc. *Grantee Acting in Fiduciary Capacity*.—If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon a showing of the fact in an appropriate proceeding, subject the lands to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it. Nor does it matter whether

sum which the purchasers had actually paid for a large lien claim, presented as for its apparent amount, but which they had bought at a large discount. Interest on the balance, from the day of purchase to the day of final decree in the suit, to be added. *Drury v. Cross*, 7 Wall. 299, 19 L. Ed. 40.

The failure of the owner of real property to invest another with the legal title thereto in compliance with a parol agreement to that effect, under which he had put such promise in actual possession of the property in question, and his conveyance of such title to a third person with intent to defraud the promisee, is such a wrong to the latter as entitled him, under the established principles of equity, to the protection which would be given by a decree specifically declaring that such grantee holds the title in trust for him. Such relief is consistent with the objects intended to be subserved by the statute of frauds; for the decree does not charge the promisor upon his parol contract with him, but rests upon the equities arising out of the acts and conduct of the parties subsequent to the making of the original agreement. *Whitney v. Hay*, 181 U. S. 77, 89, 45 L. Ed. 758.

Husband procuring fraudulent conveyance to wife.—A bill charged that a cashier of a bank had defrauded the bank of \$20,000, and that the money itself or property in which it had been invested had been converted into real estate the legal title of which stood in the name of the cashier's wife. It was decreed that the cashier was liable for the money and that the real estate should be sold to pay it. *Mann v. Rock Island Bank*, 11 Wall. 650, 20 L. Ed. 188.

A, after conveying to B an undivided interest in property to which he had an equitable title at least (having obtained a title therefor about the same time which was lost without being recorded), having changed his mind, procured some years afterwards a deed for the same property to be conveyed by the holders of the legal title to his wife, for the express purpose, as he admitted, of defeating his previous deed to B. Upon a bill filed by the wife and B, it was held that A was guilty of a fraud "in preventing the conveyance to himself, which would have inured to B, and in obtaining it to his wife, so as to reap the benefit which belonged to the grantee." A's wife stands in her husband's shoes and is to be treated as a party to his fraud, or a mere volunteer, and a trustee ex male-

ficio. *Moore v. Crawford*, 130 U. S. 122, 32 L. Ed. 878.

It was the duty of A to take the conveyance for the benefit of B and B had the right to the enforcement of that duty in equity, in view of the fraudulent device by which A attempted to avoid its discharge. The fraud was of such character as enables a court of equity to decree the relief as against the covenantor, not only under his own name but under the name of his wife; and it will not do, under such circumstances, to say that B is remitted to an action for damages for breach of the covenant of warranty, because A not only had no title at the time but never afterwards acquired title; for when the conveyance was made to A's wife it was as if the title had been acquired by A himself. Nor is this a case wherein specific performance of the covenant of warranty is sought upon failure of title in the absence of fraud. *Moore v. Crawford*, 130 U. S. 122, 133, 32 L. Ed. 878.

A's wife did not take as a stranger would have taken, but took in execution of the agreement with her husband. Clearly, then, she cannot be permitted to set up a statutory defense personal to the holders of the legal title, who could not, in fulfilling their agreement, transfer an excuse for nonfulfilment. *Moore v. Crawford*, 130 U. S. 122, 130, 32 L. Ed. 878.

Patent for land issued to party not entitled thereto.—See the title PUBLIC LANDS, vol. 10, p. 261, note 33.

When the legal title has passed from the United States to one party, when in equity, and in good conscience, and by the laws of congress it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title. This doctrine extends to the action of all officers having charge of proceedings for the alienation of any portion of the public domain. The parties actually entitled under the law cannot, because of its misconstruction by those officers, be deprived of their rights. *Rector v. Gibbon*, 111 U. S. 276, 291, 28 L. Ed. 427; *Townsend v. Greeley*, 5 Wall. 326, 335, 18 L. Ed. 547; *Carpentier v. Montgomery*, 13 Wall. 480, 496, 20 L. Ed. 698; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875.

Where a patent for land is issued by

the party takes the title in his own name in good faith, under the belief that he can thereby better manage the property to the advantage of those for whom he is acting, or in compliance with their wishes, or whether from an intention to defraud them of their rights therein. In either case a court of equity will control the legal title so as to protect the just rights of the true owner.⁴²

mistake, inadvertence, or other cause, to parties not entitled to it, they will be declared trustees of the true owner, and decreed to convey the title to him. *Bernier v. Bernier*, 147 U. S. 242, 247, 37 L. Ed. 152; *Stark v. Starrs*, 6 Wall. 402, 419, 18 L. Ed. 925.

If an agent located land for himself which he ought to have located for his principal, he is, in equity, a trustee for his principal. *Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181; *Felix v. Patrick*, 145 U. S. 317, 327, 36 L. Ed. 719; *Irvine v. Marshall*, 20 How. 558, 565, 15 L. Ed. 994; *Brush v. Ware*, 15 Pet. 93, 10 L. Ed. 672; *Stark v. Starrs*, 6 Wall. 402, 419, 18 L. Ed. 925; *Meador v. Norton*, 11 Wall. 442, 458, 20 L. Ed. 184; *Widdicombe v. Childers*, 124 U. S. 400, 405, 31 L. Ed. 427.

A title thus acquired, the patentee holds in trust for the true owner, and the federal supreme court has repeatedly held that a bill in equity will lie to enforce such trust. *Turner v. Sawyer*, 150 U. S. 578, 586, 37 L. Ed. 1189; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *Rector v. Gibbon*, 111 U. S. 276, 291, 28 L. Ed. 427; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72.

The only remedy of the true owner is by bill in equity to charge the Patentee with a trust in his favor. All this is clearly settled by previous decisions of the federal supreme court including some of those on which the petitioner most relies. In *re Emblen*, 161 U. S. 52, 57, 40 L. Ed. 613; *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Steel v. Smelting Co.*, 106 U. S. 447, 27 L. Ed. 226; *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 37 L. Ed. 72; *Turner v. Sawyer*, 150 U. S. 578, 586, 37 L. Ed. 1189.

Relief against trustee ex maleficio of a mining claim.—See the titles **FRAUD AND DECEIT**, vol. 6, p. 435, note 46; **MINES AND MINERALS**, vol. 8, p. 412.

Laches.—The fact that the holders of the legal title to lands takes under an implied or constructive trust, arising from the illegal practices resorted to in obtaining such title; does not prevent his taking and holding them for his own use and benefit, and adversely to the party justly entitled to them. Under such circumstances, the law raises an obligation

upon the part of the cestui que trust to make use of reasonable diligence in discovering and unearthing the fraud, and in applying to the courts for legal redress. *Felix v. Patrick*, 145 U. S. 317, 329, 36 L. Ed. 719. See the title **LACHES**, vol. 7, p. 790.

42. Grantee acting in fiduciary capacity.—*Sanford v. Sanford*, 139 U. S. 646, 35 L. Ed. 290; *Townsend v. Greeley*, 5 Wall. 326, 335, 18 L. Ed. 547.

Little difficulty is experienced in enforcing this doctrine where the property held is not claimed under the adjudication of a court or other tribunal affirming the title of the holder; as, for instance, upon the determination of a department like that established to supervise proceedings for the alienation of the public lands. In these latter cases the action of a court of equity is limited so as not to interfere with the rightful exercise of the powers intrusted to the department. The conclusions of the department are not even then open to review for alleged errors in passing upon the weight of evidence presented, for that would be to make a court of equity a court of appeal from its decisions, which was never contemplated. *Sanford v. Sanford*, 139 U. S. 646, 35 L. Ed. 290. See, also, *Quinby v. Conlan*, 104 U. S. 420, 426, 26 L. Ed. 800; *Baldwin v. Stark*, 107 U. S. 463, 27 L. Ed. 526. See the title **PUBLIC LANDS**, vol. 10, pp. 252, 262, 263.

In *Griffith v. Godey*, 113 U. S. 89, 94, 28 L. Ed. 934, an administrator who had obtained property by deception and fraud practised upon a person of weak intellect, for a grossly inadequate consideration, was held to the responsibilities of a trustee of the complainant in his dealings with and disposition of the property, and compelled to account for the amounts received for the property thus fraudulently obtained.

In 1803, C. obtained from the military commandant at Mobile a permit to take possession of a lot of ground near that place, and made a contract with K. that the latter should improve it, so as to lay the foundation for a perfect title, and then they were to divide the lot equally. K.'s ownership of a hostile claim, whether held then or acquired subsequently, enured to the joint benefit of himself and C.; and when K. obtained a confirmation of his title under the acts of the commissioners appointed under an act of congress, he became a trustee for C. to the extent of one-half of the lot.

dd. *Purchaser from Trustee Ex Maleficio*.—Any one taking the trust property from a trustee ex maleficio with notice of the fraud and of the consequent trust is affected by the trust.⁴³ The doctrine of notice is well established. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other, to the extent of his equity; but if he has no equity, then there is nothing for which the purchaser of the legal estate can be a trustee.⁴⁴ A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge.⁴⁵

(b) *Parol Evidence*.—A resulting trust may be established by parol. Parol evidence is admissible to show fraud, and consequently a resulting trust, in a deed absolute on its face, notwithstanding any denial by the answer.⁴⁶

3. **PRECATORY TRUSTS**.—See the title **WILLS**.

4. **CHARITABLE TRUSTS**.—See the title **CHARITIES**, vol. 3, p. 675.

5. **SPENDTHRIFT TRUSTS**.—See the title **SPENDTHRIFTS AND SPENDTHRIFT TRUSTS**, ante, p. 26.

C. Validity.—1. **WANT OF POWER IN COURT TO ENFORCE**.—It is no proof of the invalidity of trusts that no court possessing equity powers now exists, or has existed in Pennsylvania capable of enforcing such trusts. The trust would nevertheless be averred in point of law; and remedies may from time to time

Hallett v. Collins, 10 How. 174, 13 L. Ed. 376.

A husband who as agent of the wife invests her money in the purchase of real estate under an agreement that the property when purchased should be conveyed to her in fee and appear upon record in her individual name, but who without her knowledge or consent and in violation of her directions causes the deed to be made out in his name, as if the fee was vested in him, is deemed in equity to hold the property in trust for the wife and a court of equity will compel him to secure the property to her. Garner v. Second Nat. Bank, 151 U. S. 420, 434, 38 L. Ed. 218.

Agent's acquiring title to principal's property through defect in title.—See the title **PRINCIPAL AND AGENT**, vol. 9, p. 671.

Purchase by stockholder of land essential to success of corporation.—The largest stockholders of a corporation bought land which was undoubtedly necessary to the complete success of the company; but it nowhere appears that these parties, or either of them had ever been authorized to make the purchase on its account. It was held that the land was the property of the purchasers, who occupied no such trust relation to the corporation as to make their purchase enure directly to its benefit. Loring v. Palmer, 118 U. S. 321, 342, 30 L. Ed. 211.

43. Purchasers from trustee ex maleficio.—Jones v. Van Doren, 130 U. S. 684, 691, 32 L. Ed. 1077; Tyler v. Black, 13 How. 230, 14 L. Ed. 124; National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Moore v. Crawford, 130 U. S. 122, 32 L. Ed. 878. See post, "Purchaser with Notice," III, J, 6, b.

44. Wilson v. Mason, 1 Cranch 45, 100, 2 L. Ed. 29.

"When a person has not actual notice (of facts creating a constructive trust) he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence." Wilson v. Wall, 6 Wall. 83, 90, 18 L. Ed. 727.

If from inadvertence or mistake as to their rights, or other cause, they afterwards conveyed that title to another, the grantee with notice took it subject to the equitable claim of the first purchaser, who could compel its transfer to him. In all such cases a court of equity will convert the second purchaser into a trustee of the true owner and compel him to convey the legal title. Cornelius v. Kessel, 128 U. S. 456, 461, 32 L. Ed. 482; Lindsey v. Hawes, 2 Black 554, 17 L. Ed. 265; Stark v. Starrs, 6 Wall. 402, 419, 18 L. Ed. 925.

If fraud be established against the executors, and a notice of the fraud by the purchasers, they must be considered, though the sales have no form of law, as holding the property in trust for the beneficiaries. Gaines v. Chew, 2 How. 619, 649, 11 L. Ed. 402.

45. Wilson v. Wall, 6 Wall. 83, 90, 18 L. Ed. 727.

46. Parol evidence.—Babcock v. Wyman, 19 How. 289, 15 L. Ed. 644.

be applied by the legislature to supply the defects.⁴⁷

2. **PARTIAL INVALIDITY.**—All the provisions of a general trust are not void because a part of them are repugnant to a rule of law, unless they are all so intimately connected with the failing scheme as to fail with it. "The trust is not a metaphysical entity or a Prince Rupert's drop which flies to pieces if broken in any part. * * * There is no general principle by which the benefits must stand or fall together."⁴⁸

3. **TRUST FOR BENEFIT OF ALIEN.**—A devise of land to a citizen as a trustee, upon a trust to sell the land and pay over the proceeds to an alien, is a valid trust, and the interest of the alien is not subject to forfeiture.⁴⁹

4. **PAROL TRUSTS.**—See ante, "Writing," II, A, 3. See, also, ante, "Parol Evidence," II, A, 4, c.

5. **AGAINST CREDITORS AND SUBSEQUENT PURCHASERS.**—See ante, "Purchaser from Trustee Ex Maleficio," II, B, 2, c, (3), (a), dd; post, "Rights and Liabilities of Purchaser," III, J, 6. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 472.

III. Trust Estate.

A. Property Subject.—Undoubtedly the owner of real estate can specifically appropriate rents and profits to a named purpose, or create a trust in them separate and apart from the title to the real estate.⁵⁰

B. Incidents—1. **IN GENERAL.**—Generally, whatever is true at law of the legal estate, is true in equity of the trust estate.⁵¹

2. **ALIENABLE, DESCENDIBLE AND DEVISABLE.**—The trust like the legal estate is descendible, devisable, alienable and barrable by the act of the parties, and by matter of record.⁵²

47. **Want of power in court to enforce.**—*Vidal v. Girard*, 2 How. 126, 127, 196, 11 L. Ed. 205.

48. **Partial invalidity.**—*Landram v. Jordan*, 203 U. S. 56, 63, 51 L. Ed. 88.

A testator devised all his property except one lot to trustees upon a trust for the benefit of his daughter and grandchildren which was void as creating a perpetuity. The whole income or rent of the lot excepted from the general trust, or in other words an equitable estate in the specified land was given to his niece for life, with instructions to the trustees of the general trust to add to the rents enough from the general trust fund to make the niece's income up to forty dollars a month. It was held that the gift for the benefit of the niece is not so intimately connected with the failing scheme as to fail with it, but is good whether the gifts to the other beneficiaries were good or not; and that the trustees have power to keep the income up to forty dollars from the other property denied to them. *Landram v. Jordan*, 203 U. S. 56, 62, 63, 51 L. Ed. 88.

49. **Trust for benefit of alien.**—*Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460. See the title **ALIENS**, vol. 1, p. 234.

50. **Property subject.**—*Gisborn v. Charter Oak Ins. Co.*, 142 U. S. 326, 335, 35 L. Ed. 1029.

51. **Incidents.**—*Croxall v. Shererd*, 5

Wall. 268, 18 L. Ed. 572; *Ould v. Washington Hospital*, 95 U. S. 312, 24 L. Ed. 450; *New Orleans, etc., Co. v. Montgomery*, 95 U. S. 16, 18, 24 L. Ed. 346.

52. **Alienable, descendible and devisable.**—*Croxall v. Shererd*, 5 Wall. 268, 281, 18 L. Ed. 572; *Ould v. Washington Hospital*, 95 U. S. 312, 24 L. Ed. 450; *Davis v. Gray*, 16 Wall. 203, 229, 21 L. Ed. 447; *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113; *Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909.

Descent of mere legal title, according to law of descent, see *Hughes v. Clarks-ville*, 6 Pet. 369, 380, 8 L. Ed. 430.

A trust estate always passes in a general devise to the residuary legatees, if no circumstances appear to indicate a contrary intent. Here, the circumstances fortify the idea, rather than impair it, that the trust estate was intended, in the end, to pass to the residuary legatees, as they were then probably supposed to be the cestui que trust, and in fact became so before the devise took effect. Another reason is, that the devisees would, if not cestui que trusts, hold the estate for them, and be bound to account for it to them, so as to make it safe. *Taylor v. Benham*, 5 How. 233, 270, 12 L. Ed. 130.

The trustee, by his will, having appointed residuary legatees, must be considered as devising the trust as well as the lands to these residuary legatees, who thus became themselves trustees for

3. APPLICATION OF LAW OF PERPETUITIES.—When such uses are consummated and no longer in fieri, the law of perpetuity has no application.⁵³

4. APPLICATION OF RULE IN SHELLEY'S CASE.—See the title SHELLEY'S CASE, LAW IN, vol. 10, p. 1131.

5. LAW OF NOTICE.—The law of notice as to the trustee and cestui que trust is the same.⁵⁴

C. Title and Estate of Trustee—1. NATURE AND EXTENT—*a. In General.*—Where no intention to the contrary appears, the language used in creating a trust estate will be limited and restrained to the purposes of its creation. The extent of the trust estate is measured by the objects of its creation.⁵⁵ "Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate

the original cestui que trust. Taylor v. Benham, 5 How. 233, 12 L. Ed. 130.

Administrator with the will annexed.—See the title EXECUTOR AND ADMINISTRATOR, vol. 6, p. 190.

53. Application of law of perpetuities.—Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629; Perin v. Carey, 24 How. 465, 16 L. Ed. 701; Ould v. Washington Hospital, 95 U. S. 312, 24 L. Ed. 450.

54. Law of notice.—New Orleans, etc., Co. v. Montgomery, 95 U. S. 16, 18, 24 L. Ed. 346.

55. Nature and extent.—Doe v. Considine, 6 Wall. 458, 471, 18 L. Ed. 869; Young v. Bradley, 101 U. S. 782, 788, 25 L. Ed. 1044.

When a trust has been created, it is to be held large enough to enable the trustee to accomplish the objects of its creation. Doe v. Considine, 6 Wall. 458, 471, 18 L. Ed. 869.

And it is laid down generally that whenever a trust is created a legal estate sufficient for the execution of the trust shall, if possible, be implied. Stanley v. Colt, 5 Wall. 119, 168, 18 L. Ed. 502.

Where the performance of the duties imposed by the will on the trustee requires the legal estate to be vested in them, they take an estate exactly commensurate with the exigencies of their trust. Webster v. Cooper, 14 How. 488, 499, 14 L. Ed. 510; Neilson v. Lagow, 12 How. 98, 110, 13 L. Ed. 909.

Whatever the language by which the trust estate is vested in the trustee, its nature and duration are governed by the requirements of the trust. If that requires a fee simple estate in the trustee, it will be created, though the language be not apt for that purpose. If the language conveys to the trustees and his heirs forever, while the trust requires a more limited estate either in quantity or duration, only the latter will vest. Young v. Bradley, 101 U. S. 782, 787, 25 L. Ed. 1044. See Webster v. Cooper, 14 How. 488, 499, 14 L. Ed. 510. See post, "Duration and Termination," III, E.

Where the trust declared in a deed is to sell and convey in fee simple ab-

solute, a legal estate is vested in the trustees commensurate with the interest which they must convey in execution of the trust. Neilson v. Lagow, 12 How. 98, 107, 13 L. Ed. 909.

Where, under a will, in some respects peculiar, a devise was made to a society for its use and benefit, but the possession, superintendence, and direction of the estate, and the letting, leasing, and management of the same, was given to trustees who were invested with power to perpetuate their authority indefinitely, the only active duties of the society being to receive the rents and profits for its use and benefit, held, that the legal estate was in the trustees, not in the society. Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502.

Being thus in the exclusive possession and control of the property, and having devolved upon them the manifold duties incident thereto, it is quite clear that the trustees are clothed with the legal estate. Stanley v. Colt, 5 Wall. 119, 165, 18 L. Ed. 502.

"The mere fact that they are made agents in the application of the rents is sufficient to give them the legal estate, as in the case of a simple devise to A. upon trust to pay the rents to B.; and it is immaterial, in such case, that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence, a devise to the intent that A. shall receive the rents and pay them over to B. would clearly vest the estate in A.' The same effect where the duty is devolved upon them to pay taxes and make repairs." Stanley v. Colt, 5 Wall. 119, 168, 18 L. Ed. 502.

Whether devise in fee upon trust or upon condition.—Whether words in a devise constitute common-law conditions annexed to an estate, a breach of which or any one of which, will work a forfeiture, defeat the devise and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is a matter to be gathered, not from a particular

to carry an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any and what, less estate."⁵⁶

Whether trustees take an estate in fee depends upon the requirements of the trust, and not upon the insertion of words of inheritance.⁵⁷

expression in the devise, but from the whole instrument. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502.

"Mr. Sugden, speaking of conditions, observes, that what by the old law was deemed a devise upon condition would now, perhaps, in almost every case, be construed a devise in fee upon trust, and, by this construction, instead of the heir taking advantage of the condition broken, the cestui que trust can compel an observance of the trust by a suit in equity." *Stanley v. Colt*, 5 Wall. 119, 165, 18 L. Ed. 502.

The word provided, though an appropriate word to constitute a common-law condition, does not invariably and of necessity do so. On the contrary, it may give way to the intent of the party as gathered from an examination of the whole instrument, and be taken as expressing a limitation in trust. *Ex. gr.* Where a testator devised real estate to an ecclesiastical society for its use or benefit: "Provided, that said real estate be not hereafter sold or disposed of," and in connection and continuation added numerous minute directions in the nature of regulations for the guidance of trustees whom he had appointed to manage it, and with a view to the greatest advantage of the society, held, that the latter, being to be regarded as mere limitations in trust, the former was a limitation in trust also; not a common-law condition. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502. See the titles *CONDITIONS*, vol. 3, p. 1005; *ESTATES*, vol. 5, p. 908; *WILLS*.

A bequest to my executors and their successors in said office, in trust for minors, the profits and dividends thereof to be applied to their education, etc., creates a trust for their benefit; and the trust constituted was vested in the executors, in their official capacity as such, so that in case one or all of them had at any time ceased to be executors, he or they would, at the same time, have ceased to be trustees; and that in case a vacancy in the office of either of the executors had occurred and been filled, as provided in the will, by the appointment of a successor by the remaining executors, the trust would have devolved upon the new executors, *virtute officii*, so that the executors for the time being would always be the trustees, and so that whatever in their official capacity, as executors, they did in respect to the subject of this legacy, is to be imputed to them also in their character as trustees, and equally affected and bound the trust and

its beneficiaries. *Colt v. Colt*, 111 U. S. 566, 579, 28 L. Ed. 520.

56. *Doe v. Considine*, 6 Wall. 458, 471, 18 L. Ed. 869, quoting 2 Jarman on Wills, 156.

"Mr. Perry, in his work on trusts, supports by a very full array of authorities these two propositions in regard to the construction of instruments out of which trust estates arise: 1 'Whenever a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitations in the instrument, whether to him and his heirs or not.' 2. 'Although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires.' Perry, *Trusts*, § 312. Again he says: 'In the United States, the distinction between deeds and wills in respect to the trustee's estate has not been kept up; and the general rule is, that whether words of inheritance in the trustee are or are not in the deed, the trustee will take an estate adequate in the execution of the trust, and no more nor less.' Section 320." *Young v. Bradley*, 101 U. S. 782, 787, 25 L. Ed. 1044.

"Notwithstanding the devise to the trustees and their heirs, they take only a chattel interest where the trust does not require an estate of higher quality." *Doe v. Considine*, 6 Wall. 458, 471, 18 L. Ed. 869. See *Webster v. Cooper*, 14 How. 488, 499, 14 L. Ed. 510; *Neilson v. Lagow*, 12 How. 98, 111, 13 L. Ed. 909.

57. *Potter v. Couch*, 141 U. S. 296, 309, 35 L. Ed. 721; *Young v. Bradley*, 101 U. S. 782, 787, 25 L. Ed. 1044; *Doe v. Considine*, 6 Wall. 458, 471, 18 L. Ed. 869.

If a fee simple estate be necessary, it will be held to exist though no words of limitation be found in the instrument by which the title was passed to the trustee, and the estate created. *Doe v. Considine*, 6 Wall. 458, 471, 18 L. Ed. 869.

Though a devise to trustees "and their heirs," passes, as a general thing, the fee, yet where the purposes of a trust and the power and duties of the trustees are limited to objects terminating with lives in being—where the duties of the trustees are wholly passive, and the trust thus perfectly dry—the trust estate may be considered as terminating on the efflux of the lives. *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

A deed to trustees and their successors in trust to sell and convey a fee simple absolute, vested such an estate in them

Parol Evidence to Enlarge or Diminish the Estate of the Trustee Is Inadmissible.—The interests and estates of a trustee in a deed upon trusts cannot be enlarged or diminished by testimony dehors the deed.⁵⁸

b. *Under Statute of Trusts and Uses.*—See post, "Under Statute of Trusts and Uses," III, D, 1.

2. **TERMINATION.**—See post, "Title and Interest of Trustee," III, E, 1.

D. Title and Estate of Cestui Que Trust—1. **UNDER STATUTE OF TRUSTS AND USES.**—By the statute of uses and trusts passive trusts are abolished. By passive trusts are meant those which are express, or created by the words of some deed or other instrument of writing, and not those arising or resulting by implication of law.⁵⁹

without the insertion of the word "heirs" in the deed. The legal estate being in trust, must be commensurate therewith, and will be deemed to be so without the use of the usual words of limitation. *Webster v. Cooper*, 14 How. 488, 499, 14 L. Ed. 510. As the execution of the trust required the trustees to have a fee simple, in order to convey one, and the deed to them conveyed a fee. *Neilson v. Lagow*, 12 How. 98, 13 L. Ed. 909.

A testator by his will provided in one clause as follows: "I will and direct that no part of my estate, neither the real nor the personal, shall be sold, mortgaged (except for building) or in any manner incumbered, until the end of twenty years from and after my decease, when it may be divided or sold for the purposes of making a division between my devisees as herein directed;" and, in another clause the testator directed that, in the event of any of the legatees or annuitants being alive at the end of twenty years after his death, there should be a division of all his estate at that time, "anything herein contained to the contrary notwithstanding" and that "in such case my executors, in making division of the said estate, shall apportion each legacy or annuity on the estate assigned to my devisees, who are hereby charged with the payment of the same according to the apportionment of my said executors." It was held that all the powers conferred, and all the trusts imposed, were annexed to the office of executors, and not to a distinct office of trustees; and until a division was made, in one form or the other, by the executors and trustees, the legal title in fee remained in them. *Potter v. Couch*, 141 U. S. 296, 297, 309, 35 L. Ed. 721. See post, "Duration and Termination," III, E.

In order to ascertain the nature and the time of vesting of their interests, it is important in the first place to determine the extent and duration of the trust estate of the executors and trustees named in the will, bearing in mind the settled rule stated in the text. *Potter v. Couch*, 141 U. S. 296, 309, 35 L. Ed. 721; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869;

Young v. Bradley, 101 U. S. 782, 25 L. Ed. 1044.

Under the laws of Michigan, where a declaration of trust declares that the parties to it hold the property in trust for themselves and two others, the whole estate in law and in equity is vested in the trustees. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 32 L. Ed. 134.

58. Parol evidence to enlarge or diminish the estate of the trustee is inadmissible.—*Smith v. McCann*, 24 How. 396, 398, 16 L. Ed. 714. See the titles **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 525; **PAROL EVIDENCE**, vol. 9, p. 19.

59. Under statute of trusts and uses.—*McGoon v. Scales*, 9 Wall. 23, 28, 19 L. Ed. 545. See, also, *King v. Mitchell*, 8 Pet. 326, 352, 8 L. Ed. 962.

"The application of the statute of Henry VIII to a will, gives it the effect of a deed of bargain and sale to uses; they are only modes of passing title. Having no legal operation to vest the legal estate in the names used as the conduits or instruments of conveyance, the effect of either would be the same, if the grant or devise were made directly to the purpose and use declared, transferring both the title and possession. 'The statute conveys the possession to the use, and transfers the use into possession, thereby making the cestui que use complete owner of the lands and tenements, as well at law as in equity. The possession thus transferred is not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter upon the land, but an actual estate.'" *Henderson v. Griffin*, 5 Pet. 151, 156, 8 L. Ed. 79.

Instruments creating.—A deed after reciting that the trustor was indebted to the cestui que trust in a certain sum to satisfy which debt the said cestui que trust had agreed to take the real estate mentioned in the deed, conveyed the land to the trustee who was to stand seized of the premises upon the trust and confidence that they should be sold by him for such a sum as should be directed by the cestui que trust and the

Intent Governs.—Although, the deed contains some language, which, taken by itself, might raise a use, executed in the cestui que trust it is well settled that such language is controlled by an intent, manifested in the instrument, to

proceeds applied to the sole use and benefit of the cestui que trust; and if not sold, then that the trustee was to stand seized to the use of the cestui que trust and assigns. It was held such deed creates a mere passive trust. *McGoon v. Scales*, 9 Wall. 23, 24, 19 L. Ed. 545.

A conveyance of land from A to B to use of or in trust for C., the trustee having no active duties to perform, constitutes a passive trust. *McGoon v. Scales*, 9 Wall. 23, 28, 19 L. Ed. 545.

The trustee in this deed had no duty to perform; and as the estate is not limited to his own use, the trusts are but uses, and are executed as such by the statute. *Adams v. Law*, 17 How. 417, 420, 15 L. Ed. 149.

A devise to the trustees and their heirs to the uses mentioned, carries the legal estate to the cestuis que use, unless the will has imposed on the trustees some duty, the performance of which requires the legal estate to be vested in them. *Webster v. Cooper*, 14 How. 488, 499, 14 L. Ed. 510; *Neilson v. Lagow*, 12 How. 98, 110, 111, 13 L. Ed. 909.

Where no duties were imposed on the trustees which could prevent the legal estate in the lands in question from vesting in the cestuis que use; the circumstance that such duties were required of them relating to other lands in the devise, would not control the construction of the devise as to the lands in question. *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510.

The same words devising to the trustees two parcels of land, must necessarily vest the legal estates in both parcels in the trustees, because they take a legal estate in one of those parcels. They may take a legal estate in one, because subsequent parts of the will require them to do acts in reference to it, which can be done only by the holder of the legal estate, and then the law assigns to them such an estate as the due execution of their trust demands; while at the same time, by force of the statute of uses, or of wills, the other land, as to which no duties are required of the trustees, goes to the cestuis que use. *Webster v. Cooper*, 14 How. 488, 499, 14 L. Ed. 510.

Maine.—A will, executed in 1777, which devised certain lands in Maine, to trustees and their heirs to the use of Richard (the son of the testator) for life, remainder, for his life in case of forfeiture, to the trustees to preserve contingent remainders; remainder to the sons of Richard, if any, as tenants in common in tail, with cross remainders; remainder to Richard's daughter Elizabeth, for life; remainder to trustees to preserve contingent remainders during her life; re-

mainder to the sons of Elizabeth in tail,—did not vest the legal estate in fee simple in the trustees. The life estate of Richard, and the contingent remainders limited thereon, were legal estates. No duties were imposed on the trustees which could prevent the legal estate in these lands from vesting in the cestuis que use; and although such duties might have been required of them relating to other lands in the devise, yet this circumstance would not control the construction of the devise as to these lands. *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510.

The Michigan statute abolishes all express passive trusts, but allows express active trust when created in accordance with § 5573, *Howell's Am. Stat.* *Loring v. Palmer*, 118 U. S. 321, 343, 30 L. Ed. 211.

The statute of Michigan abolishing all express passive trusts, has no application to a trust created by an instrument other than the conveyance under which the trustee took the legal title. Thus a trust was not created by the conveyance under which the trustee took the title but by the original contract of purchase read in connection with the contemporaneous correspondence between the parties. The cestui que trust brought suit in equity to compel the trustee and his grantee to perform the trust. It was held that under the Michigan statute § 5573 the legal title did not vest in the cestui que trust by virtue of the conveyance to the trustee, that all he has is the equitable title which he acquired under the contract of purchase, and that equity had jurisdiction of the suit, since his remedy is in equity and not at law. *Loring v. Palmer*, 118 U. S. 321, 343, 30 L. Ed. 211.

New York.—By the article on Uses and Trusts of the Revised Statutes of New York (1 Rev. Stat. 727) all passive trusts were abolished, and the persons entitled to the actual possession of lands, and to the receipt of the rents and profits thereof, in law or in equity, were to be deemed to have the legal estate therein to the same extent as their equitable estate; saving, however, the estates of trustees whose title was not merely nominal, but was connected with some power of actual disposition or management in relation to the lands. Future trusts were allowed to be created to sell land for the benefit of creditors, or to create charges thereon, or to receive the rents and profits, and apply them to the use of any person for life or any shorter term. *Bowen v. Chase*, 94 U. S. 818, 24 L. Ed. 184.

The courts of New York have held

have the legal estate remain in trustees, to enable them to execute a trust which the deed declares.⁶⁰

A use limited upon a use is not executed or affected by the statute of uses. The statute executes only the first use. In the case of a deed of bargain and sale, the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee. But the second use may be valid as a trust, and enforced in equity according to the rights of the parties.⁶¹

2. **CONVEYANCE FOR BENEFIT OF TWO OR MORE CESTUI QUE TRUST.**—The principle of the common law that where a conveyance of lands is made to two or more persons and the instrument is silent as to the interest which each is to take, the presumption will be that their interests are equal; applies to two or more cestuis que trust who are beneficiaries under a common deed creating a trust. This is the rule in Michigan.⁶²

3. **CONDITIONS PRECEDENT.**—See post, "Mode of Ascertaining Value," III, D, 4.

4. **MODE OF ASCERTAINING VALUE.**—See note.⁶³

5. **ALIENATION.**—In the consideration of a court of equity, the cestui que trust is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust, as it would have had at law upon the legal estate.⁶⁴ Under a deed conveying property in trust for the grantor during his life and after his death for his children an equitable interest, as tenants in common in fee simple, was secured to the children by the deed; and their conveyances, together with that of the trustee, passed the whole interest, legal and equitable, to the purchasers.⁶⁵

6. **SUBJECT TO EXECUTION.**—See the title EXECUTIONS, vol. 6, p. 92.

7. **ELECTION TO TAKE PROPERTY INSTEAD OF PROCEEDS.**—Those interested

that a trust to receive and pay over rents and profits is valid; but that a trust for the use and benefit of the beneficiary, not requiring any action or management on the part of the trustee, except, perhaps, to make conveyances at the direction and appointment of the beneficiary, is not a valid trust within the statute, but inures as a legal estate in the beneficiary. *Bowen v. Chase*, 94 U. S. 818, 24 L. Ed. 184.

South Carolina.—Where an estate was devised to A. and B., in trust for C. and her heirs, the estate, by the settled rules of the courts of law and equity in South Carolina, as applied to the statute of uses of 27 Hen. VIII, c. 10, in force in that state, passed at once to the object of the trust, as soon as the will took effect, by the death of the testator the interposition of the names of A. and B. had no other legal operation than to make them the conduits through whom the estate was to pass, and they could not sustain an ejectment for the land. C., the grandchild of the testator, is a purchaser under the will, deriving all her rights from the will of the testator, and obtaining no title from A. and B.; and A. and B. were as much strangers to the estate, as if their names were not to be found in the will. *Henderson v. Griffin*, 5 Pet. 151, 8 L. Ed. 79.

By the statute of Wisconsin of 1850 every express passive trust is abolished, and the deed or instrument by which it is created, or attempted to be, takes ef-

fect as a conveyance directly to the cestui que trust in whom the legal title vests, and the trustee acquires no estate or interest whatever. *McGoon v. Scales*, 9 Wall. 23, 28, 19 L. Ed. 545.

60. *Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909.

61. *Croxall v. Shererd*, 5 Wall. 268, 282, 18 L. Ed. 572.

62. **Conveyance for benefit of two or more cestuis que trust.**—*Loring v. Palmer*, 118 U. S. 321, 341, 30 L. Ed. 211.

63. L. and wife conveyed to trustees the interest of the wife in certain estates, to be converted into money and invested by the trustees for the use of the wife during life, after her death for the use of the husband, and after the death of both to their daughter, and L. covenants that whenever it shall be ascertained and known what sum will thus be secured to the daughter, he will immediately thereupon secure to her a like sum to be paid out of his own estate. Held, that the value of the interest conveyed to the trustees for the ultimate use of the daughter must be ascertained by the conversion of the property into money or its equivalent, and such conversion is a condition precedent to the obligation of the father to secure a like sum to the daughter. *Rogers v. Law*, 1 Black 253, 17 L. Ed. 58.

64. *Croxall v. Shererd*, 5 Wall. 268, 281, 18 L. Ed. 572.

65. *Barribeau v. Brant*, 17 How. 43, 15 L. Ed. 34.

in property held in trust, and ultimately entitled to the entire proceeds, may elect to take the property in its then condition, and to hold it as tenants in common; but the acts showing an intention so to take must be unequivocal, and must be concurred in by all the parties interested.⁶⁶

8. **TERMINATION.**—See post, "Interest of Cestui Que Trust," III, E, 2.

E. Duration and Termination—1. **TITLE AND INTEREST OF TRUSTEE.**—The general rule is that a trust estate is not to continue beyond the period required by the purposes of the trust;⁶⁷ when the purposes for which a trust was created are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The duration of the trust estate is measured by the objects of its creation.⁶⁸ And upon the termination of the trust estate there arises a resulting trust in favor of the grantor and his heirs.

2. **INTEREST OF CESTUI QUE TRUST.**—The rights of one who became a cestui que trust under a contract to purchase lands in the name of another who was to take the legal title, sell the property within a limited time, and, after deducting from the proceeds the outlay with interest and taxes to pay over to such person one-half of the residue; continues after the expiration of the

66. *Potter v. Couch*, 141 U. S. 296, 321, 35 L. Ed. 721; *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044.

67. *Doe v. Considine*, 6 Wall. 458, 471, 18 L. Ed. 869; *Webster v. Cooper*, 14 How. 488, 499, 14 L. Ed. 510; *Neilson v. Lagow*, 12 How. 98, 110, 13 L. Ed. 909; *Potter v. Couch*, 141 U. S. 296, 297, 309, 35 L. Ed. 721. See ante, "Nature and Extent," III, C, 1.

68. *Young v. Bradley*, 101 U. S. 782, 788, 25 L. Ed. 1044; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.

Where a testator intended, and expressly provided, that the division required by the will should be made by his executors and trustees, their trust estate could not terminate until they had made the division and conveyed the shares. *McArthur v. Scott*, 113 U. S. 340, 377, 28 L. Ed. 1015. Whether, in case of unreasonable delay on their part to make the division, a court of equity might have compelled them to do so, see *Potter v. Couch*, 141 U. S. 296, 312, 35 L. Ed. 721.

Passive trust—Trusts vested under statute of uses.—Though a devise to trustees "and their heirs," passes, as a general thing, the fee, yet where the purposes of a trust and the power and duties of the trustees are limited to objects terminating with lives in being—where the duties of the trustees are wholly passive, and the trust thus perfectly dry—the trust estate may be considered as terminating on the efflux of the lives. The language used in creating the estate will be limited to the purposes of its creation. *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869, quoting 2 Jarman on Wills, 156. See, also, *Young v. Bradley*, 101 U. S. 782, 787, 25 L. Ed. 1044. See ante, "Under Statute of Trust and Uses," III, C, 1, b.

A trust restricted to a certain society for a particular purpose ends when the land ceases to be used and the society

is dissolved. So held where the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground, adding (as if to put the matter beyond doubt) "and for no other purpose whatever." The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground and the society was dissolved. *Hopkins v. Grimshaw*, 165 U. S. 342, 353, 41 L. Ed. 739.

The trust created by the deed having been terminated, according to its express provisions, by the land's ceasing to be used as a burial ground, and the dissolution and extinction of the society for whose benefit the grant was made, there arises, by a familiar principle of equity jurisprudence, a resulting trust to the grantor and his heirs, whether his conveyance was by way of gift or for valuable consideration. *Hopkins v. Grimshaw*, 165 U. S. 342, 355, 41 L. Ed. 739.

City of New Orleans with respect to assessments to pay drainage warrants.—The city of New Orleans purchased a drainage plant and franchises with its drainage warrants, and undertook to collect the drainage assessments and pay off such warrants. The assessments were levied against the city's own property as well as private property, and the assessments against the city were reduced to judgments. It was held that it is entirely immaterial whether the assessments against the city were reduced to judgments or not, and the city does not cease to be a trustee with respect to the assessments because they were reduced to judgments. When put in this form they were none the less obligations of the city which it was bound to treat as assets collected and such as were held by it as trustee for the benefit of the warrant holders. *New Orleans v. Warner*, 175 U. S. 120, 131, 44 L. Ed. 96.

time agreed upon for the sale, unless he subsequently relinquished his claim; and the burden of proof as to such relinquishment rests with the trustee.⁶⁹

3. **SURVIVAL OF DEATH OF TRUSTEE.—Survival of Power Coupled with a Trust.**—See the title **POWERS**, vol. 9, pp. 593, 594. And see the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 144. A trust will survive though in no way beneficial to the trustee.⁷⁰

Death of Cotrustee.—Where the trustees are invested with the legal estate, in order to enable them to discharge the various trusts declared, it is well settled that the power conferred is a power coupled with an interest, which survives, on the death of one of them, and may be executed by the survivor. It is not necessary that the trustees should have a personal interest in the trust; it is the possession of the legal estate, or a right *virtute officii* in the subject over which the power is to be exercised, that makes an interest, which, when coupled with the power, the latter survives. A trust, therefore, will survive when in no way beneficial to the trustee.⁷¹

4. **PRESUMPTION OF RECONVEYANCE TO TRUSTOR.**—Where the owner of land in fee makes a conveyance to a person in trust to convey to others upon certain conditions, and the conditions never arise, so that the trust cannot possibly be executed, a presumption arises in cases where an actual conveyance would not involve a breach of duty in the trustee or a wrong to some third person, that the trustee reconveyed to the owner; this being in ordinary cases

69. *Seymour v. Freer*, 8 Wall. 202, 215, 19 L. Ed. 306; *Townsend v. Vanderwerker*, 160 U. S. 179, 40 L. Ed. 383.

In May, 1835, an agreement was entered into between Price and Seymour, which provided, on the part of Price, that he should devote his time and best judgment to the selection and purchase of land, to an amount not exceeding five thousand dollars, in certain designated states and territories, or in such of them as he might find most advantageous to the interest of Seymour; that the purchases should be made during the then existing year; and that the contracts of purchase should be made, and the conveyances taken in the name of Seymour; and on the part of Seymour, that he should furnish the five thousand dollars; that the lands purchased should be sold within five years afterwards and that of the profits made by such purchase and sale, one half should be paid to Price, and be in full for his services and expenses. Under this agreement, lands having been purchased by Price and the title taken in the name of Seymour, held: 1. That Seymour took the legal title in trust for the purposes specified; that is, to sell the property within the time limited, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one half of the residue; and that, to this extent, Seymour was a trustee, and Price the cestui que trust. 2. That the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim; the burden of proof as to such relinquishment resting with the heirs of Seymour. 3. That the principle of equitable conversion being applied to the case, and the land which was to be

converted into money, being regarded and treated in equity as money, the personal representative of Price was the proper person to maintain this suit, and it was not necessary that his heirs at law should be parties. *Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306.

70. *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522. See, also, *United States Bank v. Beverly*, 1 How. 134, 147, 11 L. Ed. 75.

The concluding paragraph of a will was in the following words: "And if my said daughter (the trustee) shall die or from any cause should become unable to act in the trust, I direct that a trustee shall be appointed by the circuit court so that the trust hereby created shall be at all times preserved and carried into effect." It was held that the trust survives the death of the daughter named as trustee. *Cruit v. Owen*, 203 U. S. 368, 371, 51 L. Ed. 227.

Where two persons, as trustees, are invested by last will with the whole of a legal estate, and are to hold it in trust to "manage, invest and reinvest the same according to their best discretion," and pay over income during certain lives; and, on their efflux, these persons, or their successors, as trustees, are to select and appoint persons, who are to be informed of the facts by the trustees, and who are to distribute the capital among permanently established and incorporated institutions, for the benefit of the poor, the power given to such two persons to select and appoint is a power which will survive, and on the death of one in the lifetime of the testator, it may be properly executed by the other. *Lorings v. Marsh*, 6 Wall. 337, 18 L. Ed. 802.

71. *Lorings v. Marsh*, 6 Wall. 337, 354,

his duty.⁷² It is not necessary that the presumption should rest upon a basis of proof or a conviction that the conveyance had been in fact executed.⁷³ But this presumption is disputable, and may, therefore, be overcome by opposing evidence.⁷⁴

F. Liability for Debts of Cestui Que Trust.—It is a settled rule of law that the beneficial interest of the cestui que trust, whatever it may be, is liable for the payment of his debts.⁷⁵ It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and en-

18 L. Ed. 802; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522.

72. *French v. Edwards*, 21 Wall. 147, 22 L. Ed. 534.

73. *French v. Edwards*, 21 Wall. 147, 22 L. Ed. 534.

74. *Lincoln v. French*, 105 U. S. 614, 26 L. Ed. 1189.

75. *Nichols v. Levy*, 5 Wall. 433, 441, 18 L. Ed. 596.

Where a state court, interpreting a statute of its own state, which gave such court jurisdiction to subject legal and equitable interests in real estate to the claim of creditors, decided that the statute embraced trusts like one in question (which judgment creditors were seeking to set aside), and that it exempted the property embraced by the trust from liability to such creditors—the federal supreme court followed that construction of the statute and sustained the trust, though they remarked that if the question had been to be treated by them on general principles of jurisprudence, and independently of the state decision on the statute, the judgment would necessarily have been the other way. *Nichols v. Levy*, 5 Wall. 433, 18 L. Ed. 596.

Under the Wisconsin statute of 1850, abolishing passive trusts, lands held under such a trust are subject to judicial or execution sale to satisfy the debts of the cestui que trust. *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545.

Right of guarantee or indorser to resort to trust fund for indemnity of guarantor.—See the title **GUARANTY**, vol. 6, p. 594.

Subject to lien of judgment or decree.—Where the legal title is in trustees, for the purpose of serving the requirements of an active trust, the creditor has no lien, and can acquire none, at law, but obtains one only by filing a bill in equity for that purpose; but if the trust was merely passive, and, therefore, executed by the law of its locality, in the cestui que trust, so as to be subject to the levy of execution at law, the rule is otherwise and a bill in equity to enforce the judgment would fail, because the remedy at law would be adequate and complete. *Spindle v. Shreve*, 111 U. S. 542, 547, 28 L. Ed. 512; *Potter v. Couch*, 141 U. S. 296, 320, 35 L. Ed. 721; *Freedman's Sav., etc., Co. v. Earle*, 110 U. S. 710, 712, 28 L. Ed. 301. See *Nichols v. Levy*, 5 Wall. 433, 441, 18 L. Ed. 596. See the title

JUDGMENTS AND DECREES, vol. 7, p. 644. See, also, the title **EXECUTIONS**, vol. 6, p. 92.

"In *Spindle v. Shreve*, 111 U. S. 542, 548, 28 L. Ed. 512, it was stated to be the law in Illinois that where the legal title to lands is in trustees, for the purpose of serving the requirements of an active trust, the judgment creditor had no lien and could acquire none at law, but could obtain one only by filing a bill in equity for that purpose, according to the provisions of § 49 of the chancery practice act of that state. Rev. Stat. 1845, p. 97. It was otherwise if the trust was merely passive, such as those described in the section defining real estate as subject to the lien of judgments, already quoted." *Brandies v. Cochrane*, 112 U. S. 344, 350, 28 L. Ed. 760.

"By § 49, ch. 22 (Hurd's Rev. Stats. Illinois, 195), of the chancery practice act of that state, providing for creditors' bills of discovery and to reach and apply equitable estates and interests to the satisfaction of debts, property held in trust is made subject to that proceeding, 'except, when such trust has, in good faith, been created by, or the funds so held in trust has proceeded from, some person other than the defendant himself.'" *Spindle v. Shreve*, 111 U. S. 542, 546, 28 L. Ed. 512.

The statute of Illinois does not apply merely to cases where a technical discovery is sought, but to all cases where the creditor, or his representative, is obliged, by the nature of the interest sought to be applied, to resort to a court of equity for relief. *Spindle v. Shreve*, 111 U. S. 542, 577, 28 L. Ed. 512.

The Tennessee statute, which was applied to the exoneration of the interests sought to be appropriated in *Nichols v. Levy*, 5 Wall. 433, 18 L. Ed. 596, was substantially the same as this; and both seem to be copies from that of New York, 2 Rev. Stat. 173, §§ 38, 39, although in the last-named state another statute, 1 Rev. Stat. 729, § 57, limits the exemption in cases where income is payable under such a trust, to the principal fund itself, and the beneficial interest of the cestui que trust in the income only to the extent of a fair support of the beneficiary out of the trust estate. *Spindle v. Shreve*, 111 U. S. 542, 28 L. Ed. 512.

Where the trustee was required by the terms of the trust, subject to a power of appointment to retain the legal title in

joyment to the beneficiary and immunity from his creditors.⁷⁶ A condition precedent that the estate of a cestui que trust shall not vest until his debts are paid, and a condition subsequent that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid, and the law will give them full effect. Beyond this, protection from the claims of creditors is not allowed to go.⁷⁷

G. Liability for Debts of Trustee.—The trust property cannot be subjected by the trustee's creditors to the payment of his debts;⁷⁸ and are not subject to seizure and sale upon execution.⁷⁹ As between a trustee and the cestui que trust, the trustee can have no equity against the express trusts to which he assented.⁸⁰

H. Liability for Debts of Trustor.—See notes.⁸¹

himself, and to permit the cestui que trust, the wife of the party creating the trust, to use and occupy the property, and to enjoy and receive the rents and profits thereof during her life and to her own use—language which, if it cannot be properly construed to devote it to her separate use, all the more requires the protection secured to her actual right by the legal titles being vested in the trustee—it was held that the estate of party creating the trust, therefore, under the trust, whether for life or in fee, whether vested or continued, was equitable merely, and of that nature which could not be subjected to sale for payment of his debts except by the aid of the court of equity. In such cases no lien arises by operation of law from the judgment but only on the filing of the bill. *Brandies v. Cochrane*, 112 U. S. 344, 350, 28 L. Ed. 760.

Subjects to execution.—See the title EXECUTIONS, vol. 6, pp. 88, 92.

Liability to attachment or garnishment.—See the title ATTACHMENT AND GARNISHMENT, vol. 2, pp. 676, 695.

Creditor's suit to subject property held upon secret trust.—See the title CREDITORS' SUITS, vol. 5, p. 31, note 37.

76. *Nichols v. Levy*, 5 Wall. 433, 441, 18 L. Ed. 596. And see the titles ESTATES, vol. 5, p. 909; WILLS.

77. *Nichols v. Levy*, 5 Wall. 433, 441, 18 L. Ed. 596.

The rents and profits of real and the income and dividends of personal property can be given and granted by a testator to a person free from all liability for the debts of the latter. *Nichols v. Eaton*, 91 U. S. 716, 717, 24 L. Ed. 254.

A devise of the income from property, to cease on the insolvency or bankruptcy of the devisee, is good; and a limitation over to his wife and children, upon the happening of such contingency, is valid, and the entire interest passes to them; but if the devise be to him and his wife or children, or if he has in any way a vested interest thereunder, that interest, whatever it may be, may be separated from that of his wife or children, and paid over to his assignee in bankruptcy. *Nichols v. Eaton*, 91 U. S. 716, 24 L. Ed. 254.

78. *Sturm v. Boker*, 150 U. S. 312, 330, 37 L. Ed. 1093.

79. Where there was a deed of land to a debtor in trust which conveyed to him a naked legal title, he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.*; and the purchaser at such sale could not maintain an action of ejectment under the marshal's deed; nor prove that the debtor purchased the land and procured the deed in this form in order to hinder and defraud his creditors. *Smith v. McCann*, 24 How. 396, 398, 16 L. Ed. 714. See the titles EJECTMENT, vol. 5, p. 700; FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 525. See, also, the title PAROL EVIDENCE, vol. 9, p. 19.

The only interest which the plaintiff seeks to impeach is that of the cestui que trust; yet they are not before the court, nor can they by any process be made parties in this ejectment suit, nor even be permitted to make themselves parties if they desired to do so, and cannot have an opportunity of adducing testimony in defense of their rights. Under such circumstances, an inquiry into the validity of these trusts would not only be inconsistent with the established principles and jurisdiction of courts of common law, but also inconsistent with that great fundamental rule in the administration of justice, which requires that every one shall have an opportunity of defending his rights before judgment is pronounced against him. *Smith v. McCann*, 24 How. 396, 398, 407, 16 L. Ed. 714.

80. *Smith v. McCann*, 24 How. 396, 398, 407, 16 L. Ed. 714.

81. **Liability for debts of trustor.**—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, pp. 484, 506, 508, 514.

Subsequent creditors.—The statute of 13 Eliz., ch. 5, which is in force in the District of Columbia, does not affect, in favor of subsequent creditors, a voluntary settlement by a deed upon trust made by a man, not indebted at the time, for his wife and children, unless fraud was intended when the settlement was made. A settlement between the debtor

I. Liability for Expenses of Administration, Costs, Counsel Fees, etc.—It is a general principle that a trust estate must bear the expenses of its administration.⁸²

Allowances to Party Suing for Himself and Others Having Like Interest.—Where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts.⁸³

But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held that such person had any right to demand reimbursement of his expenses out

and creditor, and judgment upon the instrument evidencing the debt, can have no retroactive effect, so far as the rights of the trustee and beneficiaries under such deed upon trust are concerned. *Mattingly v. Nye*, 8 Wall. 370, 19 L. Ed. 380. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 508.

82. Liability for expenses of administration costs, counsel fees, etc.—*Meddaugh v. Wilson*, 151 U. S. 333, 343, 38 L. Ed. 183; *Trustees v. Greenough*, 105 U. S. 527, 532, 26 L. Ed. 1157; *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 122, 28 L. Ed. 915.

There can be no doubt that it is the duty of the court to pay from the trust fund it has in possession all the debts it incurred in its judicial capacity while administering the trust assumed, pending the litigation, in behalf of the litigating parties. *Myer v. Car Co.*, 102 U. S. 1, 13, 26 L. Ed. 59.

83. Allowances to party suing for himself and others having like interest.—*Trustees v. Greenough*, 105 U. S. 527, 532, 26 L. Ed. 1157; *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 122, 28 L. Ed. 915; *Hobbs v. McLean*, 117 U. S. 567, 582, 29 L. Ed. 940.

This has long been the rule in relation to proceedings for restoring property to the uses of a charity which has been unjustly divested thereupon. *Trustees v. Greenough*, 105 U. S. 527, 532, 26 L. Ed. 1157.

The suit of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders, to save from waste and spoliation certain property in which he and they had a common interest. It resulted in bringing into court or under its control a large amount of money and property for the benefit of all entitled to come in and take the benefit of the final decree. It was held that the complainant in that case was properly allowed his reasonable costs, counsel fees, charges and expenses incurred in the fair prosecution of the suit, and in reclaiming and

rescuing the trust fund and causing it to be subjected to the purposes of the trust, but his claim to be compensated, out of the fund or property recovered, for his time or personal services and private expenses such as travelling fares and hotel bills, was rejected as unsupported by reason or authority. *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 122, 28 L. Ed. 915.

Certain unsecured creditors of a railroad company in Alabama instituted proceedings in equity, in a court of that state, on behalf of themselves and of all other creditors of the same class who should come in and contribute to the expenses of the suit, to establish a lien upon the property of that company in the hands of other railroad corporations which had purchased and had possession of it. The suit was successful and the court allowed all unsecured creditors to prove their claims before a register. Pending the reference before the register, the defendant corporations bought up the claims of complainants and other unsecured creditors. Thereupon, the solicitors of complainants filed their petition in the cause to be allowed reasonable compensation in respect of the demands of unsecured creditors, other than their immediate clients, who filed their claims under a decree, and to have a lien declared therefor on the property reclaimed for the benefit of such creditors. The suit between the solicitors and such defendant corporations was removed to the circuit court of the United States; held, within the principle announced in *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, the claim was a proper one to be allowed. *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

Where an assignee of a claim upon a foreign government, holding it under an assignment supposed to be good, but afterwards adjudged invalid, prosecuted the claim to a successful result, and was subjected to costs and expenses in protecting the fund from rival claimants, and thereby preserving it, he was entitled to a reimbursement of these costs and expenses by the true owner, upon a final

of the trust fund, or contribution from those whose property he sought to misappropriate.⁸⁴

Allowance to Trustee or Their Counsel.—The trustee is entitled to be allowed, as against the estate and the beneficiary, for all his proper expenses out of pocket, which include all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and, in the absence of any such directions all expenses, reasonably necessary for the security, protection and preservation of the trust property, or for the prevention of a failure of the trust.⁸⁵

Allowance of Extravagant Counsel Fees.—The practice of allowing to trustees, complainants, and receivers, and their counsel, large and extravagant counsel fees and commissions payable out of trust funds under the control of the court, is disapproved.⁸⁶

J. Sale, Exchange or Mortgage of Trust Property—1. **POWER OF TRUSTEE AND VALIDITY.**—Where the trustee has not an unrestricted authority to sell, but only when, in his opinion, the purchase money might be laid out

settlement of accounts between them. *Williams v. Gibbs*, 20 How. 535, 15 L. Ed. 1013.

Power to give lien.—It was, also proper to give the solicitors a lien upon the property brought under the control of the court by the suit and the decree therein, such lien being authorized by the law of Alabama. *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

84. *Hobbs v. McLean*, 117 U. S. 567, 582, 29 L. Ed. 940.

85. Allowance to trustees or their counsel.—*Gisborn v. Charter Oak Ins. Co.*, 142 U. S. 326, 337, 35 L. Ed. 1029, quoting 2 *Pomeroy's Eq. Jur.*, § 1085.

It is the general rule of equity, that a trustee called upon to discharge any duties in the administering of his trust is entitled to compensation therefor, and included therein is a reasonable allowance for counsel fees. This is constantly enforced in the federal courts in the various railroad foreclosures that have been and are proceeding therein; and this, irrespective of any state legislation. The subject was exhaustively considered by Mr. Justice Bradley, in the case of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. The English and American authorities were fully reviewed, and the power and duty of the court to make reasonable allowance (including counsel fees) to trustees or others acting in that capacity was affirmed. *Dodge v. Tulleys*, 144 U. S. 451, 457, 36 L. Ed. 501. See, also, *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915.

The ground and reason for this rule are, that the trustee has an equity of his own, for reimbursement for all the necessary expenses to which he has been put in the administration of his trust, which he can enforce by means of the legal title to the trust estate vested in him; and that his creditor, in the cases supposed of his insolvency or absence from the jurisdiction, may resort to the equity of the trustee, upon a principle of equi-

table substitution or attachment, for his own security. *Hewitt v. Phelps*, 105 U. S. 393, 400, 26 L. Ed. 1072.

In case a suit is brought against trust property, the cost and expenses are properly chargeable in the trustee's accounts against the estate. *Williams v. Gibbs*, 20 How. 535, 538, 15 L. Ed. 1013. See, also, *Gooding v. Oliver*, 17 How. 274, 15 L. Ed. 148.

There is no statute of Nebraska in respect to the matter. Even if there were one expressly prohibiting courts of equity from making allowances to trustees or their counsel, such prohibition would not control the proceedings in federal equity courts. *Dodge v. Tulleys*, 144 U. S. 451, 457, 36 L. Ed. 501.

In *Mississippi* persons dealing with a trustee must look to him for payment of their demands, and ordinarily the creditor has no right to resort to the trust estate to enforce his demand for advances made or services rendered for the benefit of the trust estate. But, while this is the rule, there are exceptions to it; and where expenditures have been made for the benefit of the trust estate, and it has not paid for them, directly or indirectly, and the estate is either indebted to the trustee or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent or nonresident, so that the creditor cannot recover his demand for him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery. *Hewitt v. Phelps*, 105 U. S. 393, 400, 26 L. Ed. 1072.

86. Allowance of extravagant counsel fees.—*Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157.

In *Central R., etc., Co. v. Pettus*, 113 U. S. 116, 28 L. Ed. 915, it was held that the allowance as solicitors of an amount equal to 10 per cent upon the aggregate principal and interest of the bonds and coupons filed in the case, excluding this,

advantageously for the cestuis que trust; he would be guilty of a breach of trust if he should sell, without any settled intention to reinvest, and leave that to be governed by future events. A fortiori, if he should sell with an intention not to reinvest but to speculate, for the purpose of relieving his own necessities or of appropriating the trust fund indefinitely to his own use.⁸⁷ Where a trustee has power to sell, and reinvest the trust property, whenever, in his opinion, the purchase money may be laid out advantageously for the cestuis que trust, that opinion must be fairly and honestly exercised, and the sale will be void, where he appears to have been influenced by private and selfish interests, and the sale is for an inadequate price.⁸⁸ The word sale in a statute empowering trustees to sell the trust estate means a sale for cash and not a transfer of the property in payment of a debt.⁸⁹ A statute providing that the chancellor may order a trustee to sell or mortgage trust property in which the trustee has a life interest, for purposes of the trust, confers no jurisdiction upon the chancellor to order a transfer of the property in payment and satisfaction of debts due and owing by the trustee upon a valuation to be agreed upon between him and his respective creditors. Such an order is not an exercise of jurisdiction, but an order out of and beyond it.⁹⁰

Cotrustees.—Trustees must unite to pass any title to property jointly held by them.⁹¹

Power to Exchange.—A trustee may exchange trust property under a power to dispose of and reinvest the proceeds for the benefit of the cestui que trust.⁹²

2. PERSONS WHO MAY PURCHASE—*a. Purchase by Trustee*—(1) *Purchase at Trustee's Own Sale.*—As a general proposition, trustees,⁹³ unless they are nominally such to preserve contingent remainders;⁹⁴ agents;⁹⁵ attorneys;⁹⁶ auctioneers;⁹⁷ commissioners of bankrupts, assignees of bankrupts, solicitors

in respect of such there was special contract for compensation, under the circumstance of the case excessive.

87. Power of trustee and validity.—*Wormley v. Wormley*, 8 Wheat. 421, 442, 443, 5 L. Ed. 651.

88. *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651. So held as to a sale by a trustee in a marriage settlement.

89. *Williamson v. Berry*, 8 How. 495, 549, 12 L. Ed. 1170.

90. *Williamson v. Berry*, 8 How. 495, 549, 12 L. Ed. 1170, reaffirmed in *Williamson v. Ball*, 8 How. 566, 568, 12 L. Ed. 1200, but questioned in *Suydam v. Williamson*, 20 How. 427, 431, 15 L. Ed. 978, and apparently overruled in *Suydam v. Williamson*, 24 How. 431, 435, 16 L. Ed. 742.

91. Cotrustee.—*Wilbur v. Almy*, 12 How. 180, 190, 13 L. Ed. 944. See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 604.

A trustee may ratify a sale by his co-trustee by acts in pais but very clear proof of such ratification should be required. *Wilbur v. Almy*, 12 How. 180, 190, 13 L. Ed. 944.

92. Power to exchange.—*Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855. See the title POWERS, vol. 9, pp. 596, 597.

93. Purchase at trustee's own sale.—*Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076; *Allen v. Gillette*, 127 U. S. 589,

593, 32 L. Ed. 271; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134; *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259; *Stephen v. Beall*, 22 Wall. 329, 341, 22 L. Ed. 786.

A trustee cannot directly or indirectly become the purchaser for his own benefit or on his own behalf of the trust property which is confided to his care. Such purchase is a fraud upon the grantor. *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311; *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Ringo v. Binns*, 10 Pet. 269, 281, 9 L. Ed. 420; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134; *Stephen v. Beall*, 22 Wall. 329, 341, 22 L. Ed. 786.

94. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

95. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

Agent buying to which principal entitled.—In *Ringo v. Binns*, 10 Pet. 269, 281, 9 L. Ed. 420, the court reaffirmed the rule, by its application to an agent who had bought land to which his principal was in equity entitled. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

96. Purchase of judgment by attorney from client.—See the title ATTORNEY AND CLIENT, vol. 2, p. 718.

97. Purchase at his own sale by auctioneer.—*Veazie v. Williams*, 8 How. 134,

to the commission;⁹⁸ executors and administrators;⁹⁹ and creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restraints mentioned, in the note.¹ For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. "Emptor emit quam minimo potest, venditor vendit quam maximo potest."³ He cannot be at the same time vendor and vendee.⁴ "In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."⁵ The principle has been extended to a pur-

151, 12 L. Ed. 1018; *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076. See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 743.

98. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

99. *Allen v. Gillette*, 127 U. S. 589, 593, 32 L. Ed. 271. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 152.

1. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

As a general rule of equity jurisprudence, a trustee or person acting in a fiduciary character for the benefit of others cannot become a purchaser at his own sale, or acquire any interest therein without the express consent or under a special permission given by a court of competent jurisdiction. *Allen v. Gillette*, 127 U. S. 589, 593, 32 L. Ed. 271.

Relaxations of this rule of the civil law, which were made in some countries of Europe, were not adopted by the Spanish law, and of course never reached Louisiana. Nor were those relaxations carried so far as to allow a testamentary or dative executor to buy the property which he was appointed to administer. *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076.

Purchase from cestui que trust.—A trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances; provided the cestui que trust intended the trustee should buy; and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. It is a difficult case to make out, wherever it is contended that the exception prevails. The above remarks are fully applicable to a purchase, by an agent from his principal, of the property committed to his agency. *Brooks v. Martin*, 2 Wall. 70, 85, 17 L. Ed. 732.

In order to sustain such a sale, it must be made to appear, first, that the price paid approximates reasonably near to a

fair and adequate consideration for the thing purchased; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter. *Brooks v. Martin*, 2 Wall. 70, 85, 17 L. Ed. 732.

"If a partner who exclusively superintends the business and accounts of the concern, by concealment of the true state of the accounts and business, purchase the share of the other partner for an inadequate price, by means of such concealment, the purchase will be held void." *Brooks v. Martin*, 2 Wall. 70, 84, 17 L. Ed. 732.

3. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

4. *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Michoud v. Girod*, 4 How. 503, 555, 11 L. Ed. 1076.

A person (a trustee) cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076; *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134; *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259.

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other." *Michoud v. Girod*, 4 How. 503, 555, 11 L. Ed. 1076.

5. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely

chase by an attorney from his client whilst the relation subsists as to gifts. Nor can an arbitrator buy up the unascertained claims of any of the parties to the reference. Where a person cannot purchase the estate himself, he cannot buy it as agent for another.⁶ "On the whole, the doctrine may be generally stated, that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage."⁷ If a trustee, or persons acting for others, sells the trust estate and becomes himself interested in the purchase, the cestuis que trust are entitled, of course, to have the sale set aside, unless the trustee had fairly divested himself of the character of trustee,⁸ and to have the property re-exposed to sale, under the direction of the court.⁹ And it makes no difference in the application of the rule, that the sale was at public auction, bona fide, and for a fair price,¹⁰ or that the purchase was made through the intervention of a third party.¹¹ A purchase by a trustee

interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. *Michoud v. Girod*, 4 How. 503, 555, 11 L. Ed. 1076.

He cannot represent in himself two opposite and conflicting interests. As vendor, he must always desire to sell as high, and as purchaser, to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters. *Wormley v. Wormley*, 8 Wheat. 421, 441, 5 L. Ed. 651.

6. *Michoud v. Girod*, 4 How. 503, 553, 11 L. Ed. 1076.

7. *Brooks v. Martin*, 2 Wall. 70, 84, 17 L. Ed. 732.

8. *Stephen v. Beall*, 22 Wall. 329, 340, 22 L. Ed. 786; *Michoud v. Girod*, 4 How. 503, 556, 11 L. Ed. 1076.

9. *Michoud v. Girod*, 4 How. 503, 556, 11 L. Ed. 1076.

10. *Michoud v. Girod*, 4 How. 503, 556, 11 L. Ed. 1076.

So jealous is the law of dealings of this character by persons holding confidential relations to each other, that the cestui que trust may avoid the transaction, even though the sale was without fraud, the property sold for its full value, and no actual injury to his interests be proven. *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259.

The inquiry, in such a case, is not whether there was or was not fraud in fact. The purchase is voidable, and will be set aside at the instance of the cestui que trust, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. *Michoud v. Girod*, 4 How. 503, 556, 11 L. Ed. 1076.

11. *Stephen v. Beall*, 22 Wall. 329, 340, 22 L. Ed. 786.

"A purchase, per interpositam personam, by a trustee or agent, of the par-

ticular property of which he has the sale, or in which he represents another, whether he has an interest in it or not, carries fraud on the face of it." *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076, a case in which there was actual fraud; *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134.

So held where the trustee, an executor, did not purchase for himself, but a third person, by previous arrangement with the executor, became the purchaser, to hold in trust for the separate use and benefit of the wife of the executor, who was one of the cestuis que trust, and who had an interest in the land under the will of the testator. *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076.

Though equity will enforce in the most rigid manner good faith on the part of a trustee, and vigilantly watch any acquisition by him in his individual character, of property which has ever been the subject of his trust, yet where he has sold the trust property to another, that sale having been judicially confirmed after opposition by the cestui que trust, the fact that thirteen years afterwards he bought the property from the person to whom he once sold it does not, of necessity, vitiate his purchase. The question in such a case becomes one of actual fraud. And where on a bill charging fraud, the answer denies it in the fullest manner, alleging a purchase bona fide and for full value paid, and that when he, the trustee, made the sale to the person from whom he has since bought it, the purchase by himself, now called in question, was not thought of either by himself or his vendee—the court will not decree the purchase fraudulent, the case being heard on the pleadings, and without any proofs taken. *Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

The complainants in this case, who alleged fraud and relied on the trustee's possession of the trust property after an alleged sale of it, as evidence of it, not stating when the trustee came into possession—that is to say, how soon after his former sale—the court assumed the

is merely voidable at the option of the cestui que trust, and not absolutely void,¹³ in the sense that the purchaser takes no title, which he can convey to a third person—a bona fide purchaser without notice;¹⁴ nor that the cestui que trust may not, upon notice of all the facts, ratify and affirm the sale,¹⁵ either directly,¹⁶ or by his long acquiescence or silent approval.¹⁷ The right of the cestui que trust to have such purchase set aside as of course, is, therefore, subject to the qualification, that the application for such relief must be made within a reasonable time after the facts come to his knowledge.¹⁸ Laches and long acquiescence cannot be excused except by showing some actual hinderance or impediment caused by the fraud or concealment of the party in possession,

time to be thirteen years; this term having elapsed between the date of the sale by the trustee and the filing of the bill (or cross bill, rather) to set it aside; the court acting on the presumption that the complainant stated the case as favorably as he could for himself, and would have mentioned the fact that the trustee had been in possession long before the bill was filed, if he had really been so. *Stephen v. Beall*, 22 Wall. 329, 22 L. Ed. 786.

13. *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134; *Cunningham v. Macon*, etc., R. Co., 156 U. S. 400, 424, 39 L. Ed. 471; *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259; *Stephen v. Beall*, 22 Wall. 329, 341, 22 L. Ed. 786.

This is the settled doctrine in Georgia. *Cunningham v. Macon*, etc., R. Co., 156 U. S. 400, 424, 39 L. Ed. 471.

14. *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259.

15. *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259.

16. *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134. See *Stephen v. Beall*, 22 Wall. 329, 341, 22 L. Ed. 786.

17. *Hoyt v. Latham*, 143 U. S. 553, 566, 36 L. Ed. 259; *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134. See *Stephen v. Beall*, 22 Wall. 329, 341, 22 L. Ed. 786.

18. *Hammond v. Hopkins*, 143 U. S. 224, 252, 36 L. Ed. 134.

As the question whether the sale should be vacated or not depends upon the facts as they existed at the time of the sale, so in taking proceedings to avoid such sale, the cestui que trust should act upon his information as to such facts, and not delay for the purpose of ascertaining whether he is likely to be benefited by a rise in the property, since that would practically amount to throwing upon the purchaser any losses he might sustain by a fall, and denying him the benefit of a possible rise. *Hoyt v. Latham*, 143 U. S. 553, 567, 36 L. Ed. 259; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134.

In *Michoud v. Girod*, 4 How. 503, 11 L. Ed. 1076, the rule that within what time a constructive trust will be barred must depend upon the circumstances, was recognized. *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134.

Where a trustee of a partnership business, after carrying on the business for some time, sold the real estate and bought in a portion of it through a third person and accounted for the half of the proceeds belonging to the cestui que trust, to whom all was known and who made no objection, such sale cannot be set aside after a lapse of nineteen years. *Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134.

A trustee became associated with eight other persons to purchase the trust property. There was no attempt on his part to conceal the real transaction, or to disguise the fact that he was one of the purchasers. By making a sale he was enabled to effect the distribution of the estate without delay. There was nothing tending to show fraud or bad faith on his part, and apparently this was the most prudent disposition to make of the property in view of uncertainty regarding the title and its value. It was held that while the law pronounces a sale of this kind voidable at the election of the cestui que trust, there was every reason for demanding prompt action upon his part in disaffirming it. *Hoyt v. Latham*, 143 U. S. 553, 556, 569, 36 L. Ed. 259.

A trustee became one of a syndicate which purchased the trust property. He recognized the right of the cestui que trust to set aside the sale; gave them apparently a satisfactory statement of the facts, requesting only that a decision should be made at once, as it should not remain an open question. This was on September 11, 1872. Again on May 13, 1873, he gave the cestui que trust the option of rescinding the sale if action were taken within thirty days, which was again extended on June 19. Nothing was done for nearly two years, after which another correspondence was then instituted. The property in the meantime largely increased in value. The two most material witnesses for the heirs of the trustee died before a bill was filed on December, 1876. It was held that under the circumstances the cestui que trust should have taken immediate action, that the title under the circumstances amounted to a ratification of such sale, and that the bill should be dismissed. *Hoyt v. Latham*, 143 U. S. 553, 569, 36 L. Ed. 259.

which will appeal to the conscience of the chancellor.¹⁹

(2) *At Judicial Sale at Instance of Third Person.*—The principle that a trustee may purchase the trust property at a judicial sale brought about by a third party, which he had taken no part in procuring, and over which he could not have had control, is upheld by numerous decisions of the federal supreme court and of other courts of this country. This rule is recognized by the uniform current of decisions of the supreme court of Texas.²⁰

b. *Corporation of Which Trustee an Officer.*—See the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 492, note 52.

3. *CONFIRMATION OR REJECTION BY COURT.*—Under an order appointing a new trustee, which expressly declared that he should at all times be subject to the control and order of the court touching the trust, his subsequent sale of the property was subject to confirmation or rejection by the court. He could not pass the title without its consent.²¹ An order approving a trustee's sale was improvidently passed, where it was made without notice to the beneficial owners of the property, who were entitled to its income, and who were before the court for the protection of their rights, and where the confirmation was obtained by the trustee with knowledge that the beneficiaries, if notified of the application to the court, would oppose its ratification.²² A deed from a trustee under a decree in chancery, not approved by the court nor recorded in court, in conformity with the statute of Kentucky of the 16th of February, 1818, ch. 453, is valid. No such approval was necessary.²³

4. *NECESSITY FOR DEED.*—Where a trustee's sale is valid, the title passing thereunder should be conveyed to the purchaser by a deed properly made and acknowledged.²⁴

5. *OPERATION OF CONVEYANCE.*—The deed of a trustee holding the legal title and having power to convey operates to pass that title, even though it is a breach of the trust.²⁵

6. *RIGHTS AND LIABILITIES OF PURCHASER*—a. *Bona Fide Purchaser.*—A bona fide purchaser by regular conveyance of trust property take the same freed from the trust.²⁶ A bona fide purchaser, without notice, to be entitled

19. *Hammond v. Hopkins*, 143 U. S. 224, 252, 36 L. Ed. 134.

20. *At judicial sale at instance of third party.*—*Allen v. Gillette*, 127 U. S. 589, 596, 32 L. Ed. 271.

21. *Confirmation or rejection by court.*—*Kenaday v. Edwards*, 134 U. S. 117, 125, 33 L. Ed. 853.

22. *Kenaday v. Edwards*, 134 U. S. 117, 125, 33 L. Ed. 853.

23. *Barr v. Gratz*, 4 Wheat. 213, 224, 4 L. Ed. 553.

24. *Necessity for deed.*—*Clark v. Trust Co.*, 100 U. S. 149, 25 L. Ed. 573.

25. *Operation of conveyance.*—When a patent issued by the United States adds to the name of the patentee the word "trustee," without mention of any trust upon which he is to hold the land, such addition does not prevent the legal title from passing by the patentee's conveyance. If a trust be in fact created, it is for the *cestui que trust*, and no one else, to complain of the nonexecution thereof. *Cowell v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547.

26. *Rights and liabilities of purchaser.*—*Holly v. Missionary Society*, 180 U. S. 284, 45 L. Ed. 531; *Jones v. Van Doren*, 130 U. S. 684, 691, 32 L. Ed. 1077; *Gridley v. Wynant*, 23 How. 500, 16 L. Ed. 411.

A purchaser for a valuable consideration, without notice, cannot be affected by a secret verbal trust. *Alexander v. Pendleton*, 8 Cranch 462, 469, 3 L. Ed. 624.

There is not, perhaps, a state in the Union the laws of which do not make all secret trusts void as to creditors, as well as subsequent purchasers without notice. *Bayley v. Greenleaf*, 7 Wheat. 46, 57, 5 L. Ed. 393.

Such a purchaser is not a mere volunteer seeking to enforce the terms of the trust, nor does his equity depend upon the validity of the trust for its support. He has an independent equity, arising from his purchase from persons professing to hold a legal relation to each other and to the subject of the contract, and to enforce his right there is no need for any inquiry into the consideration or motives that operated upon these parties to assume their relation of trustee and *cestui que trust*. In such a case, equity does not refuse to lend its assistance. *Gridley v. Wynant*, 23 How. 500, 502, 16 L. Ed. 411; *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132.

An alleged illegality of the consideration of a deed upon trust—viz, that it was intended to protect the property of

to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid.²⁷ Till the actual payment the buyer is not injured, and it is voluntary to go on or not when informed that the title is in another.²⁸

Purchaser with Notice from Bona Fide Purchaser.—A subsequent purchaser with notice is not affected by a secret trust of which his grantor had no notice.²⁹

b. *Purchaser with Notice*—(1) *Transferee as a Trustee*.—It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust.³⁰

the trustee's son in law, who was insolvent—is not sufficient to destroy the independent equity of a bona fide purchaser, nor is it necessary to make the son in law a party when the bona fide purchaser sought relief in a court of equity against the title of the heirs. *Gridley v. Wynant*, 23 How. 500, 16 L. Ed. 411.

An executor paid a bequest to a missionary society out of funds received by him as attorney to be used in completing a purchase of land. The missionary society, in receiving from the executor and in applying it in accordance with the appointments in the will, acted without notice or knowledge, actual or imputable, that the executor was misapplying funds intrusted to him by a third person with whom the society had no relations whatever. It was held that the society was not a trustee *ex maleficio* of the client for the amount received by it. *Holly v. Missionary Society*, 180 U. S. 284, 45 L. Ed. 531.

Bona fide purchaser by conveyance by married woman acting as trustee.—See the title HUSBAND AND WIFE, vol. 6, p. 723.

Secret lien of vendor.—See the title VENDORS' LIENS.

27. *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Fowler v. Merrill*, 11 How. 375, 395, 13 L. Ed. 736. See, also, *Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78.

To bring the defense within the rule which affords protection to a bona fide purchaser without notice, it must be averred in the plea or answer and proved, that the conveyance was by deed, and that the vendor was seized of the legal title; that all the purchase money was paid and paid before notice. There must not only be a distinct denial of notice before the purchase, but a denial of notice before payment. Even if the purchase money has been secured to be paid, yet if it be not, in fact, paid before notice, the plea of purchase for a valuable consideration will be overruled. *Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62; *Vattier v. Hinde*, 7 Pet. 252, 271, 8 L. Ed. 675; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Fowler v. Merrill*, 11

How. 375, 395, 13 L. Ed. 736; *Wormley v. Wormley*, 8 Wheat. 421, 449, 5 L. Ed. 651.

28. *Fowler v. Merrill*, 11 How. 375, 395, 13 L. Ed. 736; *Wormley v. Wormley*, 8 Wheat. 421, 449, 5 L. Ed. 651.

29. **Purchaser with notice from bona fide purchaser.**—*Alexander v. Pendleton*, 8 Cranch 462, 469, 3 L. Ed. 624.

30. **Transferee as a trustee.**—*Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152. See, to the same effect, *Insurance Co. v. Eldredge*, 102 U. S. 545, 26 L. Ed. 245; *Williams v. Jackson*, 107 U. S. 478, 482, 27 L. Ed. 529; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *National Bank v. Insurance Co.*, 104 U. S. 54, 63, 26 L. Ed. 693; *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

Full notice of a trust draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. Ed. 152.

The fact that all the parties knew that they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on their part. *Emigrant Co. v. Wright*, 97 U. S. 339, 24 L. Ed. 912.

A sale of trust property is void as to a purchaser affected with notice of facts which in law constitute a breach of the trust. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

Wherever the purchaser is affected with notice of the facts, which in law constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud will not avail him, if the transaction be such as a court of equity cannot sanction. *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651.

Grantee with notice.—Whenever property charged with a trust is conveyed to a third party with notice, he will hold it subject to that trust, which he may be compelled to perform equally with the former owner. The vendee in that case stands in the place of such owner. *Union Pac. R. Co. v. McAlpine*, 129 U. S. 303, 314, 32 L. Ed. 673.

A person taking a conveyance of trust property with knowledge of the trust

(2) *What Constitutes Notice.*—**Notice of Authority of Trustee.**—The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within

is charged with the same trust. *Albright v. Oyster*, 140 U. S. 493, 513, 35 L. Ed. 534; *Allen v. St. Louis Bank*, 120 U. S. 20, 30 L. Ed. 573; *Bigler v. Waller*, 14 Wall. 297, 20 L. Ed. 891.

A trust is not destroyed by a deed from the holder of the legal title to a party charged with notice of the trust. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

In 1803 C. obtained from the military commandant at Mobile a permit to take possession of a lot of ground near that place, and made a contract with K. that the latter should improve it, so as to lay the foundation for a perfect title, and then they were to divide the lot equally. K.'s ownership of a hostile claim, whether held then or acquired subsequently, enured to the joint benefit of himself and C.; and when K. obtained a confirmation of his title under the acts of the commissioners appointed under an act of congress, he became a trustee for C. to the extent of one-half of the lot. K. afterwards deeded the lot to C. It was held, that the deed afterwards made by K. did not destroy this trust; but the assignee, having full knowledge of the trust, must be held bound to comply with it. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

This assignee obtained releases, for an inadequate consideration, from the heirs of C., who had just come of age, were poor, and ignorant of their rights. These releases were void. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

Before K. conveyed to the assignee just spoken of, he had conveyed the property to another person who held it as a security for a debt; and who, when the debt was paid, transferred it to the same assignee to whom Kennedy had conveyed it. This added no strength to the title, but only gave to this assignee a claim to be reimbursed for the money which he paid to extinguish the debt. *Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

Grantee of dower interest.—A defendant to a bill for right of dower obtained a conveyance of the plaintiff's dower interest by fraud, and held that interest in trust for her. The codefendant took the land from him with notice of all facts. It was held that such codefendant was equally affected by the fraud and bound by the trust. *Jones v. Van Doren*, 130 U. S. 684, 695, 32 L. Ed. 1077.

Assignee with notice.—A assigned to B certain personalities in trust. This assignment was surrendered to C in consideration of notes to a large amount, in which B was bound for A. It appears

that C was otherwise secured with respect to these notes; at least, there is reason to believe that he was secure. It was held, that C having taken this assignment with notice of the trust, takes it clothed with the trust. He is a trustee for the same uses and to the same extent with B. *Russell v. Clarke*, 7 Cranch 69, 97, 3 L. Ed. 271.

A person lending money to a trustee on a pledge of trust stocks, and selling the stocks for repayment of the loan, will be compelled to account for them, if he have either actual or constructive notice that the trustee was abusing his trust, and applying the money lent to his own purposes. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *National Bank v. Insurance Co.*, 104 U. S. 54, 63, 26 L. Ed. 693.

The lender will be held to have had this notice when the certificates of the stocks pledged show on their face that the stock is held in trust, and when, apparently, the loan was for a private purpose of the trustee, and this fact would have been revealed by an inquiry. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *National Bank v. Insurance Co.*, 104 U. S. 54, 63, 26 L. Ed. 693.

The duty of inquiry is imposed on a lender lending on stocks, where the certificate of them reveals a trust. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

These principals are not affected by the fact that the stocks pledged may be such as the trustee under the instrument creating his trust had no right to invest in; as ex. gr., stock of a canal company, when he was bound to invest in state or federal loans. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

Notice to the cashier of a bank, or of bankers, that the stock pledged is trust stock, is notice to them. *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142.

Where a trustee had no power, either in fact or in law, to pledge a note held in trust as security for an existing debt of a third person, a pledgee with notice is liable to the cestui que trust for the note. Such act was not an investment of the trust fund, and the pledgee knew that it was not. *Manhattan Bank v. Walker*, 130 U. S. 267, 278, 32 L. Ed. 959, citing *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *Smith v. Aver*, 101 U. S. 320, 25 L. Ed. 955, and *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.

Where a deed of trust of lands to secure a promissory note is released without the surrender or payment of the note, and without express authority of the holder, a subsequent purchaser with

its scope, must look to the authority of the trustee, or he will act at his peril.³¹

Notice from Title Paper.—Where, upon the face of the title papers, the purchaser from a trustee has full means of acquiring complete knowledge of the title from the references therein made, to the origin and consideration thereof, he will be deemed to have constructive notice thereof.³² Where a deed designates a party as "trustee," without setting forth for whom or for what purpose, it is sufficient to put a purchaser upon notice. Parol evidence was admissible to show these things. The designation alone was sufficient to devolve the duty of inquiry upon any third person dealing with the property.³³

A coproprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.³⁴

(3) *Recovery of Expenditure for Release of Valid Claim.*—A purchaser of trust property, charged with notice of the trust, who expends money to release the trust estate from a valid debt, may recover such expenditure where the sale to him is set aside for fraud.³⁵

c. *Looking to Application of Purchase Money.*—Where the purchase money is to be reinvested upon trusts that require time and discretion, or the acts of sale and reinvestment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money.³⁶

K. Following Trust Property—1. **IN HANDS OF TRUSTEE ILLEGALLY CONVERTING SAME.**—Where property held upon any trust to keep, or use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or cestui que trust.³⁷ It does not alter the case that the newly-acquired prop-

notice takes the land subject to the equitable rights of such holder. *Insurance Co. v. Eldredge*, 102 U. S. 545, 548, 26 L. Ed. 245; *McIntire v. Pryor*, 173 U. S. 38, 56, 43 L. Ed. 606. But such deed would pass the legal title. *Williams v. Jackson*, 107 U. S. 478, 482, 27 L. Ed. 529. See, also, the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 486.

An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

Bank account—Deposit of trust funds—Lien of bank.—See the title **BANKS AND BANKING**, vol. 3, p. 25.

Bank lien on stock held in trust.—See the title **BANKS AND BANKING**, vol. 3, p. 167, note 37.

Liability of mortgagee taking possession under sale for rents and profits.—See the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 475.

31. Notice of authority of trustee.—*Smith v. Ayer*, 101 U. S. 320, 327, 25 L. Ed. 955.

32. Notice from title paper.—*Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

33. Railroad Co. v. Durant, 95 U. S. 576, 579, 24 L. Ed. 391; *Duncan v. Jaudon*,

15 Wall. 165, 21 L. Ed. 142; *McBlair v. Gibbs*, 17 How. 232, 15 L. Ed. 132; *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732.

34. Oliver v. Piatt, 3 How. 333, 11 L. Ed. 622.

35. Recovery of expenditure for release of valid claim.—*Hallett v. Collins*, 10 How. 174, 13 L. Ed. 376.

36. Looking to application of purchase money.—*Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651.

37. In hands of trustee illegally converting same.—*Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933. See, to the same effect, *Clements v. Moore*, 6 Wall. 299, 316, 18 L. Ed. 786; *Texas, etc., R. Co. v. Bloom*, 164 U. S. 636, 643, 41 L. Ed. 580; *Moore v. Crawford*, 130 U. S. 122, 128, 32 L. Ed. 878; *Kitchen v. Bedford*, 13 Wall. 413, 20 L. Ed. 637; *Babcock v. Wyman*, 19 How. 289, 15 L. Ed. 644; *Seymour v. Freer*, 8 Wall. 202, 215, 19 L. Ed. 306; *Slaughter v. Glenn*, 98 U. S. 242, 245, 25 L. Ed. 122; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50.

"The modern doctrine of equity, as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them." Na-

erty, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it.³⁸ The real question in both cases is, what has taken the place of the property in its original form? Whenever that can be ascertained, the property in the changed form may be claimed by the original owner or the cestui que trust, and assignees and trustees in bankruptcy can acquire no interest in the property in its changed form which will defeat his rights in a court of equity.³⁹ Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the cestui que trust has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust.⁴⁰ If the proceeds of property disposed of by persons in a fiduciary position cannot be identified by reason of the trust money being mingled with that of the trustee, then the cestui que trust is entitled to a charge upon the new investment to the extent of the trust money traceable into it.⁴¹ There is no distinction between an express trustee and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or

tional Bank v. Insurance Co., 104 U. S. 54, 68, 26 L. Ed. 693.

This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property. It has been repeatedly recognized and enforced in the federal supreme court. *National Bank v. Insurance Co.*, 104 U. S. 54, 70, 26 L. Ed. 693; *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Duncan v. Jaudon*, 15 Wall. 165, 21 L. Ed. 142; *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997; *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647.

Where money has been misappropriated, the general rule of equity is, that those wronged may pursue it as far as it can be traced, and may elect to take the property in which it has been invested, or to recover the money. *Oliver v. Piatt*, 3 How. 333, 401, 11 L. Ed. 622. The same rule is applicable at law. *Smith v. Vodges*, 92 U. S. 183, 186, 23 L. Ed. 481. See post, "Actions at Law," VI, A, 1.

Jurisdiction of equity.—See post, "Following Trust Property," VI, B, 1, a, (3), (c).

38. *Cook v. Tullis*, 18 Wall. 332, 21 L. Ed. 933.

39. *Cook v. Tullis*, 18 Wall. 332, 342, 21 L. Ed. 933.

40. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

Where a trustee abuses his trust—converting trust property into new forms—the cestui que trust has the option to take the original or the substituted property, and if either has passed into the hands of a bona fide purchaser without notice, then its value in money. *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50. See *Seymour v. Freer*, 8 Wall. 202, 215,

19 L. Ed. 306. See post, "In Hands of Subsequent Purchaser," III, K, 2.

The option, however, belongs to the cestui que trust alone and is for his benefit, and not for the benefit of the trustee. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

41. *National Bank v. Insurance Co.*, 104 U. S. 54, 68, 26 L. Ed. 693.

Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter in the hands of the trustee is chargeable pro tanto to the amount or value of the original property. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

It was said by Mr. Justice Bradley in *Frelinghuysen v. Nugent*, 36 Fed. Rep. 229, 239: "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried." The rule laid down by Mr. Justice Bradley has been recognized and applied by the federal supreme court. *National Bank v. Insurance Co.*, 104 U. S. 54, 67, 26 L. Ed. 693, vet. "purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its

moneys deposited in a bank account.⁴² The fact that the trust property comes back into the hands of the trustee does not affect the right of the cestui que trust.⁴³

2. IN HANDS OF SUBSEQUENT PURCHASER.—See ante, "Rights and Liabilities of Purchaser," III, J, 6. In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, and has transferred the property, by sale or otherwise, the cestui que trust has a right to follow the property into whosoever hands he may find it, unless such person is a bona fide purchaser for a valuable consideration, without notice.⁴⁴

IV. Trustee.

A. Definition and Nature.—A trustee may be defined generally as the

own moneys then in the fund were appropriated for that purpose." *Peters v. Bain*, 133 U. S. 670, 693, 33 L. Ed. 696.

42. *National Bank v. Insurance Co.*, 104 U. S. 54, 68, 26 L. Ed. 693.

43. *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50.

If the trustee, after such an unlawful conversion of the trust property, should repurchase it, the cestui que trust may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof, and the trustee, in such a case, has no right to insist that the trust shall upon the repurchase, attach exclusively to the original trust property. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622.

The principle is that the wrongdoer shall derive no benefit from his wrong, and that profits which he makes belong to the cestui que trust. Equity will accordingly so mould and apply the remedy as to give them to him; giving, however, the party thus charged proper credits for money which he has paid, but which, if things had all been regularly transacted, the cestui que trust should have paid; making proper allowances for rent, interest, etc., and putting things on such a footing as under the circumstances does the most complete justice. *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50.

Hence, where a person who had improperly possessed himself of land and of personal securities which a complainant was entitled to have, and confused the personal securities by changing the form of them, died, leaving a will by which he devised his estate to numerous persons not within the jurisdiction of the court, but appointing executors who were within it, the court being unable to reach the devisees, and so to decree a conveyance of the land itself, gave a money decree against the executors embracing the value of the land, and also the sum realized from the securities. On the other hand, it gave the party thus charged credit for the payment of certain sums which he had paid in discharge of the complainant's debts, and which, if all things had been done properly, the com-

plainant would have paid; making also proper allowances for rent, interest, etc., and directing an account before a master. *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50.

44. *Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *Balloch v. Hooper*, 146 U. S. 363, 369, 36 L. Ed. 1008; *Ex parte Morris*, 9 Wall. 605, 607, 19 L. Ed. 799; *Babcock v. Wyman*, 19 How. 289, 15 L. Ed. 644; *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Seymour v. Freer*, 8 Wall. 202, 215, 19 L. Ed. 306. See *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997.

Property held in trust acquired from the trustee by third parties with knowledge of his trust and his disregard of its obligations, can be followed and recovered. *Smith v. Ayer*, 101 U. S. 320, 327, 25 L. Ed. 955.

Where a person acknowledged the receipt of "the sum of \$119,000, in bonds" of a railroad company, and of "50,405 dollars of coupons," amounting in the aggregate to "the sum of \$169,405," "which said sum he promised to expend in the purchase of lands" of the same railroad company, "at or near the average price of \$5 per acre;" held, that this was a trust to buy the land with the bonds at or near the price of \$5 an acre; and not to buy them with the proceeds of the bonds after they were sold at a nominal price. Purchasers who fraudulently purchased, in breach of the trust are liable in trover. *Kitchen v. Bedford*, 13 Wall. 413, 20 L. Ed. 637.

Where at the time the trustee undertook to sell the trust property, the trust estate created in him by the will of the testator had become extinct, and his powers as trustee had ceased, his conveyance to his vendee was void, and the beneficiaries under the trust, in whom the legal estate had vested, are entitled to their property and compensation for its use, and the matter of the return of the money paid by the vendee, is one solely between him and the trustee, with which the beneficiaries have nothing to do. It is not the rescission of a valid contract, in which case the parties must be placed in statu quo. *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044.

The rights of the cestui que trust, where the trustee took the legal title in

person in whom some estate, interest, or power in or affecting property is vested for the benefit of another.⁴⁵

B. Relationship to Cestui Que Trust.—The same relation as that of landlord and tenant subsists between a trustee and a cestui que trust.⁴⁶

C. Persons Who May Be Trustees.—It is improper to appoint persons to trusts, however high their personal character may be, who are allowed to pay from their right hand into their left; as where A, as administrator, has to settle an account with A as trustee; and B, as trustee, to deal with B as guardian.⁴⁷

Alien or Citizen.—Either a citizen or an alien may be a trustee.⁴⁸

Corporations.—A corporation may be a trustee.⁴⁹

The United States may be a trustee.^{49a}

Married Woman.—See the title HUSBAND AND WIFE, vol. 6, pp. 723, 731.

Infants.—See the title INFANTS, vol. 6, p. 1013, note 1.

Bank Directors as Trustees.—See the title BANKS AND BANKING, vol. 3, p. 97.

Administrator with Will Annexed.—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 190.

D. Designation.—The designation of the trustees, by their official character, is equivalent to naming them by their proper names.⁵⁰

Executors Designated—Right of Administrator with the Will Annexed to Execute.—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 190.

E. Acceptance and Disclaimer.—Although a trustee may never have heard of the deed, the title vests in him, subject to disclaimer on his part.⁵¹

trust to sell the property within a limited time and after deducting from the proceeds the outlay with interest and taxes to pay over to the cestui que trust one-half of the residue, is a trust which follows the land except upon a bona fide sale for the value; and upon such sale it follows the trustee. *Seymour v. Freer*, 8 Wall. 202, 215, 19 L. Ed. 306.

If the trustee convey to his child by way of advancement, the child would take title subject to the trust. *Seymour v. Freer*, 8 Wall. 202, 214, 19 L. Ed. 306.

45. Definition and nature.—*Taylor v. Davis*, 110 U. S. 330, 334, 28 L. Ed. 163.

A trustee is a real person, capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right. *United States Bank v. Deveaux*, 5 Cranch 61, 91, 3 L. Ed. 38.

A trustee in equity is regarded in the light of an instrument or agent for the cestui que trust, and the authority conferred to him is in the nature of a power. *Gridley v. Wynant*, 23 How. 500, 502, 16 L. Ed. 411.

The words "trustees" and "donees" are sometimes used interchangeably in speaking of a charitable use or trust. See *Vidal v. Girard*, 2 How. 126, 127, 11 L. Ed. 205.

Distinguished from agent.—See the title PRINCIPAL AND AGENT, vol. 9, p. 645.

The words "trustee of an express trust,"

as used in § 113 of Code of Procedure of New York defined. See *Chew v. Bum-mayer*, 13 Wall. 497, 502. See the titles BONDS, vol. 3, p. 418; PARTIES, vol. 9, p. 58.

46. Relationship to cestui que trust.—*Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398.

47. Persons who may be trustees.—*Barney v. Saunders*, 16 How. 535, 540, 14 L. Ed. 1047.

48. Alien or citizen.—*United States Bank v. Deveaux*, 5 Cranch 61, 91, 3 L. Ed. 38.

49. Corporations.—*Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53; *Vidal v. Girard*, 2 How. 126, 191, 11 L. Ed. 205; *Meriwether v. Garrett*, 102 U. S. 472, 528, 26 L. Ed. 197. See the titles CORPORATIONS, vol. 4, p. 727; MUNICIPAL CORPORATIONS, vol. 8, pp. 575, 597.

49a. See the title UNITED STATES. See, also, the title COURTS, vol. 4, p. 1023.

50. Designation.—*Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 114, 7 L. Ed. 617.

51. Acceptance and disclaimer.—*Adams v. Adams*, 21 Wall. 185, 192, 22 L. Ed. 504; but it was held in *Armstrong v. Morrill*, 14 Wall. 139, 20 L. Ed. 765, that the mere making of a deed to one as trustee without any acceptance, express or implied, by him, is not sufficient to vest in the trustee the title to the land mentioned in the deed.

Consideration for Execution.—The acceptance of a trust is a sufficient consideration for its execution.⁵²

Effect on Rights of Beneficiaries.—A disclaimer of title under a deed upon trust on part of a trustee will not, however, defeat the conveyance as a transfer of the equitable interest to a third person.⁵³

Proof.—Parol proof is admissible to show that the trust was never accepted. On the other hand, if the trust is accepted, though but for a moment, parol proof to show a release of the title to the trust estate cannot be admitted.⁵⁴

F. Qualification and Bond.—Though statute may enact that a trustee to whom property is assigned in trust for any person, "before entering upon the discharge of his duty, shall give bond" for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him.⁵⁵

G. Resignation or Surrender of Trust.—A trustee has a right to surrender his trust.⁵⁶

Duty of Trustee Surrendering Trust.—If a trustee of a trust, arising out of an express agreement under which he received certain funds to invest in particular kinds of property, in conformity with specific instructions given by those whom he represented, it is his duty, if he elect not to execute the trust, to surrender the property with its proceeds.⁵⁷

H. Substitution, Removal, Resignation and Discharge of Trustees—
1. **POWER TO APPOINT NEW TRUSTEE UPON FAILURE OF SUITABLE TRUSTEES—**a. *Power of Equity.*—Where there is a failure of suitable trustees to perform a trust, either from accident or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause, courts of equity will appoint new trustees.⁵⁸ It is a fundamental maxim that no trust shall fail, for a court of equity will not permit a (private) trust to fail for

52. *Consideration for execution.*—McKee v. Lamon, 159 U. S. 317, 322, 40 L. Ed. 165.

Acceptance by a trustee of the obligations created by the donor of a trust completes a contract. Such contracts have been frequent in the history of the nation, and their validity has not only been questioned but has been directly affirmed. *Tucker v. Ferguson*, 22 Wall. 527, 22 L. Ed. 805. There is nothing in the case of *Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845, in conflict with these views. *Stearns v. Minnesota*, 179 U. S. 249, 45 L. Ed. 162.

53. *Effect on rights of beneficiaries.*—*Adams v. Adams*, 21 Wall. 185, 192, 22 L. Ed. 504; *Avery v. Cleary*, 132 U. S. 604, 609, 33 L. Ed. 469.

The rights of the beneficiaries under a written transfer in trust does not depend upon the trustee's formal acceptance of the trust imposed upon him. Those rights will be protected by a court of equity, even if he decline to act as trustee. *Avery v. Cleary*, 132 U. S. 604, 609, 33 L. Ed. 469. See post, "Removal and Substitution of Trustees," IV, H. 2.

When husband and wife join in making a deed of property belonging to him, to a third party, in trust for the wife, the fact that such party was not in the least cognizant of what was done, and never heard of nor saw the deed until long afterwards, when he at once refused to ac-

cept the trust or in anyway to act in it, does not affect the transaction as between the husband and wife. *Adams v. Adams*, 21 Wall. 185, 186, 22 L. Ed. 504.

54. *Proof.*—*Armstrong v. Morrill*, 14 Wall. 139, 20 L. Ed. 765.

To show that the trustee did not accept the trust, a declaration, not under seal, but signed by him, nine years after the deed, making known to all whom the matter concerned, "that immediately on his receiving notice of the conveyance he did positively refuse to accept, or to act under the trust intended to be created, and that he had at no time since accepted the trust or acted in any wise as trustee in relation to it," is proper evidence to show the fact, the party being dead and his handwriting proved and the weight of the evidence is for the jury. *Armstrong v. Morrill*, 14 Wall. 139, 20 L. Ed. 765.

55. *Qualification and bond.*—*Gardner v. Brown*, 21 Wall. 36, 22 L. Ed. 527.

56. *Resignation or surrender of trust.*—*Kenaday v. Edwards*, 134 U. S. 117, 125, 33 L. Ed. 853. See post, "Removal and Substitution of Trustees," IV, H. 2.

57. *Duty of trustee surrendering trust.*—*Bacon v. Rives*, 106 U. S. 99, 105, 27 L. Ed. 69.

58. *Power of equity.*—*Irvine v. Dunham*, 111 U. S. 322, 327, 28 L. Ed. 444; *Girard v. Philadelphia*, 7 How. 1, 19 L. Ed. 53.

want of a trustee;⁵⁹ but a court of equity will supply one.⁶⁰ Where the trustee appointed neglects, refuses, or becomes incapable of executing the trust, the court itself in many cases will act as trustee.⁶¹

b. *Power of Legislature to Empower Devisee to Act.*—The legislature may authorize and empower a devisee to execute and perform every act, matter, and thing in relation to the real estate, in like manner and with like effect that trustees duly appointed might have done.⁶²

59. *Meriwether v. Garrett*, 102 U. S. 472, 528, 26 L. Ed. 197; *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53; *Terry v. Anderson*, 95 U. S. 628, 636, 24 L. Ed. 365; *Kain v. Gibboney*, 101 U. S. 362, 365, 25 L. Ed. 813; *Colton v. Colton*, 127 U. S. 300, 320, 32 L. Ed. 138; *Jones v. Habersham*, 107 U. S. 174, 190, 27 L. Ed. 401; *Batesville Inst. v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775; *Vidal v. Girard*, 2 How. 126, 187, 11 L. Ed. 205. See, also, *Hayes v. Pratt*, 147 U. S. 557, 567, 37 L. Ed. 279, citing *Ingle v. Jones*, 9 Wall. 486, 497, 498, 19 L. Ed. 621; *Williamson v. Suydam*, 6 Wall. 723, 18 L. Ed. 967; *Kenaday v. Edwards*, 134 U. S. 117, 125, 33 L. Ed. 853.

This maxim is expressly affirmed in the code of Georgia. *Jones v. Habersham*, 107 U. S. 174, 190, 27 L. Ed. 401.

This rule is applicable to cases in which a municipal corporation has been nominated the trustee. *Girard v. Philadelphia*, 7 Wall. 1, 19 L. Ed. 53; *Meriwether v. Garrett*, 102 U. S. 472, 528, 26 L. Ed. 197.

Where a trustee is unable any longer to administer the trust, the only conveyance is, not that the trust fails, but that the chancellor should substitute another trustee. *Girard v. Philadelphia*, 7 Wall. 1, 12, 19 L. Ed. 53.

Resignation or death of trustee or dissolution of corporate trustee.—In such cases, as in cases where a natural person or a private corporation is the trustee, and the person has died or the corporation has been dissolved, the court will appoint a new trustee, or execute the trust by its own officers or agents. In *Potter on Corporations*, § 699, it is said: "Where in any way the legal existence of municipal trustees is destroyed by legislative act, a court of equity will assume the execution of the trust, and, if necessary, will appoint new trustees to take charge of the property, and carry into effect the trust." *Meriwether v. Garrett*, 102 U. S. 472, 528, 26 L. Ed. 197.

Where a trustee is dead the trust being still alive and unexecuted, a court of equity will carry it out through any other appropriate person in whom the control of the property may be; or if necessary, through its own officers and agents without the intervention of a new trustee. *Batesville Inst. v. Kauffman*, 18 Wall. 151, 21 L. Ed. 775.

That the court have power to appoint a new trustee, and to compel the performance of the trust by him, is quite certain. It is, however, equally within

the power of a court of equity to decree and enforce the execution of the trust through its own officers and agents, without the intervention of a new trustee. *Batesville Inst. v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775; *Meriwether v. Garrett*, 102 U. S. 472, 528, 26 L. Ed. 197.

Where one of the trustees appointed by the decree of the special term of the supreme court of the District of Columbia to make the sale, had died, the court will have power to appoint a new one in his place. *Shepherd v. Pepper*, 133 U. S. 626, 654, 33 L. Ed. 706.

Although it is, under the will, the duty of the trustees therein named to exercise supervision over the administration of the fund, nevertheless the death or resignation of the trustees named in the will cannot, and does not, defeat the bequest. There is not such a personal trust as renders it necessary to have the personal action of the trustee named in the will, and the trust does not fail upon the death or resignation of the named trustee. The court may appoint his successor. *Speer v. Colbert*, 200 U. S. 130, 145, 50 L. Ed. 403; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 7 L. Ed. 617.

Where a trustee surrenders his trust, it is competent for a court of equity to appoint another person to take the title to the trust property. *Kenaday v. Edwards*, 134 U. S. 117, 125, 33 L. Ed. 853.

Refusal of trustee to act.—Plainly, if the trustee refuses altogether to exercise the discretion with which he is invested, the trust must not on that account be defeated, unless by its terms it is made dependent upon the will of the trustee himself. *Colton v. Colton*, 127 U. S. 300, 321, 32 L. Ed. 138.

A trust cannot fail for want of a trustee, or by the refusal of all the trustees to accept the trust. The court of chancery will appoint new trustees. *Adams v. Adams*, 21 Wall. 185, 192, 22 L. Ed. 504.

60. *Kain v. Gibboney*, 101 U. S. 362, 365, 25 L. Ed. 813.

If a trustee cannot assume and execute the trust, it is within the ordinary jurisdiction of a court of equity to appoint other trustees. *Jones v. Habersham*, 107 U. S. 174, 190, 27 L. Ed. 401; *Vidal v. Girard*, 2 How. 126, 187, 11 L. Ed. 205.

61. *Colton v. Colton*, 127 U. S. 300, 320, 32 L. Ed. 138.

62. **Power of legislature to empower devisee to act.**—*Williamson v. Suydam*, 6 Wall. 723, 734, 18 L. Ed. 967.

2. REMOVAL AND SUBSTITUTION OF TRUSTEES—*a. By Court of Equity*—(1) *Power of Equity*.—A court of chancery may without an act of the legislature discharge trustees and appoint others in their place.⁶³

(2) *Enforcement of Order of Removal and Account*.—Where the allegations of a bill charging a breach of trust, and praying for an account by the trustee, the payment of the amount found due, his removal, and general relief, are sustained by the proofs, the appointment of a new trustee, and the decree for the payment to him of the principal of the fund, is necessary to carry into full effect an order for the removal of the old trustee.⁶⁴

(3) *Divestiture of Title of Old and Investiture in New Trustee*.—The legal title in real estate which has once vested in trustees, whose resignation was accepted by the court, cannot be divested without a conveyance, or a decree of a court of chancery.⁶⁵

63. Power of equity.—Williamson v. Suydam, 6 Wall. 723, 734, 738, 18 L. Ed. 967. So held as to trustees named in a will.

The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated. May v. May, 167 U. S. 310, 320, 42 L. Ed. 179; McPherson v. Cox, 96 U. S. 404, 419, 24 L. Ed. 746.

Bill in chancery, prayed for the removal of the defendant as the trustee in a deed made to secure to the complainant the payment of a bond in the defendant's possession, and for the delivery of the bond. The defendant asserts a lien on the bond for legal services rendered to the complainant. Held, that while a state of mutual ill-will or hostile feeling may justify a court in removing a trustee, in a case where he has a discretionary power over the rights of the cestui que trust, and has duties to discharge which necessarily bring the parties into personal intercourse with each other, it is not sufficient cause where no such intercourse is required and the duties are merely formal and ministerial, and no neglect of duty or misconduct is established against him. McPherson v. Cox, 96 U. S. 404, 24 L. Ed. 746.

Where the acts or omissions of the trustee are such as to show a want of reasonable fidelity, a court of equity will remove him. Cavender v. Cavender, 114 U. S. 464, 472, 29 L. Ed. 212.

A fraudulent or unfaithful trustee will be removed, and another appointed to his

place. Stanley v. Colt, 5 Wall. 119, 165, 18 L. Ed. 502.

A court of equity will remove a trustee who not only refuses to act, but denies the trust, and will appoint a new trustee if necessary. Irvine v. Dunham, 111 U. S. 322, 334, 28 L. Ed. 444.

The neglect to invest trust funds is a ground for removal. Cavender v. Cavender, 114 U. S. 464, 472, 29 L. Ed. 212.

A statute authorizing the chancellor of the state to discharge trustees named in a will (the purpose of the trust being to hold real estate and to pay the rents to a person named for life, and on his death to dispose of the fee to his children), and to appoint new trustees in their place, is valid; it appearing that the act was passed with the knowledge and at the request of the original trustees. Williamson v. Suydam, 6 Wall. 723, 18 L. Ed. 967.

The trustees having been discharged pursuant to the statute, it was competent for the legislature, by a supplemental act, to grant power to the chancellor to appoint, as such trustee, in the place of those discharged, the devisee of the life estate, and authorize him to execute the trust. Such discharge and substitution did not violate the obligation of a contract. Williamson v. Suydam, 6 Wall. 723, 18 L. Ed. 967.

Removal of trustee as impairment of obligation of contract.—See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 839.

Effect of conferring power of removal on beneficiary.—See post, "Power of Removal Vested in Beneficiaries," IV, H, 2, b.

64. Enforcement of order of removal and account.—Mitchell v. Moore, 95 U. S. 587, 24 L. Ed. 492.

65. Divestiture of title of old and investiture in new trustee.—By a devise in fee to executors, their appointment by the court of probate, and their acceptance of the trust, the legal title in the real estate under the will vested in them. The subsequent acceptance by that court of their resignation of the office of execu-

(4) *Effect of Deed from Old to New Trustee*.—A deed from a trustee after he had ceased to be trustee to his successor, does not add to the powers of his successor or place him or the trust estate beyond the control of the court which appointed him.⁶⁶

(5) *Right of Removed Trustee to Retain Property*.—A trustee who not only refuses to act but denies the trust, will not, after his removal by a court of equity, be entitled to retain the property under cover of having an account as trustee, before paying over the net proceeds.⁶⁷

b. *Power of Removal Vested in Beneficiaries*.—An instrument creating a trust may give the beneficiary "for good and sufficient cause" power to remove a trustee and appoint another person in his stead.⁶⁸

3. EFFECT OF SUBSTITUTION OF NEW TRUSTEE ON RIGHTS OF BENEFICIARIES.—The mere substitution of a new trustee could neither defeat the trust nor divest the rights of those beneficially interested in the property,⁶⁹ unless there is such a personal trust as to render it necessary to have the personal action of the named trustee.⁷⁰

I. Powers and Liabilities—1. NATURE OF AUTHORITY.—The authority

tors no doubt discharged them from the performance of the duties of executors and trustees under the will; but the legal title in the real estate, which had once vested in them, could not be divested without a conveyance, or a decree of a court of chancery, or an appointment by the court of probate of new executors and trustees in accordance with the will. At common law, a conveyance, sanctioned or ordered by a court of competent jurisdiction, or at least a new appointment pursuant to the instrument by which the trust was created, would be necessary to divest the title of each trustee. *McArthur v. Scott*, 113 U. S. 340, 397, 28 L. Ed. 1015.

No statute or decision in Ohio establishes a different rule in this respect. *McArthur v. Scott*, 113 U. S. 340, 397, 28 L. Ed. 1015.

66. Effect of deed from old to new trustee.—*Kenaday v. Edwards*, 134 U. S. 117, 125, 33 L. Ed. 853.

67. Right of removed trustee to retain property.—*Irvine v. Dunham*, 111 U. S. 322, 327, 334, 28 L. Ed. 444.

Where a trustee not only refused to act, but denied that he held in trust the stock claimed by the beneficiary, the latter, having established the trust, and the appointment of a new trustee not being necessary for the preservation of his rights; was entitled to have an account taken by the court of the expenses and assessments with which his share of the trust property was chargeable, and upon their payment to have a transfer to himself of his share of the stock. *Irvine v. Dunham*, 111 U. S. 322, 334, 28 L. Ed. 444.

68. Power of removal vested in beneficiaries.—The clause in the codicil, which gave his other heirs, "for good and sufficient cause," and with the concurrence of the widow, power "by their

unanimous resolution" to remove William May from his office, as trustee, and to appoint another person in his stead, was evidently intended to enable them to remove him by their own act, without being obliged to resort to a court of equity. If no such power had been given them by the testator, any one of them could have applied to a court of equity, and have had the trustee removed, on proving good and sufficient cause therefor, satisfactory to the court. If the words "for good and sufficient cause," in the codicil, mean only such cause as would be deemed by a court of equity to be good and sufficient, the only effect of conferring the express power of removal would be to restrict the power of removal by requiring their action to be unanimous. This cannot have been the testator's intention. The extent of the power conferred appears to have been well and accurately stated by the court of appeals in these few words: "The power to remove their trustee was vested in the defendants to this cause. The power to determine when there was good and sufficient cause for such removal was necessarily in them also, subject to the restraining power of a court of equity against the abuse of it." *May v. May*, 167 U. S. 310, 320, 42 L. Ed. 179.

The filing of bill to obtain the instructions and guidance of the court as to the execution of the trust by one trustee did not suspend power of removal given by the will to the beneficiaries with the concurrence of the other trustee; but only subjected their action to the supervision and control of the court. *May v. May*, 167 U. S. 310, 322, 42 L. Ed. 179.

69. Effect of substitution of new trustee on rights of beneficiaries.—*Williamson v. Suydam*, 6 Wall. 723, 734, 18 L. Ed. 967.

70. *Williamson v. Suydam*, 6 Wall. 723, 734, 738, 18 L. Ed. 967.

confided to a trustee is in the nature of a power.⁷¹

2. **COMPULSORY TRUSTEE.**—The liability of a compulsory trustee should be restricted to the narrowest limits.⁷²

3. **COTRUSTEE**—a. *Authority to Act Independently.*—Where there are co-trustees, with equal power, one can do nothing without the other.⁷³ "Cotrustees may not act independently of one another, nor ignore each other in the management of the trust. The trust is entitled to the united judgment, discretion and ability of all the trustees selected. For this reason they may not delegate discretionary powers among themselves."⁷⁴ An abandonment of discretionary power by a trustee to a cotrustee, where the trust is entitled to the united discretion of both, is such an act of supine negligence as to render the trustee who has abandoned his active participation in the management of the trust liable for the losses occasioned by the misconduct of the cotrustee.⁷⁵ It is true, that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all, and binding on all. The trustee thus acting is to be considered the agent of all the trustees and not as an individual trustee.⁷⁶ That one of several trustees can be entrusted by his associates with the transaction of the business of the trust may be, under certain circumstances, conceded, but those circumstances will not justify the doing of an act by one trustee on his own responsibility which is of a nature to require the deliberate discretion and judgment of all the trustees.⁷⁷

A deed of land executed by one trustee does not convey his share as in the case of ordinary joint tenants. So where a deed of land was executed by two out of three trustees, the burden is upon the purchaser to prove the third trustee was dead.⁷⁸ In the case of a deed of lease of property, the signatures of all the trustees are necessary to the validity of the paper.⁷⁹

71. **Nature of authority.**—Gridley v. Westbrook, 23 How. 503, 16 L. Ed. 412.

72. **Compulsory trustee.**—The liability of the city of New Orleans as a trustee under the Louisiana legislation of 1871 respecting drainage districts should be restricted to the narrowest limits, as it is a compulsory trustee by force of that act and a voluntary and contractual trustee. Peake v. New Orleans, 139 U. S. 342, 351, 35 L. Ed. 131.

73. **Authority to act independently.**—McPherson v. Cox, 96 U. S. 404, 419, 24 L. Ed. 746.

74. Colburn v. Grant, 181 U. S. 601, 606, 45 L. Ed. 1021.

75. Colburn v. Grant, 181 U. S. 601, 606, 45 L. Ed. 1021.

The statement that the trust estate, to the extent of twenty-two thousand dollars, was left by a trustee to the collection, management and discretion solely of his cotrustee and that the cotrustee handled said sum without the co-operation, supervision or knowledge of such trustee is not sufficient proof of the abandonment of the duties of the trust or any proof of negligence on his part in the supervision of the trust in such manner as to render himself or his estate liable. The statement may be consistent with the relinquishment only of the ministerial duties which he might well have intrusted to his cotrustee. In order to

hold the trustee responsible there should be some evidence of abandonment by him of the discretionary duties which it was not proper for him to delegate to his cotrustee. Colburn v. Grant, 181 U. S. 601, 607, 45 L. Ed. 1021.

76. Insurance Co. v. Chase, 5 Wall. 509, 514, 18 L. Ed. 524; Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 656, 47 L. Ed. 635.

If, within the scope of his agency, he procures an insurance, it is for the other trustee, as well as himself. Insurance Co. v. Chase, 5 Wall. 509, 514, 18 L. Ed. 524; Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 656, 47 L. Ed. 635. See the title INSURANCE, vol. 7, pp. 114, 115.

77. Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 655, 47 L. Ed. 635.

78. Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 655, 47 L. Ed. 635.

79. Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 655, 47 L. Ed. 635.

A lease for five years from the first of August of the year 1887, with a covenant of renewal, is not legally renewed in 1892 by paper of that year signed by one trustee only. Such signature did not make a valid lease. It required the signatures of all the trustees. Winslow v. Baltimore, etc., R. Co., 188 U. S. 646, 655, 47 L. Ed. 635.

"It is contended that the act of one of the trustees in signing the lease was sub-

b. *Liability for Wrongful Act of Cotrustee.*—Trustees are not liable for the wrongful acts of their cotrustees unless they connive at them or are guilty of negligence conducive to their commission.⁸⁰ One trustee is not liable for the acts or defaults of his cotrustees, and if he remains merely passive and does not obstruct the collection by a cotrustee of moneys, is not liable for waste, but if he himself receives the funds, and either delivers them over to his associates, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste.⁸¹

4. **CONTRACTUAL LIABILITY OF TRUSTEE.**—Although a trustee describe himself as covenanting as trustee, the covenant binds him personally, and the addition of the words “as trustee” is but matter of description, to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party.⁸² When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is, therefore, the personal undertaking of the trustee.⁸³

5. **RESPECTING ADMINISTRATION OF TRUST.**—See post, “Administration of Trust,” IV, J.

J. Administration of Trust—1. **CONTROL OF DISCRETION BY COURT.**—See post, “Control of Discretion of Trustee by Court,” VI, B, 1, a, (1), (b).

2. **ADMINISTRATION BY AN AGENT.**—It is laid down as a rule that “trustees may justify their administration of the trust fund by the instrumentality of

sequently ratified by the other by a recognition of its existence by long-continued silence, if not by an express ratification. But an express ratification would consist of the signature of the other trustee to the paper, and of that there is no pretense. A ratification of an invalid instrument of this nature by recognition, we do not understand.” *Winslow v. Baltimore, etc., R. Co.*, 188 U. S. 646, 656, 47 L. Ed. 635.

But assuming that something in the nature of a ratification might be based upon subsequent recognition, yet such recognition or ratification must be shown to have been founded upon a full knowledge of all the facts. *Winslow v. Baltimore, etc., R. Co.*, 188 U. S. 646, 657, 47 L. Ed. 635.

80. Liability for wrongful act of cotrustee.—*Briggs v. Spaulding*, 141 U. S. 132, 159, 35 L. Ed. 662.

81. *Briggs v. Spaulding*, 141 U. S. 132, 151, 35 L. Ed. 662.

82. Contractual liability of trustee.—*Duval v. Craig*, 2 Wheat. 45, 56, 4 L. Ed. 180; *Taylor v. Davis*, 110 U. S. 330, 336, 28 L. Ed. 163.

As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his

hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof. *Taylor v. Davis*, 110 U. S. 330, 335, 28 L. Ed. 163.

If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate. There are, no doubt, cases where persons occupy the position of quasi trustees, under the appointment of a court, such as receivers charged with the performance of active duties, in which it would involve much hardship to make them personally liable. But in such cases, as the parties have the right to prove their claims against the common fund, and have them allowed by the court, the officer may have the protection of the court by which he is appointed, restraining parties from bringing suits against him, except where leave is given for the purpose of fixing the amount due. *Taylor v. Davis*, 110 U. S. 330, 335, 28 L. Ed. 163; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672.

A trustee is personally liable on a contract by which he agrees to pay a demand against the trust estate; whenever there shall be trust funds in his hands sufficient for that purpose, an action at law for breach of his contract may be maintained and judgment rendered against him individually. *Taylor v. Davis*, 110 U. S. 330, 338, 28 L. Ed. 163.

83. *Taylor v. Davis*, 110 U. S. 330, 334, 28 L. Ed. 163.

others, where there exists a moral necessity for it;" and this is said to arise "from the usage of mankind. If the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business; as, if a trustee appoint rents to be paid to a banker at that time in credit, but who afterwards breaks, the trustee is not answerable; so in the employment of stewards and agents."⁸⁴ "The trustee cannot without responsibility delegate the general trust for sale; but there seems to be no objection to the employment of agents by him, where such a course is conformable to the common usage of business, and the trustee acts as prudently for the cestui que trust as he would have done for himself."⁸⁵

3. SECURING AND PRESERVING TRUST ESTATE—*a. Duty to Place Trust Property in a State of Security.*—"The first duty of trustees is to place the trust property in a state of security. Thus, if the trust fund be an equitable interest, of which the legal interest cannot be at present transferred to them, it is their duty to lose no time in giving notice of their own interest to the persons in whom the legal estate is vested; for, otherwise, he who created the trust might incur the interest he has settled in favor of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority. If the trust fund be a chose in action as a debt, which may be reduced into possession, it is the trustee's duty to be active in getting it in; and any unnecessary delay in this respect will be at his own personal risk."⁸⁶

b. Duty to Defend Suits against Trust Estate.—"It is the duty of a trustee, whether of real or personal estate to defend the title, at law or in equity, in case a suit is brought against it."⁸⁷

4. ADJUSTMENT AND SETTLEMENT OF CLAIMS AND SURRENDER OF SECURITY—*a. Power of Trustee.*—"A trustee may have no right to give up a security for a claim, and yet be at full liberty to settle and adjust the claim itself or to sell it."⁸⁸

b. Construction of Settlement.—"The term current expenses of the trust, within the meaning of a contract by which a trustee agrees to apply to the payment of a demand against the trust estate, "all the moneys which shall come into our hands as trustees as aforesaid after first paying therefrom all taxes and current expenses of said property and trust," does not include sums expended by the trustees in the erection of a fire proof office and other improvements and in building and protecting levees. By that contract even the payment of taxes is not classed as among current expenses. The phrase current expenses means ordinary expenses."⁸⁹

5. DEALINGS WITH AND USE OF TRUST FUNDS OR ESTATE—*a. Duty Respecting Application of Trust Fund.*—"A trustee of a fund is charged with the duty of seeing that it applied in conformity with the provisions creating it."⁹⁰

84. Administration by an agent.—*Phelps v. Harris*, 101 U. S. 370, 383, 25 L. Ed. 855. See the title PARTITION, vol. 9, p. 71.

85. *Phelps v. Harris*, 101 U. S. 370, 383, 25 L. Ed. 855.

86. Duty to place trust property in state of security.—*Tyler v. Campbell*, 106 U. S. 322, 325, 27 L. Ed. 162, quoting *Lewin on Trusts*, c. 14, § 1.

"To the same effect is the language of Perry in his treatise on trusts. The trustee must take such steps as will prevent incumbrances from being placed upon the property transferred to him, and, of course, as will prevent the possibility of its destruction, as in this case, from its conversion by the original assignor or settlor. 'If the trust fund,' he says,

'consists in part of the notes, bonds, policies of insurance, and other similar choses in action, notice should be given to the promisors, obligors, or makers of the instruments.' *Law of Trusts*, § 438." *Tyler v. Campbell*, 106 U. S. 322, 325, 27 L. Ed. 162.

87. Duty to defend suits against trust estate.—*Williams v. Gibbs*, 20 How. 535, 538, 15 L. Ed. 1013. See, also, *Gooding v. Oliver*, 17 How. 274, 15 L. Ed. 148.

88. Power of trustee.—*Woodson v. Murdock*, 22 Wall. 351, 371, 22 L. Ed. 716.

89. Construction of agreement.—*Taylor v. Davis*, 110 U. S. 330, 338, 28 L. Ed. 163.

90. Duty respecting application of trust fund.—*Clews v. Jamieson*, 182 U. S. 461, 478, 45 L. Ed. 1183.

b. *Use for Benefit of Trustee*—(1) *In General*.—An essential incident to trust property is that the trustee can never make use of it for his own benefit. In other words a trustee cannot deal with the subject of his trust for his own benefit or on his own behalf.⁹¹

(2) *Trustee's Borrowing Funds with Consent of Beneficiary*.—A trustee who with the consent of the cestui que trust borrows from the trust funds under a promise that the loan shall be secured according to the trust; must be decreed to substitute such security as he ought to have taken upon any other change of investment effected in pursuance of the original trust where he fails to secure the loan in the manner promised.⁹²

(3) *Gifts from Beneficiary to Trustee*.—See the title GIFTS, vol. 6, p. 565, note 8, a gift by one beneficiary to the trustee for the benefit of other beneficiaries.

c. *Deposit in Bank*.—See post, "Time to Select Investment," IV, J, 5, d, (2), "Mingling Trust Funds with Trustee's Own Money," IV, J, 6, b, (2).

d. *Investment*—(1) *Duty to Invest*.—Having taken possession of the trust moneys, it becomes the duty of the trustee to invest them as directed by the will (or other instrument declaring the trust) if it is possible to do so.⁹³ The

91. Use for benefit of trustee.—*Sturm v. Boker*, 150 U. S. 312, 330, 37 L. Ed. 1093; *Stephen v. Beall*, 22 Wall. 329, 340, 22 L. Ed. 786; *Hammond v. Hopkins*, 143 U. S. 224, 251, 36 L. Ed. 134.

The office of a trustee is important to the community at large, and frequently most so to those least able to take care of themselves. It is one of confidence. The law regards the incumbent with jealous scrutiny, and frowns sternly at the slightest attempt to pervert his powers and duties for his own benefit. *Railroad Co. v. Durant*, 95 U. S. 576, 579, 24 L. Ed. 391.

If there was anywhere the slightest evidence of fraud or unfaithfulness, their conduct would be carefully scrutinized. The acts of trustees when personally interested should always be open and fair. Slight circumstances will sometimes be considered sufficient proof of wrong to justify setting aside what has been done. But when everything is honestly done, and the courts are satisfied that the rights of others have not been prejudiced to the advantage of the trustee, the simple fact of interest is not sufficient to justify the withholding of a confirmation of his acts. *Shaw v. Railroad Co.*, 100 U. S. 605, 613, 25 L. Ed. 757.

92. Trustee's borrowing funds with consent of beneficiary.—*Caldwell v. Taggart*, 4 Pet. 190, 200, 7 L. Ed. 828.

93. Duty to invest.—*Cavender v. Cavender*, 114 U. S. 464, 472, 29 L. Ed. 212.

Although it is wrong in any case for trustees under a will, in making investments, to depart from the rule prescribed by the testator, yet if it is done, and acquiesced in by the party in interest, and there is no interference by the court having charge of the trust, the right of action to the cestui que trust for an illegal disposition of the property thus substituted is not affected by reason of this departure. It is still an estate held

in trust for the beneficiary under the will, and to be protected equally with an investment made strictly in accordance with the terms of the will. It follows, then, that the relation of those having dealings with the trustee, based on shares of stock held in this way, is not changed by reason that the original purchase was not in accordance with the directions of the testator. *Duncan v. Jaudon*, 15 Wall. 165, 172, 21 L. Ed. 142.

"The will directed investments to be made in government or state stocks, and on this account the conversion by the trustee of the state stocks on hand into canal stock, was a wrongful act and a breach of trust. But the cestui que trust was at liberty to approve or reject this unauthorized proceeding, and her decision on the subject concerned no one not interested in the trust estate. She elected to approve it after she learned of the occurrence, and by doing this adopted the new investment and waived the breach of trust. But her waiver on that occasion did not bind her to observe the same line of conduct in case of further violation of duty. It would be absurd to suppose because she ratified this transaction she intended to assent to future breaches of trust." *Duncan v. Jaudon*, 15 Wall. 165, 171, 172, 21 L. Ed. 142.

It was treated by all concerned, during the long course of years in which it was held in trust, as a most desirable investment, and no thought of substituting other securities for it was ever entertained by anyone, until the idea occurred to the trustee as a means of escape from the embarrassment in which he was placed by the unlawful use he made of it. The cestui que trust not only never gave consent to pledge or sell it, but had no reason to suppose that the trustee would attempt anything of the kind; nor has she said or done anything, fairly inter-

neglect to invest trust funds constitutes of itself a breach of trust.⁹⁴

(2) *Time to Select Investment*.—Trustees shall be allowed a reasonable time to select investments.⁹⁵

(3) *Security Required*.—Trust money lent on a mere personal obligation, like a promissory note, without security, is at the risk of the trustee, for it should have been on some security as binds land or something to be answerable for it.⁹⁶

(4) *Duty to Inform Beneficiary of Investment*.—It is the duty of a trustee of a trust, arising out of an express agreement, under which he undertook to invest certain funds in particular kinds of property, in conformity with specific instructions given by those whom he represented, although the agreement did not in terms so declare, from time to time, as the circumstances required to inform those whom he represented of his acts.⁹⁷

e. *Insurance*.—See the title *INSURANCE*, vol. 7, pp. 114, 119.

f. *Partition*.—See the titles *PARTITION*, vol. 9, pp. 66, 71; *POWERS*, vol. 9, p. 596.

g. *Redemption from Tax Sale*.—See the title *TAXATION*; ante, p. 356.

6. *LIABILITY FOR LOSS OR INJURY OF TRUST ESTATE*—a. *Observance of Ordinary Prudence*.—The general rule seems to be that a trustee, though compensated for his services, is bound to take no greater care of the trust funds than a prudent man would of his own. But at the same time if the line of his duty is prescribed, he must, "strictly pursue it, without swerving to the right hand or the left;" and if he fail to do so, and loss occur, he must bear the loss.⁹⁸

b. *Liability for Misconduct, Negligence or Breach of Trust*—(1) *In General*.—A trustee is liable for misconduct or breach of trust or negligence, as well as for money actually received. And if in these ways he injures the cestui que trust, he is liable, whether he himself gains by his misbehavior or

preted, which tends even to relieve the trustee from the legal responsibility which pertains to the administration of the trust estate. *Duncan v. Jaudon*, 15 Wall. 165, 174, 175, 21 L. Ed. 142.

94. *Cavender v. Cavender*, 114 U. S. 464, 472, 29 L. Ed. 212.

95. *Time to select investment*.—*Barney v. Saunders*, 16 How. 535, 545, 14 L. Ed. 1047.

If a trustee keep funds, which ought to be invested, longer on deposit than necessary, and loss occurs, he must bear the loss. *Barney v. Saunders*, 16 How. 535, 544, 14 L. Ed. 1047.

The trustees ought not to have been credited with the amount of a sum of money, deposited with a private banking house, and lost by its failure, so far as related to the capital of the estate, but ought to have been credited for so much of the loss as arose from the deposit of current collections of income. *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047.

Five months have been held to be an unreasonable time to keep money on deposit. A payment left on deposit nearly ten months and a second seven months, would seem to have been on deposit waiting for investment too long; but deeming three months not to be an unreasonable time to be allowed for selecting investments, a payment left for six weeks would not be too long and would

not be chargeable to the trustees. *Barney v. Saunders*, 16 How. 535, 545, 14 L. Ed. 1047.

96. *Security required*.—The court of chancery, before the Declaration of Independence, appears to have allowed some latitude to trustees in making investments. The best evidence of this is to be found in the judgments of Lord Hardwicke. He held, indeed, in accordance with the clear weight of authority before and since, that money lent on a mere personal obligation, like a promissory note, without security, was at the risk of the trustee. *Barney v. Saunders*, 16 How. 535, 545, 14 L. Ed. 1047. But in so holding, he said: "For it should have been on some security as binds land or something, to be answerable for it." *Lamar v. Micou*, 112 U. S. 465, 28 L. Ed. 751.

97. *Duty of trustee to inform beneficiary of his acts*.—*Bacon v. Rives*, 106 U. S. 99, 105, 27 L. Ed. 69.

98. *Observance of ordinary prudence*.—*Barney v. Saunders*, 16 How. 535, 544, 14 L. Ed. 1047.

Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them. They are not liable for a loss by theft without

not.⁹⁹ But upon principles of general law, a trustee cannot be held responsible to his cestui que trust for the loss of a trust fund, if the loss has not been occasioned by his own laches or bad faith.¹

(2) *Mingling Trust Funds with Trustee's Own Money.*—When trustees mix the trust money with their own, whereby it loses its identity, and they become mere debtors, the exemption from liability for loss which would otherwise be without their fault, ceases.² It is the duty of a trustee, dealing with a trust fund, to keep such money separate from his own. And if he use a bank for the custody of it, he should have the account so kept as to show the fund to which it belongs.³

(3) *Illegal Disposition of Trust Property.*—Where a trustee fraudulently retains for his own benefit a large amount of the property of the trust estate which should have been paid over, he or his estate is liable for that amount.⁴ The cestui que trust has a right of action against the trustee for an illegal disposition of property substituted for the trust property.⁵

Evidence of Fraud.—The fact that trustees divided the trust estate by means of a sale at which the property brought a fair price is not proof of conspiracy, nor does selling in blocks instead of subdividing the property into lots proof of fraud.⁶

(4) *Liability of Husband for Breach of Trust by Wife.*—See the title HUSBAND AND WIFE, vol. 6, p. 731.

7. ACCOUNTING—*a. Duty to Account.*—It is the duty of a trustee when called on in a proper case for accounting, to give all the information he had on the subject.⁷

their fault. *United States v. Thomas*, 15 Wall. 337, 343, 21 L. Ed. 89.

99. Liability for misconduct, negligence or breach of trust.—*Taylor v. Benham*, 5 How. 233, 274, 12 L. Ed. 130.

That a trustee, by whose negligence of a plain duty the property in his hands is wasted or injured, is chargeable with the loss, is a doctrine which pervades the whole law of trusts. And it is the only doctrine which will insure fidelity in trustees and protection to the interests of cestuis que trust. The simpler and easier the act required, the clearer the duty and liability for its neglect. If any distinction can be made in liability where duties are neglected, the liability should be the more strictly enforced where the duty required was the mere observance of ordinary prudence. *Tyler v. Campbell*, 106 U. S. 322, 326, 27 L. Ed. 162.

In all cases of trust, the trustee is personally responsible for any breach of duty. *Smith v. Ayer*, 101 U. S. 320, 327, 25 L. Ed. 955.

1. *Rockhold v. Rockhold*, 92 U. S. 129, 23 L. Ed. 507. So held by the Tennessee courts.

The delivery of the trust fund by the trustee into the hands of the Confederate authorities, under an order which he dared not disobey, excused him from liability to the cestui que trust. This is not a federal question. *Rockhold v. Rockhold*, 92 U. S. 129, 23 L. Ed. 507.

2. *Mingling trust funds with trustee's own money.*—*United States v. Thomas*, 15 Wall. 337, 343, 21 L. Ed. 89.

3. *Hinckley v. Railroad Co.*, 100 U. S.

153, 157, 25 L. Ed. 591; *United States v. Thomas*, 15 Wall. 337, 343, 21 L. Ed. 89.

Trust funds were deposited where the trustees deposited their own private funds, but the trust funds were not mingled with their own. Other prudent and discreet men made deposits with the same bankers. The advice of counsel was taken. There was no reason to suspect the solvency of the bankers. It was held that the trustees had not acted with such want of prudence or discretion as to render them liable for the loss of the funds so deposited in case the bank failed. *Barney v. Saunders*, 16 How. 535, 546, 14 L. Ed. 1047.

4. *Illegal disposition of trust property.*—*Darlington v. Turner*, 202 U. S. 195, 50 L. Ed. 992.

5. *Duncan v. Jaudon*, 15 Wall. 165, 172, 21 L. Ed. 142.

6. *Evidence of fraud.*—*Hammond v. Hopkins*, 143 U. S. 224, 36 L. Ed. 134.

7. *Duty to account.*—*Hinckley v. Railroad Co.*, 100 U. S. 153, 157, 25 L. Ed. 591; *Dillman v. Hastings*, 144 U. S. 136, 140, 36 L. Ed. 378; *Irvine v. Dunham*, 111 U. S. 322, 327, 28 L. Ed. 444.

It is the duty of a trustee of a trust arising out of an express agreement under which he received certain funds to invest in particular kinds of property in conformity with specific instructions given by those whom he represented, upon completion of the trust to render an account of all he had done in the premises. *Bacon v. Rives*, 106 U. S. 99, 105, 27 L. Ed. 69.

The responsibility of trustees (to ac-

b. *Rules for Settling Accounts*—(1) *Charges against Trustee*—(a) *Gains and Losses*.—The rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the cestui que trust, and all the losses shall be borne by the trustee himself.⁸

(b) *Proceeds of Sale of Trust Property*.—A trustee having sold or parted with the title to the trust property, is bound to account for its proceeds to the beneficiary of the trust according to the terms of the trust.⁹

(c) *Rental Value*.—Whether the rental value or the actual receipts should be charged against the trustee depends upon the circumstances of the case.¹⁰

(d) *Payments in Confederate Money*.—A trustee residing in Alabama during the rebellion, who kept no separate accounts of the trust fund, but invested it in his own name, cannot charge it with the losses he sustained from payments made to him in Confederate money.¹¹

(e) *Interest*.—Interest is not to be paid by a mere trustee, for the money which he holds for the use of another, unless he neglects to pay it, on demand.¹²

On the subject of compounding interest on trustees, there is, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and wilfully neglected; where the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damage for undisclosed profits and in place of them. For mere neglect to invest, simple interest only is generally imposed. Six months' rests have been made only where the amounts received were large, and such as could be easily and at all times invested.¹³

(2) *Allowances to Trustee*—(a) *Expenditures and Improvements*.—See ante, "Contractual Liability of Trustee," IV, I, 4.

Compensation for Improvements.—See the title IMPROVEMENTS, vol. 6, p. 897.

count) does not depend upon the validity of the title of the grantor of the trust property. If the right or interest transferred to them can be sold for a valuable consideration, it is to be treated as property; and corresponding duties devolve upon the trustees with respect to its sale as upon the sale of property, the title of which is undisputed. *Griffith v. Godey*, 113 U. S. 89, 96, 28 L. Ed. 934.

8. **Gains and losses**.—*Oliver v. Piatt*, 3 How. 333, 400, 11 L. Ed. 622.

It is a well-settled principle of equity, that wherever a trustee, or one standing in a fiduciary character, deals with the trust estate for his own personal profit, he shall account to the cestui que trust for all the gain which he has made. If he uses the trust money in speculations, dangerous though profitable, the risk will be his own, but the profit will inure to the cestui que trust. Such a rule, though rigid, is necessary to prevent malversation. *Barney v. Saunders*, 16 How. 535, 542, 14 L. Ed. 1047.

The trustees ought to be charged with all gains as with those arising from usurious loans, unknown friends, or otherwise. *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047.

Where a trustee fails to account for an investment in real estate he will be held liable for the amount realized therefrom, that sum being known, where it is impos-

sible to determine the ultimate fate of the investment. *Darlington v. Turner*, 202 U. S. 195, 50 L. Ed. 992.

Loss by failure to invest.—See ante, "Investment," IV, J, 5, d.

9. **Proceeds of sale of trust property**.—*Irvine v. Dunham*, 111 U. S. 322, 327, 334, 28 L. Ed. 444.

10. **Rental value**.—In a suit in equity to set up a trust in real property and obtain a decree for title it was held that the rental value ought not to have been charged, under the peculiar circumstances of the case having reference to the doubt that must have arisen as to the matter of title to the prima facie effect of the award given by the commissioners, and to the evidence of good faith of all the parties in reference thereto, the true measure of liability is not the rental value but the actual receipts. *Lawrence v. Rector*, 137 U. S. 139, 34 L. Ed. 600; *Goode v. Gaines*, 145 U. S. 141, 152, 36 L. Ed. 654; *Gaines v. Rugg*, 148 U. S. 229, 37 L. Ed. 432.

11. **Payments in Confederate money**.—*Mitchell v. Moore*, 95 U. S. 587, 24 L. Ed. 492.

12. **Interest**.—*Knight v. Reese*, 2 Dall. 182, 1 L. Ed. 340.

13. *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047.

In *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047, it was held that under the

(b) *Claims against Grantor of Trust.*—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1118.

(c) *Commissions and Allowances to Other Fiduciaries.*—Commissions and allowances paid other fiduciaries, through whose hands the trust property passed, may be allowed the trustee.¹⁴

K. Compensation.—In England, courts of equity adhere to the principle which has its origin in the Roman law, "that a trustee shall not profit by his trust," and therefore that a trustee shall have no allowance for his care and trouble. A different rule prevails generally, if not universally, in this country. Here it is considered just and reasonable that a trustee should receive a fair compensation for his services; and in most cases it is gauged by a certain percentage on the amount of the estate.¹⁵

V. Cestui Que Trust.

A. Necessity for and Persons Who May Be.—If there is a trustee, there must be cestuis que trust. There cannot be one without the other, and the trustee cannot be a trustee for himself alone. A trust does not exist when the legal right and the use are in the same party, and there are no ulterior trusts. Thus if the United States is a trustee, there must be a cestui que trust.¹⁶

circumstances of the case, the trustees ought not to have been charged upon the principle of six months' rests and compound interest.

14. Commissions and allowances to other fiduciaries.—There were two trustees of real and personal estate for the benefit of a minor. One of the trustees was also administrator de bonis non upon the estate, of the father of the minor, and the other trustee was appointed guardian to the minor. When the minor arrived at the proper age, and the accounts came to be settled, the following rules ought to have been applied: The trustees ought not to have been charged with an amount of money, which the administrator trustee had paid himself as a commission. That item was allowed by the orphans' court, and its correctness cannot be reviewed, collaterally, by another court. Nor ought the trustees to have been charged with allowances made to the guardian trustee. The guardian's accounts also were cognizable by the orphans' court. Having power under the will to receive a portion of the income, the guardian's receipts were valid to the trustees. *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047.

15. Compensation.—*Barney v. Saunders*, 16 How. 535, 541, 14 L. Ed. 1047.

But on principles of policy as well as morality, and in order to insure a faithful and honest execution of a trust, as far as practicable, it would be inexpedient to allow a trustee who has acted dishonestly or fraudulently the same compensation with him who has acted uprightly in all respects. And there may be cases where negligence and want of care may amount to a want of good faith in the execution of the trust as little deserving of compensation as absolute fraud. If trustees, having a large estate to invest and accumulate for the benefit

of an infant, for a number of years, will keep no books of account, make out no annual or other account of their trust estate; if they risk the trust funds in their own speculations; lend them to their relations without security; and in other ways show a reckless disregard of the duties which they have assumed, they can have but small claim on a court of equity for compensation in any shape or to any amount. *Barney v. Saunders*, 16 How. 535, 540, 14 L. Ed. 1047.

In *Walker v. Walker*, 9 Wall. 743, 757, 19 L. Ed. 814, it was held that to allow the trustee compensation, when he literally did nothing towards executing his trust, but on the contrary was guilty of the grossest abuses concerning it, would be a departure from correct principle.

In *Williams v. Morgan*, 111 U. S. 684, 28 L. Ed. 559, it was held that an allowance to two trustees of a railroad company of \$79,083.23 and \$52,722.15 respectively was excessive under the circumstances of the case and that a gross sum of \$75,000 would have been a just and sufficient allowance to said trustees jointly for their services and compensation.

Amount.—In *Barney v. Saunders*, 16 How. 535, 14 L. Ed. 1047, the trustees were properly allowed and credited by five per cent on the principal of the personal estate, and ten per cent on the income.

16. Necessity for and persons who may be.—*United States v. Union Pac. R. Co.*, 98 U. S. 569, 619, 25 L. Ed. 143.

It will be seen from the particular phraseology of Beattie's will, that his land was not devised to his negroes; but the direction was, to his executor, to sell it, and invest the proceeds in the purchase of other land in Indiana, and to invest his negroes with the title to that, and settle them upon it. If it can be

National Bank Taking Real Estate Security Through Medium of Trustee.—See the title **BANKS AND BANKING**, vol. 3, p. 63.

Charitable Trusts.—See the title **CHARITIES**, vol. 3, p. 683.

B. Notice to Cestui Que Trust.—Notice to a trustee is notice to the cestui que trust.¹⁷ A cestui que trust can claim nothing under a deed which is fraudulently obtained by his trustee acting by his authority.¹⁸

C. Rights and Title to and Respecting Trust Estate.—See ante, "Title and Estate of Trustee," III, C; "Title and Estate of Cestui Que Trust," III, D.

VI. Remedies.

A. Actions by Trustee—1. **ACTIONS AT LAW**—a. *In General.*—At law a trustee sues in his own right.¹⁹

b. *Action of Trespass.*—Nothing is better settled than that a trustee has the legal title to the lands, and that actions at law for trespasses must be brought by him, and by him alone.²⁰

2. **SUITS IN EQUITY.**—**Suits for Instruction and Guidance in Execution of Trust.**—There is authority for saying, that a trustee having notice that it is doubtful if the trust fund should be distributed according to the trusts under which he holds it, he should apply to the court for its direction before he executed the trust, by paying over the fund.²¹

Bill to Declare Future Rights.—Although a court of equity will not ordinarily sustain a bill merely to declare future rights, yet there is a class of cases where the bills were filed by trustees for their protection, that they might have a construction of the will and the direction of the court as to the disposition of the property. In such cases, from necessity, and in order to protect the trustee, the court is compelled to settle questions as to the validity and effect of contingent limitations in a will, even to persons not in esse, in order to make a final decree and give proper instructions in relation to the execution of the trust.²²

Suit to Enforce Equitable Rights.—See ante, "Duty to Place Trust Property in a State of Security," IV, J, 3, a.

B. Suits against Trustee or Trust Property—1. **SUITS FOR ESTABLISHMENT, PRESERVATION AND ENFORCEMENT OF TRUST**—a. *Jurisdiction*—(1) *Jurisdiction of Equity*—(a) *General Rules and Principles.*—All possible trusts,

considered as a devise of the land to the executor, as a trustee, it was well enough, provided the trust was of such a nature as could be executed. If, however, cestui que trust was incapable of taking, the devise to the executor was just as void as if he himself had been under such a disability. In this case, the negroes not having been freed by the will of Beattie, they descended as property, contemporaneously with the origin of the devise of the land to the executor, in trust for them; and, consequently, there was no cestui que trust, that could be recognized as such, for whose benefit the trust could be executed, or which could sustain the devise in trust. *McCutchen v. Marshall*, 8 Pet. 220, 229, 8 L. Ed. 923.

17. **Notice to cestui que trust.**—*Brooks v. Marbury*, 11 Wheat. 78, 87, 6 L. Ed. 423.

So held in *Virginia and West Virginia*.—*Peters v. Bain*, 133 U. S. 670, 696, 33 L. Ed. 696.

18. *Brooks v. Marbury*, 11 Wheat. 78, 87, 6 L. Ed. 423.

19. **Actions at law.**—*United States*

Bank v. Deveaux, 5 Cranch 61, 91, 3 L. Ed. 38.

20. **Action of trespass.**—*United States v. Loughrey*, 172 U. S. 206, 213, 43 L. Ed. 420; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198.

21. **Suits for instruction and guidance in execution of trust.**—*Williams v. Gibbs*, 20 How. 535, 540, 15 L. Ed. 1013.

22. **Bill to declare future rights.**—*Cross v. DeValle*, 1 Wall. 5, 17 L. Ed. 515.

Upon a bill in equity by a trustee for instructions in the execution of his trust, the court will not decide questions depending upon future events, and affecting the rights of persons not in being, and unnecessary to be decided for the present guidance of the trustee. "The court has no power to decree in these, as to the future rights of parties not before the court in esse." *May v. May*, 167 U. S. 310, 323, 42 L. Ed. 179; *Cross v. DeValle*, 1 Wall. 5, 16, 17 L. Ed. 515.

Thus the question who will take the estate after the deaths of the wife and the children, before those events happen,

whether express or implied, are within the jurisdiction of the chancellor.²³ The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the cestui que trust, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief, to be obtained by the cestui que trust consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein."²⁴

and in the absence of parties who may then be interested, cannot be decided. *May v. May*, 167 U. S. 310, 323, 42 L. Ed. 179.

23. General rules and principles.—*Clews v. Jamieson*, 182 U. S. 461, 479, 45 L. Ed. 1183. See, to the same effect, *Oelrichs v. Spain*, 15 Wall. 211, 228, 21 L. Ed. 43; *Bacon v. Rives*, 106 U. S. 99, 105, 27 L. Ed. 69.

Where a trust is clearly defined, and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority, not derived from the statute, nor resulting from its functions as *parens patriæ*. *Perin v. Carey*, 24 How. 465, 502, 16 L. Ed. 701.

Pomeroy, in his work on Equity Jurisprudence, 2d Ed., instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trust. In vol. 1, § 151, he says: "The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys." *Clews v. Jamieson*, 182 U. S. 461, 479, 45 L. Ed. 1183.

It is the peculiar province of equity to compel the execution of trusts. *Hunter v. United States*, 5 Pet. 173, 189, 8 L. Ed. 86.

In all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted; it is the appropriate tribunal. *Fowle v. Lawrason*, 5 Pet. 495, 8 L. Ed. 204.

In *Oelrichs v. Spain*, 15 Wall. 211, 228, 21 L. Ed. 43, the court remarked that there being an element of trust in the case, that element, wherever it existed, always confers jurisdiction in equity. *Clews v. Jamieson*, 182 U. S. 461, 481, 45 L. Ed. 1183.

In 2 Story's Eq. Jur. (12th Ed.) it is stated, at § 975a, that in general a trustee is suable in equity in regard to any matters touching the trust. *Clews v. Jamieson*, 182 U. S. 461, 481, 45 L. Ed. 1183.

In case of a breach, a court of equity will interpose and enforce performance. *Stanley v. Colt*, 5 Wall. 119, 165, 18 L. Ed. 502.

A diversion of the fund will be arrested, and an account compelled for any waste or improvident use of it. *Stanley v. Colt*, 5 Wall. 119, 165, 18 L. Ed. 502.

Express trust for payment of debt.—Of course, if an express trust is created, no matter by whom, nor of what, for the payment of the debt, equity will enforce it, according to its terms, for the benefit of the creditor, as a cestui que trust. *Hampton v. Phipps*, 108 U. S. 260, 264, 27 L. Ed. 719.

Trust arising from acceptance of money for another.—A party for whom money is placed in the hands of a person to be delivered to him, may enforce the trust which arises in his favor, by a bill in equity if not by action at law. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

If there be any conflict between individuals of a class for whom money is placed in the hands of a third person, a court of equity is the proper tribunal for the adjustment of their respective claims. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

City a trustee of property dedicated for a particular purpose.—If ground had been dedicated for a particular purpose, and the city authorities had appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. *Barclay v. Howell*, 6 Pet. 498, 507, 8 L. Ed. 477.

24. *Clews v. Jamieson*, 182 U. S. 461, 478, 45 L. Ed. 1183, quoting 1 Ponn. Eq. Jur., § 158.

Complainants seeking to set up a trust must come into court with clean hands. If they are seeking the benefit of a contract obtained by fraud, they have no standing in a court of equity.²⁵

Jurisdiction Sustainable Wherever the Person Found.—In cases of trust, the jurisdiction of a court of chancery is sustainable, wherever the person is to be found, although lands not within the jurisdiction of that court may be affected by the decree.²⁶

Adequate Remedy at Law.—Where a proceeding at law would not be adequate, the fund to be reached being in the hands of a trustee, a resort to equity jurisdiction of the court is proper and necessary.²⁷ A cestui que trust cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. He must bring an action at law in the name of the trustee to his own use. This is true of all legal demands standing in the name of a trustee and held for the benefit of cestuis que trust.²⁸

Where Court of Probate Can Furnish Adequate Remedy as by Refusing or Granting Probate of a Will.—See the title WILLS.

(b) *Control of Discretion of Trustee by Court.*—It is quite true that where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no mala fides, the court will not ordinarily control their discretion as to the way in which they exercise the power, so that if a fund be applicable to the maintenance of children at the discretion of trustees, the court will not take upon itself, in the first instance, to regulate the maintenance, but will leave it to the trustees. But the court will interfere wherever the exercise of the discretion by the trustees is infected with fraud or misbehavior, or they decline to undertake the duty of exercising the discretion, or generally where the discretion is mischievously and erroneously exercised, as if a trustee be authorized to lay out money upon government, or real, or personal security, and the trust is outstanding upon any hazardous se-

25. Where it was impossible to separate a receipt for one hundred and nineteen bonds containing a declaration of trust from the arrangement by which the trustee gave up his own land to the trustor who had made fraudulent misrepresentations to the trustee about the value and character of the bonds, the trustor and beneficiary cannot ask the aid of equity to compel an execution of the alleged trust. *Kitchen v. Rayburn*, 19 Wall. 254, 22 L. Ed. 64.

26. **Jurisdiction sustainable wherever the person found.**—*Massie v. Watts*, 6 Cranch 148, 160, 3 L. Ed. 181.

27. **Adequate remedy at law.**—*Hunter v. United States*, 5 Pet. 173, 188, 8 L. Ed. 86.

The liability of a trust to make payment as the law requires, can only be enforced in equity, as the process at law is not adequate. *Hunter v. United States*, 5 Pet. 173, 188, 8 L. Ed. 86.

Where a fund was in the hands of an assignee of an insolvent, out of which the United States asserted a right to a priority of payment, in such a case proceedings at law might not be adequate and it was proper to proceed in equity. *Hunter v. United States*, 5 Pet. 173, 174, 8 L. Ed. 86.

The governing committee of a stock exchange had no personal interest in or title to a fund which was placed in its

possession in the trust and confidence that it would see that the purposes of the deposit were fulfilled and the moneys paid out only in accordance with the terms of the trust under which it was deposited. It was held that a suit in equity to recover the funds and for damages for breach of the trust might be maintained. The court said: "The maintenance of this suit enables the whole question between all the parties to be determined therein, and prevents the necessity of any action at law or other proceeding in the courts for the purpose of determining the ultimate and final rights of all the parties to this suit. Such relief cannot be obtained in any one action at law. Upon all the facts we think that the jurisdiction of the court was plainly established, because under the circumstances the complainants had no adequate and full remedy at law." *Clews v. Jamieson*, 182 U. S. 461, 478, 45 L. Ed. 1183.

That the trustee could file a bill of interpleader against the complainants and the other defendants, alleging that each claimed the fund, or some portion thereof, and ask the court to determine which of the parties was entitled to the same, furnishes no reason for excluding the jurisdiction of equity in this case. *Clews v. Jamieson*, 182 U. S. 461, 481, 45 L. Ed. 1183.

28. *New York Guaranty Co. v. Mem-*

curity.²⁹ But it is always for the court eventually to say, when called upon, whether the discretion has been either exercised at all, or exercised honestly, and in good faith.³⁰

(c) *Following Trust Property Illegally Converted or Sold.*—A party having a right to resort to a fund in the hands of a trustee may have the aid of a court of equity in following that fund, where it has been improperly mingled with other funds, or has been invested in property in which third persons have an interest.³¹

(d) *Indemnifying Beneficiary, Part of Property Held by Bona Fide Purchaser.*—When a trustee, dealing with the trust property together with property of his own, as one mass, conveys part of the whole to a purchaser who takes it for value, in good faith, without notice of the fraud or of the trust, and who therefore acquires a good title, the question how far the rest of the property shall be charged with the trust, so as fully to indemnify the person defrauded, can only be determined in a court of equity.³²

(e) *Power to Make Incidental Orders.*—And in enforcing a trust, a court of equity may make such incidental orders as may be necessary for the proper protection and distribution of the trust fund.³³

(2) *Concurrent Jurisdiction of Courts of Equity and Law.*—In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged.³⁴

(3) *Jurisdiction of Courts of Law.*—(a) *General Rules and Principles.*—It is not perceived, why a court of law should regard a resulting trust more than any other equitable rights; and any attempt to give effect to these rights at law, through the instrumentality of a jury, must lead to confusion and uncertainty.

phis Water Co., 107 U. S. 205, 214, 27 L. Ed. 484, citing *Hayward v. Andrews*, 106 U. S. 672, 27 L. Ed. 271. See the title ASSIGNMENTS, vol. 2, p. 591.

29. *Control of discretion of trustee by court.*—*Colton v. Colton*, 127 U. S. 300, 320, 32 L. Ed. 138.

When trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act. And certainly they would not do so in violation of the wishes of the testator. *Nichols v. Eaton*, 91 U. S. 716, 724, 24 L. Ed. 254.

Substituted trustee.—See ante, "Substitution, Removal and Discharge of Trustees," IV, H; "Effect of Deed From Old to New Trustee," IV, H, 2, a, (4); "Powers and Liabilities," IV, I.

30. *Colton v. Colton*, 127 U. S. 300, 321, 32 L. Ed. 138.

31. *Following trust property illegally converted or sold.*—*Texas, etc., R. Co. v. Bloom*, 164 U. S. 636, 643, 41 L. Ed. 580.

"And a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right and takes the property relieved from the

trust." *Moore v. Crawford*, 130 U. S. 122, 128, 32 L. Ed. 878. See ante, "Following Trust Property," III, K.

32. *Indemnifying beneficiary part of property held by bona fide purchaser.*—*Jones v. Van Doren*, 130 U. S. 684, 691, 32 L. Ed. 1077.

Relief against conveyance of dower interest obtained by fraud.—See the title FRAUD AND DECEIT, vol. 6, p. 427.

33. *Power to make incidental orders.*—*McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

So held as to a trust which arises from the acceptance of money by one person to be delivered to another. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

34. *Concurrent jurisdiction of courts of equity and law.*—*Clews v. Jamieson*, 182 U. S. 461, 480, 45 L. Ed. 1183.

An action at law sounding in damages, may, undoubtedly, be maintained for the breach of an express agreement by the trustee to sell property purchased for him by the cestui que trust, within a limited time and to pay to him as compensation for his services in the purchase of the trust property one-half the residue of the proceeds after deducting the outlay, interest and taxes. But this in no wise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent reme-

Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere.³⁵

In the states where no courts of chancery are established, courts of law, in giving relief, of necessity trench upon an equitable jurisdiction.³⁶

Adequate Remedy at Law.—See ante, "General Rules and Principles," VI, B, 1, a, (1), (a).

Concurrent Remedies at Law and in Equity.—See ante, "Concurrent Jurisdiction of Courts of Equity and Law," VI, B, 1, a, (2).

(b) *Assumpsit against Trustee.*—"If money is paid into the hands of a trustee for a specific purpose, it cannot be recovered in an action for money had and received, until that specific purpose is shown to be at an end. If the plaintiff show that the specific purpose has been satisfied, that it has absorbed a certain sum only, and left a balance, such balance (the trust being closed) becomes a clear and liquidated sum, for which an action will lie at law."³⁷

(c) *Following Trust Property*—aa. *In General.*—The interposition of equity is not necessary where a trust fund is perverted. The cestui que trust can follow it at law as far as it can be traced.³⁸

bb. *Trover.*—Purchasers who fraudulently purchase, in breach of the trust, trust bonds and coupons, are liable in trover.³⁹

cc. *Ejectment.*—In Pennsylvania the cestui que trust can bring an ejectment in his own name, since, there being no court of equity in that state, he would be without remedy, in the case of an obstinate trustee, if he could not bring such action.⁴⁰

b. *Courts.*—**The courts of the United States** have jurisdiction to enforce trusts.⁴¹

A court of admiralty cannot declare or enforce a trust.⁴²

c. *Notice to Trustee and Demand of Performance.*—Before a suit can be brought against a trustee, he must have had notice of the duty he is required to perform, and must have had an opportunity to perform it. "The trustee, as to the suit, is not in the situation of a common debtor who knows his liability, and whose business it is to look to a compliance with his engagements. * * * This proceeding, as to the trustee, is *res inter alios acta*, and it is but reasonable that when it terminates, he shall be notified of the result before any steps are taken against him, either by attachment or by action on his trustee's bond against him and his sureties."⁴³ Notice and demand are not necessary where the trustee is himself an actor and has full knowledge of all that is required to be done.⁴⁴

dies, either of which may be selected. The remedy in equity is the better one. *Seymour v. Freer*, 8 Wall. 202, 215, 19 L. Ed. 306; *Townsend v. Vandermerker*, 160 U. S. 179, 40 L. Ed. 383.

35. **General rules and principles.**—*Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873.

36. *Watkins v. Holman*, 16 Pet. 25, 59, 10 L. Ed. 873.

37. **Assumpsit against trustee.**—*McLaughlin v. Swann*, 18 How. 217, 220, 15 L. Ed. 357. See the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 695.

38. **Following trust property.**—*United States v. State Bank*, 96 U. S. 30, 35, 24 L. Ed. 647; *Smith v. Vodges*, 92 U. S. 183, 186, 23 L. Ed. 481.

39. **Trover.**—*Kitchen v. Bedford*, 13 Wall. 413, 20 L. Ed. 637.

40. **Ejectment.**—*Kennedy v. Fury*, 1 Dall. 72, 1 L. Ed. 42.

41. **Courts.**—So held as to resulting trusts. *Irvine v. Marshall*, 20 How. 558, 565, 15 L. Ed. 994; *Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181.

Jurisdiction of federal court dependent upon diverse citizenship.—See the title COURTS, vol. 4, p. 958.

42. *Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249; *The Steamer Eclipse*, 135 U. S. 599, 34 L. Ed. 269. So holding as to a bill to wind up a trust concerning a licensed vessel.

43. **Notice to trustee and demand of performance.**—*Brent v. Maryland*, 18 Wall. 430, 433, 21 L. Ed. 777.

44. *Brent v. Maryland*, 18 Wall. 430, 435, 21 L. Ed. 777.

Where in a proceeding to sell the real estate of a decedent for the payment of his debts the solicitor who presents the petition for the decree of sale is himself appointed trustee to make the sale, and himself becomes bound in bonds

d. *Parties*—(1) *Parties Plaintiff*—(a) *Cestui Que Trust, or His Assignee, Personal Representative, or Heirs.*—Ordinarily it is for the cestui que trust and no one else, to complain of the nonexecution thereof and to sue to enforce the same.⁴⁵

Personal Representative or Heirs at Law.—Where lands were purchased under an agreement by which the grantee took the legal title in trust to sell the property within a specified time, and after deducting from the proceeds the outlay, with interest and taxes, to pay to the cestui que trust one-half the residue, the bond which was to be converted into money, being regarded and treated in equity as money; the personal representative of the cestui que trust is the proper person to maintain a suit to enforce the trust and it is not necessary that his heirs at law should be parties.⁴⁶

Assignee of Beneficial Interest.—The assignee of the beneficiary of a trust may bring an action against the trustee for breach of the trust.⁴⁷

Assignee in Bankruptcy of Cestui Que Trust.—See the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, ante, p. 26. See, also, the title BANKRUPTCY, vol. 2, p. 893, et seq.

(b) *Trustor.*—The grantor of lands conveyed in trust may be the only party with power to complain of the breach of that trust, or on account of such breach to challenge the title in the hands of the trustee or others holding under him; and the title conveyed, voidable alone at his instance, may be good as against all the world besides.⁴⁸

(2) *Parties Defendant*—(a) *Trustee and Cestui Que Trust.*—The general rule is, that in suits respecting trust property, brought either by or against the trustees, the cestuis que trust as well as the trustees are necessary parties. To this rule there are several exceptions.⁴⁹

for the performance of the duties belonging to such appointment, and himself makes all the motions and procures all the orders under which the trustee's liability in the matter arises, he may, if he is liable for the nonpayment of money which he was ordered by the court to pay, be sued without formal notice to him. He has notice in virtue of his professional and personal relations to the case. *Brent v. Maryland*, 18 Wall. 430, 21 L. Ed. 777.

Here was a positive direction to the trustee to pay specific sums to persons named, and without qualification or delay. He became an absolute debtor to each of them for the amount payable to each. The order was of his procuring, made and entered through his agency. That it should be necessary to give a man notice of what he had himself done, or that a demand of performance should be required of that which he had himself directed should be done by himself at once and without condition, would be quite remarkable. No such necessity exists. The case falls within the other principle referred to, that notice and demand are not necessary where the trustee is himself an actor and has full knowledge of all that is required to be done. *Brent v. Maryland*, 18 Wall. 430, 21 L. Ed. 777.

45. Cestui que trust, or his assignee, personal representative, or heirs.—*Cowell v. Springs Co.*, 100 U. S. 55, 58, 25 L. Ed. 547.

The person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself. *Russell v. Clarke*, 7 Cranch 69, 3 L. Ed. 271.

Right of guarantor to the indemnity.—See the title GUARANTY, vol. 6, p. 592.

46. Personal representative or heirs at law.—*Seymour v. Freer*, 8 Wall. 202, 19 L. Ed. 306. See, also, *Townsend v. Vanderwerker*, 160 U. S. 179, 40 L. Ed. 383.

47. Assignee of beneficial interest.—*McBurney v. Carson*, 99 U. S. 567, 25 L. Ed. 378.

48. Trustor.—*United States v. Des Moines, etc.*, R. Co., 142 U. S. 510, 538, 35 L. Ed. 1099.

49. Trustee and cestui que trust.—*Carey v. Brown*, 92 U. S. 171, 23 L. Ed. 479. See the title PARTIES, vol. 9, p. 45.

A trustee who has large powers over the trust estate, and important duties to perform with respect to it, is a necessary party to a suit brought by a stranger to defeat the trust, and often sufficiently represents the beneficiaries. *McArthur v. Scott*, 113 U. S. 340, 396, 28 L. Ed. 1015; *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. Ed. 843; *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. Ed. 840.

Undoubtedly cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustee to represent their interests. They then become proper parties, and may be brought in or

(b) *Heirs at Law of Discharged or Deceased Trustee*.—Where a substituted trustee is appointed by a court to execute a trust concerning lands the heirs at law of the first trustee may be a necessary party.⁵⁰

(c) *Trustor*.—In case of dispute between the beneficiaries of a trust, where the property is disposed of absolutely, the original assignor or party creating the trust need not be made a party to the bill.⁵¹

e. *Bill or Complaint*.—The usual rules of pleading are applicable to bills in equity to enforce, preserve, or establish trusts, and have been applied in respect to amendments,⁵² necessity for and sufficiency of the averment,⁵³ prayers for relief,⁵⁴

not, as the court in the exercise of its judicial discretion may determine. *Kerrison v. Stewart*, 93 U. S. 155, 160, 23 L. Ed. 843.

Where the object is to divest a feme covert or minor of an interest in real estate, the title of which is in a trustee for her use, the trust being an active one, it is error to decree against her without making the trustee a party to the suit. *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. Ed. 840; *McArthur v. Scott*, 113 U. S. 340, 396, 28 L. Ed. 1015.

"The legal title to the property in question was held by Fetterman, in trust for Mrs. O'Hara. The trust was not a naked or dry trust; for he was empowered, with her consent, to sell it, and reinvest the proceeds on the same trusts, or to mortgage it, and with the money so raised purchase other real estate. How the decree can clear the property of this trust without having the trustee before the court it is difficult to see. This was the object of the suit; but how can it be made effectual for that purpose in the absence of the person in whom the title is vested? We think that, in a case like this, where a woman, under the double disability of coverture and infancy, has a trustee in whom the title of the property in controversy is vested for her use, the court should have refused a decree until he was made a party." *O'Hara v. MacConnell*, 93 U. S. 150, 154, 23 L. Ed. 840.

50. *Heirs at law of discharged or deceased trustee*.—Where a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying, before the conveyance of the property to a purchaser, another trustee was appointed by the court, upon the application of the creditors, to execute the trust; in a proceeding relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs at law of the first trustee shall be parties to the same; as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs. *Greenleaf v. Queen*, 1 Pet. 138, 7 L. Ed. 85.

51. *Trustor*.—*McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

Thus an Indian nation is not a necessary party to a suit to establish a trust in a sum received for collecting a claim

it held against the government. *McKee v. Lamon*, 159 U. S. 317, 322, 40 L. Ed. 165.

52. *Amendments of bill to enforce trust*.—See the title AMENDMENTS, vol. 1, pp. 296, 297.

53. *Cestui que trust setting up stale trust*.—See the title LACHES, vol. 7, p. 795.

In suits to enforce constructive or implied trusts, the plaintiff is held to stringent rules of pleading, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery was, so that the court may clearly see whether by ordinary diligence the discovery might not have been made before. *Felix v. Patrick*, 145 U. S. 317, 332, 36 L. Ed. 719. See, also, *Stearns v. Page*, 7 How. 819, 829, 12 L. Ed. 928; *Wollensak v. Reiher*, 115 U. S. 87, 96, 29 L. Ed. 355, and *Godden v. Kimmell*, 99 U. S. 201, 211, 25 L. Ed. 431.

A bill or complaint to enforce a resulting trust should show, without ambiguity or equivocation that the whole consideration is appropriate to that share of the land which the plaintiff claims by virtue of such payment (his payment of the purchase price) was paid before the deed was taken. *Ducie v. Ford*, 138 U. S. 587, 592, 34 L. Ed. 1091 in which the allegation of the bill was held insufficient. See ante, "Resulting Trusts," III, B, 2 c, (2), (b).

54. *Prayer for relief*.—The general object of the bill was to secure to the plaintiff the dower interest of which she had been defrauded, and the bill contained a prayer for general relief. It was held that this is sufficient to enable a court of equity to decree such relief as the facts stated in the bill justify. *Jones v. Van Doren*, 130 U. S. 684, 690, 32 L. Ed. 1077, citing *English v. Foxall*, 2 Pet. 595, 7 L. Ed. 531; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 13 L. Ed. 187; *Texas v. Hardenberg*, 10 Wall. 68, 19 L. Ed. 839.

Where the prayer of the original bill was not for a sale, but for a reconveyance by the trustee of trust property remaining in his name, it does not lie in the mouths of the complainants to object that the decree did not order a sale for which they did not pay and which they

a departure, in a replication.⁵⁵

f. *Laches and Presumption of Extinguishment*.—As length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transaction, it operates, by way of presumption, in favor of innocence, and against imputation of fraud; and may give rise to a presumption of extinguishment of a trust, proved once to have existed, although in general, length of time is no bar to a trust clearly established to have once existed.⁵⁶

g. *Limitation of Actions and Adverse Possession*.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 948, 981.

h. *Set-Off by Trustee*.—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1118.

i. *Evidence*—(1) *Presumptions and Burden of Proof*.—To establish the existence of a trust, the onus probandi lies on the party who alleges it.⁵⁷

Presumption That Trust Will Be Faithfully Executed.—No court can sanction the violation of a trust, but will always act on the presumption that it will be faithfully executed. And this is especially the case when the trust is vested in a state, which is not amenable to judicial process.⁵⁸

Presumption of Extinguishment.—See ante, "Laches and Presumption of Extinguishment," VI, B, 1, f.

(2) *Weight and Sufficiency*.—In suits to enforce constructive or implied trust, the complainant is held to stringent rules of evidence.⁵⁹ And must establish his title by a clear preponderance of testimony.⁶⁰ A trust alleged in a bill to exist will not be considered as proved when every material allegation of the bill in that behalf is distinctly denied in the answer; and the proofs, instead of

have not shown themselves to be entitled to demand as a matter of right. *Flagg v. Walker*, 113 U. S. 659, 678, 28 L. Ed. 1072.

55. **Departure.**—The bill set forth a title in B. H., the wife of T. H., by direct descent from her brother to herself, and insisted on this title to certain real estate; the answer of the defendants resisted the claim, because the land had been conveyed by the complainants, before the institution of the suit, to A. C., the complainant, in his replication, admitted the execution of the deed to A. C.; but averred, that it was made in trust to reconvey the lot to T. H., to be held by him for the use and benefit of B. H., his wife and her heirs, and to enable T. H. to manage and litigate the said rights; and that A. H., in execution of the trust, made a deed to T. H.; the deed was recorded, and was exhibited, but it did not state the trust. The rules of the court of chancery will not permit this departure in the replication from the statements of the bill. *Vattier v. Hinde*, 7 Pet. 252, 8 L. Ed. 675. See the title PLEADING, vol. 10, pp. 426, 451.

56. **Laches and presumption of extinguishment.**—*Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311. See the titles FRAUD AND DECEIT, vol. 6, p. 440; LACHES, vol. 7, pp. 794, note 7, 813, 814; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 948, 981.

The lapse of forty years, and the death of all the original parties, deemed sufficient to presume the discharge and ex-

tinguishment of a trust, proved once to have existed, by strong circumstances; by analogy to the rule of law, which, after a lapse of time, presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances require it. *Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311.

Concealment of fraud.—The evidence does not make out a case of actual abandonment of his rights by the cestui que trust nor such laches as bar him of the equities which existed in his favor, where it shows that the delay was due to the fault and misstatements of the trustee. *Loring v. Palmer*, 118 U. S. 321, 345, 30 L. Ed. 211. See the title LACHES, vol. 7, pp. 815, 816.

57. **Presumptions and burden of proof.**—*Prevost v. Gratz*, 6 Wheat. 481, 5 L. Ed. 311.

58. **Presumption that trust will be faithfully executed.**—*Paup v. Drew*, 10 How. 222, 13 L. Ed. 394.

59. **Weight and sufficiency.**—*Felix v. Patrick*, 145 U. S. 317, 332, 36 L. Ed. 719.

60. Very positive and satisfactory evidence is required to establish an arrangement by which a mortgagee who purchased the mortgaged property at a sale by the trustee at which no other bidder appeared, agreed to buy and hold the property for the benefit of the mortgagor and to reconvey to him so much as was left after selling enough to satisfy the mortgage debt. *Lewis v. Kengla*, 169 U. S. 234, 236, 42 L. Ed. 728

being sufficient to overcome the answer, afford satisfactory ground for holding that there was no trust in the case.⁶¹

j. *Judgment or Decree*.—See post, "Judgment," VI, B, 2, b.

Res Adjudicata.—Judgment for or against trustee as concluding cestui que trust, see the title RES ADJUDICATA, vol. 10, pp. 751, 752.

k. *Appeal and Error*.—The bondholders may appeal from an order allowing a trustee of an insolvent corporation a sum for compensation and expenses.

2. ACTIONS ON CONTRACTS OF TRUSTEE—(a) *Liability to Suit*.—A trustee, merely as such is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law, for a breach thereof, in the same manner as any other person.⁶³

(b) *Judgment*.—An individual judgment should be rendered against a person who covenants as trustee; indeed, there can be no other judgment rendered, for at law a judgment against a trustee in such special capacity is utterly unknown.⁶⁴

3. SUITS AGAINST SURETY OF TRUSTEE.—In the District of Columbia, a suit against the surety of a trustee, the trustee in his life time having had notice of everything, may be maintained by the children of the cestui que trust jointly, and such action may be at law.⁶⁵

TUGS.—See the title TOWAGE, TUGS AND TOWS, ante, p. 610.

TULE.—See LAND, vol. 7, p. 825.

TUNNEL.—As to rights of owners of tunnels, see the title MINES AND MINERALS, vol. 8, p. 399.

TURNING STATE'S EVIDENCE.—As giving right to pardon, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 68. See, also, the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 400.

61. *Voorhees v. Bonesteel*, 16 Wall. 16, 21 L. Ed. 268.

62. *Appeal and error*.—*Williams v. Morgan*, 111 U. S. 684, 699, 28 L. Ed. 559.

Federal questions.—What amounts to a trust, or out of what facts a trust may spring, are not federal questions, and on a writ of error to a state court decision in respect thereto cannot be reviewed by the supreme court. *Smith v. Adsit*, 23 Wall. 368, 374, 22 L. Ed. 114; *Smith v. Adsit*, 16 Wall. 185, 21 L. Ed. 310.

63. *Liability to suit*.—*Taylor v. Davis*, 110 U. S. 330, 336, 28 L. Ed. 163.

Mr. Justice Story in his work on Promissory Notes, declares: "As to trustees, guardians, executors, and administrators, and other persons acting en autre droit, they are by our law generally held personally liable on promissory notes, because they have no authority to bind ex directo the persons for whom, or for whose benefit, or for whose estate, they act, and hence, to give any validity to the note, they must be deemed personally bound as makers." Section 63. *Taylor v. Davis*, 110 U. S. 330, 337, 28 L. Ed. 163.

An action at law for breach of a contract by which a trustee agreed to pay a demand against the trust estate wherever there should be trust funds in his hands sufficient for that purpose.

Taylor v. Davis, 110 U. S. 330, 338, 28 L. Ed. 163.

64. *Judgment*.—*Duvall v. Craig*, 2 Wheat. 45, 56, 4 L. Ed. 180; *Taylor v. Davis*, 110 U. S. 330, 336, 28 L. Ed. 163.

65. *Suits against surety of trustee*.—*Brent v. Maryland*, 18 Wall. 430, 431, 21 L. Ed. 777.

Where a trustee in a proceeding to sell the real estate of a decedent for the payment of his debts has given bonds with security in a penal sum to the state conditioned for the performance of his duties, children, entitled equally to a share in any surplus remaining after debts, expenses, etc., are paid from the proceeds of the sale, may, by the practice in the District of Columbia, after the exact amount of such share has been found by an auditor whose report is confirmed by the court, bring joint suit against the surety—the trustee being dead—in the name of the state, on the bond for the penal sum; and a judgment for that sum be discharged on the payment of the shares or sums certain found as above said is regular. *Brent v. Maryland*, 18 Wall. 430, 21 L. Ed. 777.

Such a joint suit though against the surety of the trustee (the trustee in his lifetime having had notice of everything), may, in the district, be at law. *Brent v. Maryland*, 18 Wall. 430, 21 L. Ed. 777.

TURNPIKES AND TOLLROADS.

CROSS REFERENCES.

As to whether rights acquired under original franchise extend to grants under supplementary charter, see the titles BRIDGES, vol. 3, p. 529; CORPORATIONS, vol. 4, p. 680, et seq. As to toll bridges and their regulation, see the titles BRIDGES, vol. 3, p. 528, et seq.; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 799, et seq. As to canal tolls, see the title CANALS, vol. 2, p. 551. As to right of regulation of tollroads reserved to state, see the title CONSTITUTIONAL LAW, vol. 4, p. 174. As to taxation of mail coaches on Cumberland road, see the title CONSTITUTIONAL LAW, vol. 4, p. 200. As to the incorporation of a competing corporation as a defense to a scire facias for nonuser of franchise, see the title CORPORATIONS, vol. 4, p. 793. As to power to appropriate property for use as turnpike, see the title EMINENT DOMAIN, vol. 5, p. 765. As to power of state to limit the time in which must be exercised a franchise to operate a lottery for the repair of a turnpike, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 882. As to power of statute to charter a competing corporation, see the titles CORPORATIONS, vol. 4, p. 683; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 802. As to state regulation of interstate and foreign commerce, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 436. As to municipal aid to plank roads and turnpikes, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 618. As to basis for calculating reasonableness of rates in state regulation, see the title POLICE POWER, vol. 9, p. 544, et seq. As to capacity to pay dividends to be reckoned as a factor in regulating rates, see the title POLICE POWER, vol. 9, p. 546. As to state bargaining away the power of regulation, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 842; POLICE POWER, vol. 9, p. 539. As to turnpikes as public highways, see the title STREETS AND HIGHWAYS, ante, p. 259. As to remedy for the infringement of charter, see the title CORPORATIONS, vol. 4, p. 713.

Right to Build and Operate.—The right to construct turnpikes is a public right and when this right is conceded to a corporation, it is conceded as a public franchise,¹ and the right to exact tolls from those using them comes from the state granting the franchise.²

Regulation of Rates.—The principles governing the regulation of rates of railroads by a state legislature are equally applicable, in like circumstances, to corporations engaged under legislative authority in maintaining turnpike roads for the use of which tolls are exacted. The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates

1. *County Comm'rs v. Chandler*, 96 U. S. 205, 208, 24 L. Ed. 625.

2. *Covington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578, 41 L. Ed. 560.

Toll on mail coaches on Cumberland Road—In Maryland.—By a compact between Maryland and congress no toll was to be charged for the passage of mail coaches over the Cumberland Road. Later the legislature of Maryland passed an act imposing a toll upon all passengers in mail coaches, and if it were not paid, a toll of one dollar for each coach for every passage over the road. The toll upon passengers in mail coaches was held inconsistent with the compact, and therefore void. And the toll per coach of one dollar being more properly a commutation of tolls than a

penalty, was also held void. *Achison v. Huddleson*, 12 How. 293, 13 L. Ed. 993.

Toll on mail coaches on Cumberland Road—In Pennsylvania.—Under the acts of congress ceding to Pennsylvania that part of the Cumberland Road which is within that state, and the acts of Pennsylvania accepting the surrender, a carriage, whenever it is carrying the mail, must be held to be laden with the property of the United States, within the true meaning of the compact, and consequently exempted from the payment of tolls. But this exemption does not apply to any other property conveyed in the same vehicle, nor to any person traveling in it, unless he is in the service of the United States and passing along

different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road.³ The legislature cannot reduce the rates of a turnpike road to such an extent as not to raise a sufficient income to pay for repairs and a fair income on the investment.⁴

TURNTABLES.—See the title NEGLIGENCE, vol. 8, p. 886.

TWICE.—As to requirement of publication of a notice "twice a week" for a designated period of time, see WEEK. See, also, the title SUMMONS AND PROCESS, ante, p. 299.

TWICE IN JEOPARDY.—See the title AUTREFOIS, ACQUIT AND CONVICT, vol. 2, p. 751.

TWINE.—See the title REVENUE LAWS, vol. 10, pp. 881, 891. As to "gilling twine," see the title REVENUE LAWS, vol. 10, p. 891.

TWO-THIRDS.—See note 1.

ULTRA VIRES.—See the titles BANKS AND BANKING, vol. 3, p. 20; CORPORATIONS, vol. 4, p. 745; COUNTIES, vol. 4, p. 841; MUNICIPAL CORPORATIONS, vol. 8, p. 577; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 813. As to impairment of ultra vires contract of municipality, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 812. As to right to raise question for first time on appeal, see the title APPEAL AND ERROR, vol. 2, p. 90.

UMPIRES.—See the title ARBITRATION AND AWARD, vol. 2, p. 475.

UNADMINISTERED ASSETS.—See ASSETS, vol. 2, p. 548, and references there given.

UNAUTHORIZED APPEARANCE.—See the title APPEARANCES, vol. 2, p. 435.

UNAVOIDABLE ACCIDENTS.—See the title NEGLIGENCE, vol. 8, p. 877.

UNBLOCKED FROG.—See the title MASTER AND SERVANT, vol. 8, p. 282.

UNBORN CHILDREN.—See the titles DESCENT AND DISTRIBUTION, vol. 5, pp. 338, 340; RES ADJUDICATA, vol. 10, p. 747.

UNCONDITIONAL.—As to the fee simple owners of lands and buildings being, within the meaning of a policy of fire insurance, the entire unconditional and sole owners, although the property is subject to a lease, see the title INSURANCE, vol. 7, p. 167.

UNCONSCIONABLE BARGAINS.—See the titles FRAUD AND DECEIT, vol. 6, p. 394; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799; SPECIFIC PERFORMANCE, ante, p. 14.

in pursuance of orders from the proper authority. Nor can the United States claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail. *Searight v. Stokes*, 3 How. 151, 11 L. Ed. 537.

3. **Regulations of rates.**—*Covington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578, 594, 41 L. Ed. 560.

As to the regulation of rates of carriers, see, generally, the titles CARRIERS, vol. 3, p. 556; RAILROADS, vol. 10, p. 455.

4. *Covington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578, 41 L. Ed. 560, approved in *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 43 L. Ed. 1154.

Assent to regulation.—There is no ground for holding that a turnpike company was brought under the operation of a general statute reserving to the

legislature the right to amend or repeal charters of or grants to corporations by an act that did nothing more than reduce the rates of toll to be charged. It did not create a new corporation, nor give any additional franchises or privileges to the company. The mere collecting of tolls, in conformity with such rates, does not show that the company assented to the exercise by the legislature, at will, of the power to amend or repeal its charter. *Covington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578, 585, 41 L. Ed. 560. See the title CORPORATIONS, vol. 4, p. 702.

1. **Two-thirds of the qualified voters.**—As to a requirement of two-thirds of "qualified voters" at an election meaning two-thirds of those actually voting, not of the number enrolled as qualified, see the titles ELECTIONS, vol. 5, p. 727; MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 635.

UNCONSTITUTIONAL LAW.—See the title CONSTITUTIONAL LAW, vol. 4, p. 1. See, also, LAW, vol. 7, p. 846.

UNDER.—See note 1.

UNDERGROUND WATERS.—See the title WATERS AND WATERCOURSES.

UNDERWRITERS.—See the title INSURANCE, vol. 7, p. 66.

UNDISCLOSED PRINCIPAL.—See the title PRINCIPAL AND AGENT, vol. 9, p. 681.

UNDUE INFLUENCE.

CROSS REFERENCES.

See the titles DEEDS, vol. 5, p. 245; DURESS, vol. 5, p. 683; FRAUD AND DECEIT, vol. 6, p. 413; GIFTS, vol. 6, p. 564; INSANITY, vol. 6, pp. 1074, 1075; LACHES, vol. 7, pp. 802, 803; RELEASE, vol. 10, p. 636; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, pp. 805, 806, 813, 815.

What Constitutes.—Influence obtained by flattery, importunity, threats, superiority of will, mind or character, or by what art soever that human thought, ingenuity, or cunning might employ, which would give dominion over the will of a person to such an extent as to destroy free agency or constrain him against his will to do what he is unable to refuse, is such influence as the law condemns as undue, when exercised by any one immediately over the transaction, whether by direction or indirection, or obtained at one time or another.²

Evidence—Weakness of Mind.—It is obvious that weakness of mind may constitute a very important circumstance to prove that a transaction has been obtained through undue influence.³

1. **Authority of commissioner of the general land office.**—As to the meaning of the phrase “under the direction of the secretary of the interior, as used in an act authorizing the commissioner to do certain acts, see DIRECTION, vol. 5, p. 348.

Under the law.—In *Mills v. Stoddard*, 8 How. 345, 366, 12 L. Ed. 1107, in construing the proviso in the act of July 4, 1836, “that if it should be found that any tract confirmed, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed or sold by the United States, that act should confer no title on such lands, in opposition to the rights acquired by such location or purchase,” the court said: “In the case of *Stoddard v. Chambers*, this court held, that ‘a location under the law of the United States’ must be ‘in conformity with it.’ But this, it is insisted, is not the true construction of the proviso. That ‘under the law’ does not mean, ‘in pursuance of it,’ or ‘in conformity with it,’ but an act assumed to be done under it. The word under has a great variety of meanings. But the sense in which it was used in the proviso is, ‘subject to the law.’ We are under the laws of the United States, that is, we are subject to those laws. We live under a certain jurisdiction, that is, we are subject to it.” See the title PUBLIC LANDS, vol. 10, p. 81.

2. **What constitutes.**—*Ormsby v. Webb*,

134 U. S. 47, 66, 33 L. Ed. 805; *Conley v. Nailor*, 118 U. S. 127, 135, 30 L. Ed. 112; *Mackall v. Mackall*, 135 U. S. 167, 172, 34 L. Ed. 84.

“It will be remembered that it is not influence, but undue influence, that is charged, and is necessary to overthrow a will. The question No. 2 puts in the same category, fraud, circumvention and undue influence. Placing undue influence along with fraud and circumvention interprets the character of the influence. *Noscitur a sociis.*” *Beyer v. Le Fevre*, 186 U. S. 114, 124, 46 L. Ed. 1080.

That is undue influence which amounts to constraint, which substitutes the will of another for that of the testator. It may be either through threats or fraud, but, however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made. *Conley v. Nailor*, 118 U. S. 127, 135, 30 L. Ed. 112.

“Influence gained by kindness and affection will not be regarded as ‘undue,’ if no imposition or fraud be practised, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.” *Mackall v. Mackall*, 135 U. S. 167, 172, 34 L. Ed. 84.

3. **Weakness of mind.**—*Harding v. Handy*, 11 Wheat. 103, 123, 6 L. Ed. 429; *Allore v. Jewell*, 94 U. S. 506, 511, 24 L. Ed. 260; *Ralston v. Turpin*, 129 U.

Extent of Weakness Necessary.—It is not necessary, in order to prove that a person was unduly influenced in a transaction, that his mind be shown to be so weak as to render him incapable of attending to ordinary business.³

Inadequacy of Consideration.—Gross inadequacy of price may show undue influence.⁴ But such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud.⁵

Relation of Parties as Evidence.—Confidential relations existing between the parties to a transaction do not alone furnish any presumption of undue influence.⁶ The undue influence for which such transaction will be set aside must be such, that the party making it has no free will, but stands in vinculis. It must amount to force and coercion, destroying free agency.⁷

Parent and Child.—The deed of a child to a parent is not to be deemed, *prima facie*, void. It is, undoubtedly, the duty of courts carefully to watch and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance.⁸

Illegal Sexual Relations.—When a will or deed is made while the parties

S. 663, 670, 32 L. Ed. 747; *Conley v. Nailor*, 118 U. S. 127, 135, 30 L. Ed. 112.

3. **Extent of weakness necessary.**—*Ormsby v. Webb*, 134 U. S. 47, 66, 33 L. Ed. 805.

Federal court rule.—"Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence." *Beyer v. Le Fevre*, 186 U. S. 114, 125, 46 L. Ed. 1080.

4. **Inadequacy of consideration.**—*Eyre v. Potter*, 15 How. 41, 42, 14 L. Ed. 592; *Harding v. Handy*, 11 Wheat. 103, 124, 6 L. Ed. 429; *Stockmeyer v. Tobin*, 139 U. S. 176, 189, 35 L. Ed. 123.

5. *Eyre v. Potter*, 15 How. 41, 42, 60, 14 L. Ed. 592.

6. **Relation of parties as evidence.**—The fact that the testator, an old and helpless man, made his will in favor of a son who for years cared for him and attended to his business affairs, his other children having forsaken him, furnishes no presumption of undue influence. *Mackall v. Mackall*, 135 U. S. 167, 172, 34 L. Ed. 84.

The terms on which the grantor in the deed stood with his family are not entirely unworthy of consideration. *Harding v. Handy*, 11 Wheat. 103, 124, 6 L. Ed. 429.

7. *Conley v. Nailor*, 118 U. S. 127, 134, 30 L. Ed. 112.

"It has * * * more than once been recognized by this court that 'the influence for which a will or deed will be annulled must be such as that the party making it has no free will, but stands in vinculis.'" *Towson v. Moore*, 173 U. S. 17, 22, 43 L. Ed. 593; *Conley v. Nailor*, 118 U. S. 127, 134, 30 L. Ed. 112; *Ralston*

v. Turpin, 129 U. S. 663, 670, 32 L. Ed. 747. See, also, *Mackall v. Mackall*, 135 U. S. 167, 172, 173, 34 L. Ed. 84. See the title *RESCISSION, CANCELLATION AND REFORMATION*, vol. 10, pp. 805, 806.

8. **Parent and child.**—To consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection; and acting on the presumption, that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child. Whereas, the presumption ought to be, in the absence to all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child; and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The *prima facie* presumption is, that it was intended as an advancement to the child, and so not falling within the principle of a resulting trust. The natural and reasonable presumption, in all transactions of this kind, is, that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected, by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it. *Jenkins v. Pye*, 12 Pet. 241, 253, 9 L. Ed. 1070; *Taylor v. Taylor*, 8 How. 183, 201, 12 L. Ed. 1040; *Ralston v. Turpin*, 129 U. S. 663, 673, 32 L. Ed. 747.

A confidential relation between father and son is thus deduced, which, resembling

are living in illegal sexual relations, it is open to suspicion of fraud and undue influence.⁹

Effect of Undue Influence.—Transactions entered into by persons through undue influence will be set aside.¹⁰

Jurisdiction.—That a court of equity will interpose to set aside a transaction obtained by undue influence is among its best-settled principles.¹¹

UNFAIR—UNFAIRLY.—See note 1.

UNFAIR COMPETITION.—See the title TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION, ante, p. 617.

UNFORESEEN EVENT.—See ACCIDENT, vol. 1, p. 57; CAS FORTUITS, vol. 3, p. 645. See, also, the title LANDLORD AND TENANT, vol. 7, p. 841.

UNIFORMITY OF TAXATION.—See the title TAXATION, ante, p. 356.

UNIFORM TAXATION.—See the title TAXATION, ante, p. 356. The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.²

UNILATERAL CONTRACTS.—See the title CONTRACTS, vol. 4, p. 562.

UNINCORPORATED ASSOCIATIONS.—See the title ASSOCIATIONS, vol. 2, p. 633.

that between client and attorney, principal and agent, parishioner and priest, compels proof of valuable consideration and bona fides in order to sustain a deed from one to the other. But while the relationships between the two suggest influence, they do not prove undue influence. *Mackall v. Mackall*, 135 U. S. 167, 171, 34 L. Ed. 84; *Towson v. Moore*, 173 U. S. 17, 24, 43 L. Ed. 593.

A deed from a female child, just of age, and living with her parents, made to a trustee for the benefit of one of those parents, founded on no real consideration, executed under the influence of misrepresentation by the parents, and containing in its preamble a recital of false statements, ordered to be set aside, and the property reconveyed to the grantor. *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040.

9. Illegal sexual relations.—*Conley v. Nailor*, 118 U. S. 127, 136, 30 L. Ed. 112.

10. Effect of undue influence.—*Harding v. Handy*, 11 Wheat. 103, 123, 6 L. Ed. 429; *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260; *Conley v. Nailor*, 118 U. S. 127, 135, 30 L. Ed. 112; *Ralston v. Turpin*, 129 U. S. 663, 670, 32 L. Ed. 747; *Ormsby v. Webb*, 134 U. S. 47, 66, 33 L. Ed. 805. See the titles INSANITY, vol. 6, pp. 1074, 1075; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, pp. 805, 806.

It is not influence, but undue influence, that is necessary to overthrow a will, *Beyer v. Le Fevre*, 186 U. S. 114, 124, 46 L. Ed. 1080.

When a person, from infirmity and mental weakness, is likely to be easily influenced by others, transactions entered into by such person without independent

advice will be set aside, if there is any unfairness in them. *Allore v. Jewell*, 94 U. S. 506, 24 L. Ed. 260. See the titles INSANITY, vol. 6, pp. 1074, 1075; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, pp. 805, 806.

11. Jurisdiction.—*Harding v. Handy*, 11 Wheat. 103, 123, 6 L. Ed. 429; *Allore v. Jewell*, 94 U. S. 506, 511, 24 L. Ed. 260.

1. Unfair held tantamount to illegal.—“If a man had not been a trader, or, if he had not committed an act of bankruptcy, it was unfair to grant him a certificate; so that unfair is tantamount to illegal; holding equally with the converse of the proposition, that a certificate illegally, must be unfairly, obtained.” *Pleasants v. Meng*, 1 Dall. 380, 383, 1 L. Ed. 185. See the title INSOLVENCY, vol. 7, p. 12.

2. Uniform taxation.—*Head Money Cases*, 112 U. S. 580, 594, 28 L. Ed. 798; *Patton v. Brady*, 184 U. S. 608, 622, 46 L. Ed. 713.

Uniformity clause.—“By the result, then, of an analysis of the history of the adoption of the constitution it becomes plain that the words ‘uniform throughout the United States’ do not signify an intrinsic but simply a geographical uniformity.” *Patton v. Brady*, 184 U. S. 608, 622, 46 L. Ed. 713; *Knowlton v. Moore*, 178 U. S. 41, 106, 44 L. Ed. 969. See, also, *Nicol v. Ames*, 173 U. S. 509, 521, 43 L. Ed. 786.

Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream. *Head Money Cases*, 112 U. S. 580, 595, 28 L. Ed. 798; *Patton v. Brady*, 184 U. S. 608, 622, 46 L. Ed. 713.

UNION DEPOTS.—As to the exercise of power of eminent domain for construction of union depot, see the title EMINENT DOMAIN, vol. 5, p. 769.

UNION ELASTIC WEBBING.—See note 1.

UNITE.—As to the grant of authority to connect with other roads not conferring authority to make and take leases, see the title RAILROADS, vol. 10, p. 518. As to the power to connect or unite with another road referring merely to a physical connection of tracks and not authorizing a consolidation, see the title RAILROADS, vol. 10, p. 526. As to power of railroad to unite or connect with another road referring merely to the physical connection of the track and not authorizing a purchase of such road, see the title RAILROADS, vol. 10, p. 516.

1. "Union elastic webbing" made of rubber, silk and cotton, is distinguished from "wool elastic webbing" made of India-rubber, wool and cotton; and "cotton

elastic webbing," made of rubber and cotton. See *Beard v. Nichols*, 120 U. S. 260, 261, 30 L. Ed. 652. See, also, the title REVENUE LAWS, vol. 10, p. 893.

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BY A. P. WALKER.

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As to protection of papers on file in departments of government, see the title PRODUCTION OF DOCUMENTS, vol. 9, p. 790.

I. Definition and Establishment.

The United States is a union of states, under a common constitution, which forms a distinct and greater political unit, which that constitution designates as the United States, and makes of the people and states which compose it one people and one country.¹

Establishment.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 91, 92, 93.

II. A Body Corporate.

The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment.²

III. Powers, Prerogatives and Liabilities.

A. Rights and Powers Generally.—See the title CONSTITUTIONAL LAW, vol. 4, p. 130, et seq.

Power to Execute Its Laws, Exercise Jurisdiction over All Persons and Places.—See the title CONSTITUTIONAL LAW, vol. 4, p. 125.

Jurisdiction of Federal Government over Places under Its Exclusive Control, Such as Forts, Arsenals, etc.—See the title CONSTITUTIONAL LAW, vol. 4, pp. 151, 152.

Control of International Relations.—See the title CONSTITUTIONAL LAW, vol. 4, p. 109.

B. Prerogatives and Immunities—1. **IN GENERAL.**—It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.³

2. **PRIORITY AS TO PAYMENT.—Priority as Creditor.**—The right of priority of payment of debts due to the government is a prerogative of the crown of England, well known to the common law; it is founded, not so much upon any personal advantage to the sovereign, as upon motives of public policy, to secure an adequate revenue to sustain the public burdens and discharge the public debts.⁴

Priority of Payment Out of Estate of Insolvent Debtor.—The United

1. *Texas v. White*, 7 Wall. 700, 721, 19 L. Ed. 227.

2. **Powers as a nation and prerogatives.**—*Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845. See, also, *Respublica v. Sweers*, 1 Dall. 41, 44, 1 L. Ed. 29.

3. **Prerogatives.**—*Dollar Sav. Bank v. United States*, 19 Wall. 227, 239, 22 L. Ed. 80; *United States v. American Bell Tel. Co.*, 159 U. S. 548, 554, 40 L. Ed. 255; *Stanley v. Schwalby*, 147 U. S. 508, 515, 37 L. Ed. 259. See, also, *United States v. Herron*, 20 Wall. 251, 263, 22 L. Ed. 275; *United States v. Knight*, 14 Pet. 301, 315, 10 L. Ed. 465.

4. **Priority as creditor.**—*United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308.

This priority rests on statute. *United States v. State Bank*, 6 Pet. 29, 8 L. Ed. 308; *Beaston v. Farmers' Bank*, 12 Pet. 102, 134, 9 L. Ed. 1017.

Under the power to pay the debts of the United States, congress had the power to enact that debts due to the United States should have that priority of payment which the law of England gave to debts due to the crown. *Legal Tender Case*, 110 U. S. 421, 440, 28 L. Ed. 204; *United States v. Fisher*, 2 Cranch 358, 2 L. Ed. 304.

States are not bound by the bankrupt acts, nor subject to the rule of a ratable distribution, but are entitled to preference over all other creditors.⁵

Tax upon Same Subject by Both State and Federal Governments.—The power of taxation of the states is a concurrent power with that of the general government, and in the case of a tax upon the same subject by both governments, the claim of the United States as the supreme authority must be preferred.⁶

3. **RESPECTING STATUTES IN WHICH THE UNITED STATES ARE NOT NAMED.**—It is a familiar principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) effect not him in the least, if they may tend to restrain or diminish any of his rights and interests; but he may take the benefit of any particular act, though not named. The rule thus settled respecting the British crown is equally applicable to this government, and it has been practically applied in the federal courts.⁷

4. **DELAY OR DEFAULT NOT ATTRIBUTABLE.**—Delay or default cannot be at-

5. *Merrill v. National Bank*, 173 U. S. 131, 177, 43 L. Ed. 640. See, also, *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 279, 8 L. Ed. 392; *United States v. Howland*, 4 Wheat. 108, 4 L. Ed. 526. See the title **BANKRUPTCY**, vol. 2, pp. 919-921. And as to what law governs right of priority, see the title **CONFLICT OF LAWS**, vol. 3, p. 1048.

Priority with respect to mortgage.—The federal supreme court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of congress in the distribution of the debtor's estate. *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 428, 42 L. Ed. 803; *United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370; *Thelusson v. Smith*, 2 Wheat. 396, 426, 4 L. Ed. 271; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 441, 7 L. Ed. 189.

"It was held by this court in *United States v. Hooe*, 3 Cranch 73, 2 L. Ed. 370, that the mortgage of a part of his property, made by a collector of revenue to the surety upon his official bond, to indemnify him for his responsibility, and to secure him for indorsements at the bank, was valid against the United States, though it turned out that the mortgagor was unable to pay all his debts at the time the mortgage was given, and the mortgagee also knew at that time that he was largely indebted to the United States." *Huntley v. Kingman*, 152 U. S. 527, 533, 38 L. Ed. 540.

Prior attachment.—Money attached by legal process, before the issuing of an attachment in behalf of the United States, is bound for the debt for which it was legally attached, by a writ, which is in the nature of an execution; and the right of a private creditor, thus acquired, could not be defeated by the process subsequently issued on the part of the United

States. *Beaston v. Farmers' Bank*, 12 Pet. 102, 136, 9 L. Ed. 1017; *Prince v. Bartlett*, 8 Cranch 431, 3 L. Ed. 614.

Distinction between right of priority and lien of attachment.—See *Harris v. De Wolf*, 4 Pet. 147, 7 L. Ed. 811; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 7 L. Ed. 189.

Case of partnership.—See the title **BANKRUPTCY**, vol. 2, p. 951.

Under insolvency law of Louisiana—Funds in hands of the syndics.—*Field v. United States*, 9 Pet. 182, 9 L. Ed. 94.

Debtor due from national banks.—See the title **BANKS AND BANKING**, vol. 3, p. 190.

6. *Railroad Co. v. Peniston*, 18 Wall. 5, 29, 21 L. Ed. 787; *Lane County v. Oregon*, 7 Wall. 71, 77, 19 L. Ed. 101.

7. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 239, 22 L. Ed. 80. See, to the same effect, *Stanley v. Schwalby*, 147 U. S. 508, 515, 37 L. Ed. 259. And see, also, *United States v. Nashville, etc., R. Co.*, 118 U. S. 120, 125, 30 L. Ed. 81, and *United States v. Beebe*, 127 U. S. 338, 32 L. Ed. 121.

But see *McKnight v. United States*, 98 U. S. 179, 186, 25 L. Ed. 115, holding that, with a few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and to individuals are the same. There is not one law for the former and another for the latter.

It must, then, be concluded that the government is not prohibited by anything contained in the act of 1866 from employing any common-law remedy for the collection of its dues. The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason. *Dollar Sav. Bank v. United States*, 19 Wall. 227, 239, 22 L. Ed. 80.

tributed to the government. It is presumed to be always ready to pay what it owes.⁸

5. **LACHES AND LIMITATIONS.**—See the titles **LACHES**, vol. 7, p. 820; **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 916.

6. **PRESUMPTION OF PAYMENT.**—There is no presumption of payment against the United States arising from lapse of time.⁹

7. **ESTOPPEL.**—See the title **ESTOPPEL**, vol. 5, pp. 945, 983, 1001. The unauthorized acts of public officers cannot estop the United States government from insisting upon their invalidity, however beneficial they may have proved to the United States.¹⁰

8. **EXEMPTION FROM LIABILITY TO SUIT.**—See post, "Immunity from Suit without Consent of Congress," X, A.

C. Right to Acquire Territory by Treaty or Conquest.—The United States has the right of acquiring territory by treaty or conquest.¹¹

D. Cession of Jurisdiction from States over Forts, etc.—Special provision is made in the constitution for the cession of jurisdiction from the states over places where the federal government shall establish forts, or other military works. And it is only in these places, or in the territories of the United States, that it can exercise a general jurisdiction.¹²

E. Military Power.—The United States possesses the broad power of war; it may provide and maintain a navy; and make rules for the government and regulation of land and naval forces.¹³

F. Respecting Negotiable Paper.—When the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments.¹⁴

IV. Officers and Agents.

An officer of the United States can only be appointed by the president, by and with the advice and consent of the senate or by a court of law, or the head of the department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States in the sense of the constitution. Hence a clerk of the collector of customs is not an officer of the United States within the provisions of § 3639 of the Revised Statutes. The term public officer as used in that section applies only to officers of the United States in the sense of the constitution.¹⁵

8. **Delay or default not attributable.**—United States *v.* Sherman, 98 U. S. 565, 568, 25 L. Ed. 235.

9. **Presumption of payment.**—United States *v.* Thompson, 98 U. S. 486, 489, 25 L. Ed. 194.

10. *Filor v. United States*, 9 Wall. 45, 49, 19 L. Ed. 549.

11. **Right to acquire territory by treaty or conquest.**—Wilson *v.* Shaw, 204 U. S. 24, 32, 51 L. Ed. 351. See the titles **CONSTITUTIONAL LAW**, vol. 4, p. 96, et seq.; **INTERNATIONAL LAW**, vol. 7, p. 246; **PUBLIC LANDS**, vol. 10, p. 50, et seq.

12. *New Orleans v. United States*, 10 Pet. 662, 737, 9 L. Ed. 573. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 151.

13. **Military power.**—United States *v.* Bevans, 3 Wheat. 336, 389, 4 L. Ed. 404. See the titles **ARMY AND NAVY**, vol. 2, p. 494; **MILITARY LAW**, vol. 8, p. 342; **MILITIA**, vol. 8, p. 358; **WAR**

14. **Respecting negotiable paper.**—United States *v.* Bank, 15 Pet. 377, 392, 10 L. Ed. 774; *Cotton v. United States*, 11 How. 229, 231, 13 L. Ed. 675.

The government of the United States has a right to use bills of exchange in conducting its fiscal operations, as it has the right to use any other appropriate means of accomplishing its legitimate purposes. The *Floyd Acceptances*, 7 Wall. 666, 19 L. Ed. 169.

15. *United States v. Smith*, 124 U. S. 525, 532, 31 L. Ed. 534, following *United States v. Germaine*, 99 U. S. 508, 25 L. Ed. 482, and *United States v. Mouat*, 124 U. S. 303, 31 L. Ed. 463, and distinguishing *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830, in which the defendant was a clerk in the office of the assistant treasurer at Boston but his appointment by that officer under the act of congress can only be made with the approbation of the secretary of the treasury. See, to the same effect, *Wise v.*

V. Acquisition and Disposition of Property.

A. Acquisition of Real Property—1. **RIGHT TO ACQUIRE AND HOLD.**—The United States hold the title to land for public purposes; they do not and cannot hold property, as a monarch may, for private or personal purposes. All the property of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, "to pay the debts and provide for the common defense and general welfare of the United States."¹⁶ So the United States, at the discretion of congress, may acquire and hold real property in any state, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light-houses, custom houses, courthouses, barracks or hospitals, or for any other of the many public purposes for which such property is used.¹⁷

2. **MODE**—a. *Devise.*—By a statute of New York, a devise of lands in that state can only be made to natural persons and to such corporations as are created under the laws of the state and are authorized to take by devise. A devise, therefore, of lands in that state to the government of the United States is void.¹⁸

b. *Purchase, Lease and Mortgage or Deed of Trust.*—Real property may be acquired by the United States by voluntary arrangement with the owners, in other words by purchase.¹⁹

Lease.—See post, "Lease or Rental," VII, I, 4.

Power to Take Mortgage or Deed of Trust.—The United States may take mortgages of real estate to secure the payment of debts due to them, notwithstanding congress has enacted that "no land shall be purchased on account

Withers, 3 Cranch 331, 336, 2 L. Ed. 457; Ex parte Garland, 4 Wall. 333, 378, 18 L. Ed. 366.

A justice of the peace in the District of Columbia is an officer of the government of the United States. *Wise v. Withers*, 3 Cranch 331, 2 L. Ed. 457.

Attorneys and counsellors are not officers of the United States; but officers of the court. Ex parte Garland, 4 Wall. 333, 378, 18 L. Ed. 366. See the title ATTORNEY AND CLIENT, vol. 2, p. 709.

Liability of United States for misfeasance, laches or unauthorized exercise of power by its officers and agents.—See the titles LACHES, vol. 7, p. 820; PUBLIC OFFICERS, vol. 10, p. 432.

Declarations and admissions as evidence against the United States.—See the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 225.

Departmental officers and employees.—See post, "Executive Departments," XII. See, also, the title PUBLIC OFFICERS, vol. 10, p. 363.

Official bonds.—See the titles BONDS, vol. 3, pp. 387, 395, et seq.; PUBLIC OFFICERS, vol. 10, p. 363.

Eight hour labor laws.—See the title LABOR, vol. 7, p. 786.

16. Right to acquire.—*Van Brocklin v. Tennessee*, 117 U. S. 151, 158, 29 L. Ed. 845; *United States v. Insley*, 130 U. S. 263, 265, 32 L. Ed. 968; *Dobbins v. Erie County Comm'rs*, 16 Pet. 435, 448, 10 L. Ed. 1022. See, also, *Buchanan v. Alexander*, 4 How. 20, 11 L. Ed. 837.

So holding the title and the right of possession under their deed, the United

States holds in the same manner, and for public purposes, the incidental right of redemption. *United States v. Insley*, 130 U. S. 263, 265, 32 L. Ed. 968.

17. *Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845, citing *Harris v. Elliott*, 10 Pet. 25, 9 L. Ed. 333; *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *United States v. Fox*, 94 U. S. 315, 320, 24 L. Ed. 192; *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 531, 532, 29 L. Ed. 264.

18. *Devise.*—*United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192.

19. *Purchase, lease and mortgage or deed of trust.*—*Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845; *Ryan v. United States*, 136 U. S. 68, 81, 34 L. Ed. 447.

The act of congress, passed on May 1st, 1820 (3 Stat. at L. 568), enacts, "That no land shall be purchased on account of the United States, except under a law authorizing such purchase." *Neilson v. Lagow*, 12 How. 98, 13 L. Ed. 909; *Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845.

In *Ryan v. United States*, 136 U. S. 68, 81, 34 L. Ed. 447, it was held that there could not be any question in respect to the right of the United States, by purchase, to acquire the premises in dispute for the purposes of fortification and garrison expressed in the act of July 8, 1886. The court cited *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *United*

of the United States, except under a law authorizing such purchase." Rev. Stat., § 3736.²⁰

c. *By Exercise of Right of Eminent Domain*.—See the title EMINENT DOMAIN, vol. 5, p. 752.

B. Acquisition of Personal Property and Choses in Action—1. ASSIGNMENT OF CLAIM TO UNITED STATES.—Any instrument or claim, though not negotiable, may be assigned to the government of the United States, who can sue upon it in their own name.²¹

2. INDORSEE OF NEGOTIABLE PAPER.—The United States take negotiable paper subject to all the equities existing against the person from whom they purchase at the time when they acquire their title.²²

3. FUNDS OR PROPERTY OF INNOCENT PERSON OBTAINED BY FRAUD—**a. Where Agents of United States Have Knowledge of the Fraud**.—Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal. The rules of law applicable to individuals in such cases apply also to the United States.²³

b. Where Agents of United States Have No Knowledge of the Fraud.—Where, by the connivance of a clerk in the office of an assistant treasurer of the United States, a person unlawfully obtains from the office money belonging to the United States, and to replace it, pays to the clerk money which he obtains by fraud from a bank, the clerk having no knowledge of the means by which the latter money was obtained, the United States are not liable to refund the

States *v. Jones*, 109 U. S. 513, 27 L. Ed. 1015, and *Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845.

20. *Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845, citing *Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909, which was the case of a deed of trust to the United States. And it was also held that the trustees might purchase the legal title.

21. *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585; *United States v. Thompson*, 98 U. S. 486, 489, 25 L. Ed. 194.

The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States. *United States v. Nashville, etc., R. Co.*, 118 U. S. 120, 125, 30 L. Ed. 81.

An assignment of a claim to the United States made under a special act vests the legal right in the government although it may be that at common law the United States could claim in equity but not at law. *United States v. Buford*, 3 Pet. 12, 28, 7 L. Ed. 585.

Where, before the transfer to the United States of an instrument which was the evidence of debt, the term of five years had elapsed, the period after which the statute of limitations was a bar, it can require no argument to show that the transfer of such claim to the United States cannot give it any greater validity than it possessed before the transfer. *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585.

22. *Indorsee of negotiable paper*.—*United States v. Nashville, etc., R. Co.*, 118 U. S. 120, 125, 30 L. Ed. 81.

When the United States, through their lawfully authorized agents, become the owners of negotiable paper, they are obliged to give the same notice to charge an indorser as would be required of a private holder. *United States v. Nashville, etc., R. Co.*, 118 U. S. 120, 125, 30 L. Ed. 81; *United States v. Barker*, 12 Wheat. 559, 6 L. Ed. 728; *United States v. Bank*, 15 Pet. 377, 392, 393, 10 L. Ed. 774; *Cooke v. United States*, 91 U. S. 389, 396, 398, 23 L. Ed. 237. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 326.

23. *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 629, 44 L. Ed. 611; *State Bank v. United States*, 114 U. S. 401, 409, 29 L. Ed. 149.

A person received money unlawfully from the cashier of the United States sub-treasury and afterwards with knowledge of the cashier procured gold certificates from an innocent party and deposited the same in the sub-treasury to enable the cashier to conceal his guilt while an examination of the funds was being made. It was held that the owner's title to the certificates was not divested and that he is entitled to recover their value from the United States. *United States v. State Bank*, 96 U. S. 30, 36, 24 L. Ed. 647. See *State Bank v.*

money to the bank.²⁴

C. Sales by the United States—1. **SALES OF PERSONALTY.—Validity.**—A naval contractor cannot make a private sale of old material, the property of the United States, where there has been no survey or inspection of the old material, nor appraisement as required by law. The fact that an account had been settled at the navy department and at the treasury in which a contractor was charged with the material at an estimated value considerably less than the true value does not waive the illegality, and is no bar to the recovery of its real value by the government.²⁵

Construction.—See notes.²⁶

2. **SALES OF LAND.—Sales by Solicitor of Treasury.**—The solicitor of the treasury, "with the approval of the secretary of the treasury," is authorized to sell at public sale certain lands acquired by the United States for debt, etc.²⁷

Law Governing Where Resort Had by Government to Mode of Transfer of Title Prescribed by State Statute.—See the title **CONFLICT OF LAWS**, vol. 3, p. 1037.

VI. Revenues.

See the titles **REVENUE LAWS**, vol. 10, p. 838; **TAXATION**, ante, p. 356. All

United States, 114 U. S. 401, 409, 29 L. Ed. 149; *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 629, 44 L. Ed. 611.

24. **Where agents of United States have no knowledge of the fraud.**—*State Bank v. United States*, 114 U. S. 401, 29 L. Ed. 149; *Holly v. Missionary Society*, 180 U. S. 284, 294, 45 L. Ed. 531, distinguishing *United States v. State Bank*, 96 U. S. 30, 24 L. Ed. 647.

The essential difference, between *United States v. State Bank*, 96 U. S. 24 L. Ed. 647, and this case, is, that, in the former, the agents of the government appropriated to its use the property of an innocent person, knowing at the time that it belonged to that person and not to the government, while in the present case, they received, in the discharge of a debt due the government, a draft belonging to the debtor, without any knowledge or notice that the debtor had obtained it upon conditions which had not been complied with, or by means of fraudulent representations. The bank from which such debtor had so obtained the draft cannot recover the amount thereof from the United States. *State Bank v. United States*, 114 U. S. 401, 410, 29 L. Ed. 149.

25. *Steele v. United States*, 113 U. S. 128, 28 L. Ed. 952; *Wisconsin, etc., R. Co. v. United States*, 164 U. S. 190, 207, 41 L. Ed. 399.

Delay in enforcing such claim is no bar to the recovery of its value. *Steele v. United States*, 113 U. S. 128, 28 L. Ed. 952.

26. **Where a party under his contracts with the United States was entitled to "all hides of beef cattle slaughtered for Indians"** which the superintendent of Indian affairs should decide were not required for their comfort, and where the commissioner of Indian affairs directed that the cattle be turned over to the

agent who gave them out from time to time to the Indians, by whom they were killed, held, that the order of the commissioner was in effect a decision that the hides were required for the comfort of the Indians, and excused the United States from delivery to the contractor. *Lobenstein v. United States*, 91 U. S. 324, 23 L. Ed. 410.

The estimate of the number of hides—about two thousand, more or less, and about four thousand, more or less—as made in the contract, does not create an obligation on the part of the United States to deliver that number, as the conditions of the agreement rendered it impossible for either party to determine how many would be reserved for the Indians. Therefore, the number specified could not have been understood to be guaranteed. *Lobenstein v. United States*, 91 U. S. 324, 23 L. Ed. 410.

27. *United States v. Jonas*, 19 Wall. 598, 22 L. Ed. 177.

The act of March 3d, 1863, qualifies and limits the powers of the said solicitor, given to him by the act of May 29th, 1830, creating his office and prescribing his duties, and authorizing him to sell such lands at private sale; and pro tanto repeals it. *United States v. Jonas*, 19 Wall. 598, 22 L. Ed. 177.

The former act being thus repealed, and the latter one only in force, the approval of the secretary of the treasury is an indispensable condition to the validity of a sale made under the act by the solicitor. *United States v. Jonas*, 19 Wall. 598, 22 L. Ed. 177.

The purchaser is not bound to accept a deed unless there be written evidence of its approval. *United States v. Jonas*, 19 Wall. 598, 22 L. Ed. 177.

The approval of the secretary is not a fact to be presumed because the deed of the solicitor is the deed of an official

the revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, to pay the debts and provide for the common defense and general welfare of the United States.²⁸

VII. Contracts.

A. Power of United States to Contract.—The United States, as incident to the general right of sovereignty, have the capacity, within the sphere of their constitutional powers, and through the instrumentality of the proper department, to enter into contracts not prohibited by law, and appropriate to the just exercise of those powers, although not expressly directed or authorized to do so by any pre-existing legislative act.²⁹

B. Form, Requisites and Validity—1. **WHAT CONSTITUTES.**—Generally, the written bid in connection with the advertisement for proposals by the United States and the acceptance of that bid, constitutes the contract between the parties.³⁰

2. **FORM PRESCRIBED BY STATUTE**—a. *In General.*—When the form of a contract with the United States is prescribed by the statute, a departure from its directions will not render the contract invalid.³¹

b. *Writing.*—The act of congress approved June 2, 1862 (12 Stat. 411), which makes it the duty of the secretary of war, the secretary of the navy, and the secretary of the interior to require every contract made by them severally on behalf of the government, or by officers under them appointed to make such

person, nor even because it recites that the sale was made in pursuance of the act of 1863. *United States v. Jonas*, 19 Wall. 598, 22 L. Ed. 177.

28. **Revenues.**—*Van Brocklin v. Tennessee*, 117 U. S. 151, 29 L. Ed. 845; *United States v. Insley*, 130 U. S. 263, 265, 32 L. Ed. 968; *Dobbins v. Erie County Comm'rs*, 16 Pet. 435, 448, 10 L. Ed. 1022. See, also, *Buchanan v. Alexander*, 4 How. 20, 26, 11 L. Ed. 857.

29. **Power of United States to contract.**—*Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845; *Jessup v. United States*, 106 U. S. 147, 151, 27 L. Ed. 85; *United States v. Bradley*, 10 Pet. 343, 360, 9 L. Ed. 448, stating that this principle was acted on in the case of *Dugan v. United States*, 3 Wheat. 172, 4 L. Ed. 362; *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66; *United States v. Linn*, 15 Pet. 290, 311, 10 L. Ed. 742; *United States v. Hodson*, 10 Wall. 395, 406, 19 L. Ed. 937.

The United States can, without the authority of any statute, make a valid contract. *Jessup v. United States*, 106 U. S. 147, 152, 27 L. Ed. 85.

Grounds of rule.—See *United States v. Tingey*, 5 Pet. 115, 127, 8 L. Ed. 66; *United States v. Hodson*, 10 Wall. 395, 406, 19 L. Ed. 937.

A voluntary contract or security, taken by the United States, for a lawful purpose, and upon a good consideration, although not prescribed by any law, is not utterly void. *United States v. Linn*, 15 Pet. 290, 311, 10 L. Ed. 742.

Bonds.—Thus the United States may take bonds, without the authority of any statute. *Van Brocklin v. Tennessee*, 117 U. S. 151, 154, 29 L. Ed. 845; *Jessup v.*

United States, 106 U. S. 147, 152, 27 L. Ed. 85; *Moses v. United States*, 166 U. S. 571, 586, 41 L. Ed. 1119; *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 66. See the title **BONDS**, vol. 3, p. 396.

Power to borrow money.—The United States has the power to borrow money on its credit. *New York v. Commissioners*, 2 Black 620, 634, 17 L. Ed. 451. See the titles **CONSTITUTIONAL LAW**, vol. 4, p. 1; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**, vol. 8, p. 650.

Power of Indian agent to contract for subsistence of Indians.—See the title **INDIANS**, vol. 6, p. 958.

30. **What constitutes.**—*Harvey v. United States*, 105 U. S. 671, 688, 26 L. Ed. 1206, citing *Garfields v. United States*, 93 U. S. 242, 23 L. Ed. 779; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398.

An act of congress directing the secretary of the navy to enter into contract with certain parties, provided it could be done on terms previously offered by the parties, does not, of itself, create a contract. If such parties afterwards sign a written agreement with the secretary, on terms less favorable to them than the act of congress authorized the secretary to make, they must abide by their action in accepting the less favorable terms; and cannot recover the compensation named in the original proposal. *Gilbert v. United States*, 8 Wall. 358, 19 L. Ed. 303; *Parish v. United States*, 8 Wall. 489, 490, 19 L. Ed. 472.

31. **Form prescribed by statute.**—*Jessup v. United States*, 106 U. S. 147, 152, 27 L. Ed. 85.

contracts, to be reduced to writing, and signed by the contracting parties, is mandatory, and in effect prohibits and renders unlawful any other mode of making the contract.³²

Quantum Meruit or Valebat.—Where, however, a parol contract has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a quantum meruit,³³ or a quantum valebat.³⁴

3. **POWER OF OFFICER TO MAKE.**—The promise of an officer of the United States is not of binding obligation on the government, where no authority of law existed for the promise.³⁵

4. **MUTUAL ASSENT—PRIVITY OF CONTRACT.**—Mutual assent as to both parties is essential in contracts with the United States.³⁶

Advertisement for Bids.—See post, "Advertisement for Proposals," VII, I, 7, b, (2), (c).

5. **IMPLIED CONTRACTS.**—To constitute an implied contract with the United States for the payment of money upon which an action will lie in the court of claims, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case

32. **Writing.**—Where such a contract is not so executed, it cannot be sued upon if it has not been performed. *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518; *South Boston Iron Co. v. United States*, 118 U. S. 37, 42, 30 L. Ed. 69; *Monroe v. United States*, 184 U. S. 524, 46 L. Ed. 670; *St. Louis Hay, etc., Co. v. United States*, 191 U. S. 159, 163, 48 L. Ed. 130.

Where the papers relied on to show a contract in writing are nothing more in law or in fact than the preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law, which was never done, they are insufficient and the United States never became bound. *South Boston Iron Co. v. United States*, 118 U. S. 37, 42, 30 L. Ed. 69.

Proposal for carrying mails and acceptance.—See the title **POSTAL LAWS**, vol. 9, p. 567.

33. **Quantum meruit or valebat.**—*Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518. See the title **SHIPS AND SHIPPING**, vol. 10, p. 1173.

34. See *St. Louis Hay, etc., Co. v. United States*, 191 U. S. 159, 163, 48 L. Ed. 130.

35. **Power of officer to make.**—*Stansbury v. United States*, 8 Wall. 33, 36, 19 L. Ed. 315; *Hume v. United States*, 132 U. S. 406, 414, 33 L. Ed. 393; *Whiteside v. United States*, 93 U. S. 247, 257, 23 L. Ed. 882; *United States v. Barlow*, 132 U. S. 271, 33 L. Ed. 346.

The written promise of the secretary of the interior to pay for the value of services, is not a binding obligation on the government, where no authority of law existed for the promise. *Stansbury v. United States*, 8 Wall. 33, 36, 19 L. Ed. 315.

Notice of power of agent.—In order to

guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal. *Hume v. United States*, 132 U. S. 406, 414, 33 L. Ed. 393; *Whiteside v. United States*, 93 U. S. 247, 257, 23 L. Ed. 882; *United States v. Barlow*, 132 U. S. 271, 33 L. Ed. 346.

Contracts between army officers.—The only regulation forbidding contracts by one army officer or agent with another does not forbid a contract made by the secretary of war with an army officer, as the secretary of war, though the head of the war department, is not in the military services in the sense of the regulation, but, on the contrary, is a civil officer with civil duties to perform as much so as the head of any other of the executive departments. *United States v. Burns*, 12 Wall. 246, 251, 20 L. Ed. 388.

The army regulation forbidding contracts by officers and agents in the military service with another in such service, for furnishing supplies, etc., does not apply to contracts on behalf of the United States, which require for their validity the approval of the secretary of war. *United States v. Burns*, 12 Wall. 246, 251, 20 L. Ed. 388.

36. **Mutual assent—Privity of contract.**—There is no privity between the United States and the laborers employed by a contractor in the execution of his contract, which will sustain a claim against the United States for wages. The mode, manner and right of the contractor's

of money paid by mistake.³⁷ A promise on part of the United States to pay for services and for property taken for public use, or under military necessity, may be implied.³⁸

Property Taken for Public Use.—Where the government, in emergencies, takes private property to which it asserts no title into its use, a contract to reimburse the owner is implied—*aliter*, where it asserts title.³⁹ But the United States is not entitled to compensation for structures erected on land of private

compensation was a matter between him and the United States, and one with which the laborers have nothing to do. The laborers trust the contractor and if he fails to pay them the loss is theirs. *United States v. Driscoll*, 96 U. S. 421, 423, 24 L. Ed. 847.

Claimants against the United States did not expect during the period in which the services were performed, that the United States would compensate them; but they looked for recompense to the client who had retained them; and their use of the name of the United States in the litigation was consented to on their own application, and with the express understanding that they were to receive no compensation from the United States. It was held that the court of claims committed no error in dismissing the claimant's petition for compensation. *Coleman v. United States*, 152 U. S. 96, 99, 38 L. Ed. 368.

An officer of the United States, under authority of congress, made a contract with D. and S., by which they agreed to furnish bricks to the government. The contract contained a clause that D. and S. should not sublet or assign it. D. and S. having abandoned the contract, it was taken up, with the consent of the officer representing the government, by M. and A. the sureties of D. and S. to the government for its performance. M. and A. then entered into a contract with K., by which he undertook to perform the contract and to receive payment therefor from the United States at the contract price, and to pay over to M. and A. a certain percentage of the amount received, M. and A. constituting him, at the same time, their attorney to furnish the bricks and to receive payment. The government, desiring to abandon their enterprise, proposed to all parties respectively interested on account of their contract, etc., that if they would cancel it, the United States would settle with them "on the principles of justice and equity" all damages, etc., incurred by them. Held, that K. was not a party to, nor interested in the contract. He was not acting under a contract with the United States, and was recognized only as agent, attorney in fact, or employee of the sureties. *Kellogg v. United States*, 7 Wall. 361, 364, 19 L. Ed. 81.

37. Implied contracts.—*Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442.

No such implied contract with the United States arises with respect to moneys received into the treasury as the proceeds of property forfeited and sold under the confiscation act of July 17, 1862 (12 Stat. 589). *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442.

38. Services.—A promise on part of the United States to pay for services can only be implied when the court can see that they were rendered in such circumstances as authorized the party performing to entertain a reasonable expectation of their payment by the party benefited. *Coleman v. United States*, 152 U. S. 96, 99, 38 L. Ed. 368.

Where there is an express promise on part of the United States and an acceptance by the claimant of employment at an agreed compensation per annum, before either party had acted on the faith of a different understanding, there is no room for implying any other contract or usage. *Smithmeyer v. United States*, 147 U. S. 342, 359, 37 L. Ed. 196.

39. Property taken for public use.—*United States v. Russell*, 13 Wall. 623, 20 L. Ed. 474; *Salomon v. United States*, 19 Wall. 17, 22 L. Ed. 46; *Hijo v. United States*, 194 U. S. 315, 322, 48 L. Ed. 994; *United States v. Palmer*, 128 U. S. 262, 32 L. Ed. 442; *Coleman v. United States*, 152 U. S. 96, 99, 38 L. Ed. 368. See the title *COURTS*, vol. 4, p. 1029.

In *Salomon v. United States*, 19 Wall. 17, 22 L. Ed. 46, the property appropriated and used by the government was admitted to belong to the claimant and in *Clark v. United States*, 95 U. S. 539, 24 L. Ed. 518, the government was estopped by the circumstances under which it received the property from the claimant from raising any question as to his title. In each case, the United States were held liable, as upon implied contract, to make compensation to the owner. *Camp v. United States*, 113 U. S. 648, 654, 28 L. Ed. 1081.

When, without any express contract founded on advertisement or on military exigency, subsistence stores (hay) have been received into custody by army officers in frontier parts of the country, and subsequently, the use of them becoming necessary or convenient, have been in part used, in part destroyed through carelessness of the army subalterns, and in part become useless from natural causes, the original owner having left (but not with a purpose of abandoning)

parties, or annexed to their property, not by their request, but as a matter of military necessity.⁴⁰

6. **VALIDITY.—Contract with Army Officer.**—See ante, "Power of Officer to Make," VII, B.

C. Interpretation.—The ordinary rules for the interpretation of contracts are applied to contracts to which the United States is a party, that is, precisely as in cases between mere private persons, taking into consideration their nature and object; thus, contracts of the United States are always to be construed with a view to the real intention of the parties and a fair interpretation given.⁴¹ The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them.⁴²

D. Duration and Effect.—Where a public agent of the United States acts in the line of his duty, and by legal authority, his contracts made on account of the government are public and not personal. They enure to the benefit of, and

that part of the country, where, had he remained, its disturbed state would have prevented him taking care of the stores except in the government posts, the government is properly charged with the value of all the stores except of the part which had spoiled through natural causes; that is to say, is chargeable with that which it got benefit from or suffered to be carelessly destroyed. *United States v. Gill*, 20 Wall. 517, 22 L. Ed. 421.

But it is chargeable only at the value of the stores when they were received by it, and not with the value at the time when they were used, the value having risen between the two dates. *United States v. Gill*, 20 Wall. 517, 22 L. Ed. 421.

Use of property and services of owner.—The United States having, under a military emergency, taken into its service certain already officered and manned steamers of a citizen of the United States is bound to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crew during the period the steamboats were employed in the government service. *United States v. Russell*, 13 Wall. 623, 630, 20 L. Ed. 471.

40. *United States v. Pacific Railroad*, 120 U. S. 227, 240, 30 L. Ed. 634. So held as to a charge against a railroad company for the rebuilding of bridges by the United States, from military necessity.

41. *United States v. Utah*, etc., Stage Co., 199 U. S. 414, 423, 50 L. Ed. 251; *United States v. Gurney*, 4 Cranch 333, 343, 2 L. Ed. 638; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 611, 9 L. Ed. 773; *Gilbert v. United States*, 8 Wall. 358, 361, 19 L. Ed. 303; *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107; *United States v. Smith*, 94 U. S. 214, 217, 24 L. Ed. 115; *Manufacturing Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715. See, also, *Huidekoper v. Douglass*, 3 Cranch 1, 2 L. Ed. 347.

Appeals to the power of the government, its magnanimity, and generosity can properly be presented to congress alone and not to the court of claims. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107.

Contract between United States and state.—In interpreting contracts between the United States and a state the court must look at the character of the parties, the relations in which they stood to one another, as well as to the subject matter of the contract, and the object which the high contracting parties intended to attain; and must expound it upon principles of justice so as to accomplish the purposes for which it was made, and not defeat their manifest intention, by a narrow and literal interpretation of its words. *Neil v. Ohio*, 3 How. 720, 742, 11 L. Ed. 800; *Searight v. Stokes*, 3 How. 151, 167, 11 L. Ed. 537.

The contract should not be treated as one between individuals bargaining with each other with adverse interest, and the same strict and technical rules of construction that are appropriate to cases of that description should not be applied. *Searight v. Stokes*, 3 How. 151, 167, 11 L. Ed. 537; *Neil v. Ohio*, 3 How. 720, 742, 11 L. Ed. 800.

An amendment, not very clear in its terms, to an original government contract, the amendment having been suggested by one officer of the government, signed by another officer in behalf of the government, without being signed by the contractor on the other side; will be construed most strongly against the government, if a reasonable construction of the language of the amendment, which the officer who suggested it had acted upon as the right one, will be given. *Garrison v. United States*, 7 Wall. 688, 19 L. Ed. 277.

42. *United States v. Bostwick*, 94 U. S. 53, 66, 24 L. Ed. 65.

are obligatory on, the government; not the officer, although the contract be under his seal.⁴³

E. Performance, Discharge and Breach—1. **LIABILITY OF UNITED STATES FOR BREACH.**—The United States is liable to damages for a breach of contract, on the same principles and to the same extent as a private party, for which a suitable remedy is provided by law in jurisdiction conferred upon the court of claims.⁴⁴

2. **EFFECT OF ENTERING INTO NEW CONTRACT.**—A claimant who has executed a new contract with the United States government, in lieu of one with which the government unlawfully refused to comply, cannot recover the difference between the right of compensation prescribed in the former contract and that of the new one, on the ground that the last contract was executed under such circumstances as amount in law to duress.⁴⁵

Performance—Approval of Certificate.—See the title **WORKING CONTRACTS**. And see post, "Transportation Contracts," VII, I, 9.

F. Alteration, Modification and Repeal.—Contracts with the United States usually provide for "change or modification" upon the written consent or order of a designated officer, and no departure can be made from the condition of the contract in the absence of such consent or order.⁴⁶

Repeal of Contract.—The United States government, whatever power it may reserve over its own agreement, cannot impose new contracts upon those with whom it deals. It may, by a repeal of the contract, expressly stipulated, restore the previous state, and claim the bare rights it had before; but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the other party thereto and at the same time vary its own, unless it has reserved the right to do so in the contract itself.⁴⁷

G. Duration and Termination.—Where contracts with the United States are limited to a fixed period, the United States are neither bound to order nor the contractors to deliver after the end of that term.⁴⁸

H. Assignment.—Sections 3737 and 3477, Rev. Stat., forbid the assignment of contracts with the United States by the party to whom such contract was given.⁴⁹

43. Duration and effect.—Hodgson *v.* Dexter, 1 Cranch 345, 362; 2 L. Ed. 130. See the title **PUBLIC OFFICERS**, vol. 10, p. 363.

44. Liability of United States for breach.—Chicago, etc., *R. Co. v. United States*, 104 U. S. 680, 684, 26 L. Ed. 891.

45. Effect of entering into new contract.—Silliman *v. United States*, 101 U. S. 465, 25 L. Ed. 987.

46. Alteration, modification and repeal.—Although a contract for the construction of a dry dock for the United States provided that "change or modification" thereof can only be made upon written order of the bureau of yards and docks, the secretary of the navy has authority to direct or consent to a change in such contract since "the duties of the bureau of the navy department are performed under the control of the secretary of the navy. Their orders are considered as emanating from him and being of full force and effect as such. Section 420, Rev. Stat." *United States v. Barlow*, 184 U. S. 123, 136, 46 L. Ed. 463.

In *Hawkins v. United States*, 96 U. S. 689, 24 L. Ed. 607, it was held that an order for a change by an unauthorized

officer would not avail the contractor.

47. Repeal of contract.—Chicago, etc., *R. Co. v. United States*, 104 U. S. 680, 684, 26 L. Ed. 891.

48. Duration and termination.—Continental Bank Note Co. *v. United States*, 154 U. S. 671, 26 L. Ed. 997.

49. Assignment.—St. Paul, etc., *R. Co. v. United States*, 112 U. S. 733, 736, 28 L. Ed. 861; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Burck v. Taylor*, 152 U. S. 634, 38 L. Ed. 578; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229. See post, "Assignment," VIII, C, 5.

Purpose.—The sections under consideration were passed for the protection of the government. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Hobbs v. McLean*, 117 U. S. 567, 576, 29 L. Ed. 940; *Burck v. Taylor*, 152 U. S. 634, 648, 38 L. Ed. 578.

A voluntary transfer, by way of mortgage, for the security of a debt finally completed and made absolute by a judicial sale, of a contract to carry the mail, is forbidden by § 3737, U. S. Rev. Stat. *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 737, 28 L. Ed. 861.

A partnership contract for the purpose

Recognition by United States.—Where the assignment is recognized by the government, the parties to the agreement and those claiming under them are precluded from insisting that the contract was not assignable.⁵⁰

I. Particular Contracts—1. **CHARTER PARTY.**—See the title SHIPS AND SHIPPING, vol. 10, pp. 1162, 1173.

Vessel Chartered under Contract of Conditional Sale.—See the title SHIPS AND SHIPPING, vol. 10, p. 1162.

2. **GUARANTY.**—See the titles WARRANTY; WORKING CONTRACTS.

3. **INSURANCE.**—As to liability of United States for premiums, see note.⁵¹

4. **LEASE OR RENTAL.**—**Approval.**—A lease of premises for the use of the quartermaster's department, or any branch of it, is not binding upon the government until approved by the quartermaster general.⁵²

Recognition by Appropriation.—An appropriation for two years of the term is not such a recognition by congress of the validity of a lease as binds the United States to pay a stipulated rent for the third year of the term.⁵³

Limitation of Recovery to Amount of Appropriation.—A lessor who leased premises to the government by a lease containing a clause providing that the rent should not be paid until an appropriation for its payment was made by congress, cannot recover for rent in excess of the appropriation. The parties to the indenture, by their expressed understanding and agreement, intended to incorporate into the instrument the substance of the act of congress which pro-

of carrying out an expected contract with the United States, is not invalid by reason of §§ 3737 and 3477. *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940, citing *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988 and *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 28 L. Ed. 861, in reference to which it is said, that in none of them is any opinion expressed in conflict with the views announced in this case. See, also, *Burck v. Taylor*, 152 U. S. 634, 648, 38 L. Ed. 578.

Assignment of lease.—Section 3737, U. S. Rev. Stat., does not embrace the assignment of a lease of real estate and the rent accruing therefrom, in which the United States is the lessee and under which the lessor is not required to perform any services for the government, and has nothing to do, in respect to the lease, except to receive from time to time the rent agreed to be paid. The assignment of such a lease is not within the mischief which congress intended to prevent. *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 491, 505, 32 L. Ed. 163.

Assignment of patent and profits therefrom.—**Effect of disloyalty of assignor.**—The right of an assignee of one-half of a patent and "the one-half interest in all the benefits and net profits arising from and belonging to the invention," for the use of which the secretary of war had made a contract on behalf of the United States; to recover his moiety in the court of claims, is not affected by the act of March 3, 1863, although the origi-

nal contractor is barred from recovery by his disloyalty. *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388. See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 7.

Assignment of claims against United States.—See post, "Assignment," VIII, C, 5.

Transfer of working contract.—An agreement between a contractor and a third person cannot affect a contract with the United States to erect a certain house, such contracts not being transferable. *Prairie State Bank v. United States*, 164 U. S. 227, 231, 41 L. Ed. 412.

50. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

51. A contract for granite in which the United States agreed to pay the full cost of the "labor, tools and materials, and insurance on the same, increased by fifteen per centum thereof," only binds the United States to pay for insurance in fact effected. The United States have not agreed to obtain insurance. *Tillson v. United States*, 129 U. S. 101, 102, 32 L. Ed. 636.

52. **Approval.**—*Filor v. United States*, 9 Wall. 45, 48, 19 L. Ed. 549; *United States v. Winchester, etc., R. Co.*, 163 U. S. 244, 253, 41 L. Ed. 145.

The unauthorized acts of the officers in making such unapproved lease and using the property cannot estop the government from insisting upon their invalidity, however beneficial they may have proved to the United States. *Filor v. United States*, 9 Wall. 45, 46, 19 L. Ed. 549.

53. **Recognition by appropriation.**—*Bradley v. United States*, 98 U. S. 104, 25 L. Ed. 105.

hibits any department from, "involving the government in any contract for the future payment of money in excess of the appropriations."⁵⁴

Assignment.—See ante, "Assignment," VII, H.

5. **MECHANICS' LIENS.**—As against the United States, no lien can be provided upon its public buildings or grounds.⁵⁵

6. **NEGOTIABLE PAPER.**—When the United States becomes a party to commercial paper, they are bound by the same rules in determining their rights and liabilities as individuals under the same circumstances.⁵⁶

7. **SALES**—a. *Sales by the United States.*—See references in notes.⁵⁷

b. *Sales to United States*—(1) *Construction.*—See references in note.⁵⁸

(2) *Supplies for Departments*—(a) *Power to Contract and Validity.*—The war department, by its proper officers, may make a valid contract for the slaughtering, curing, and packing of pork, when that is the most expedient mode of securing army supplies of that kind.⁵⁹

(b) *Mutuality.*—See the titles **CONTRACTS**, vol. 4, p. 563; **DAMAGES**, vol. 5, p. 172.

(c) *Advertisement for Proposals.*—Under a statute requiring contracts for supplies or services in any of the departments of the government, except, etc., to be advertised, but authorizing the officer in charge of the matter to dispense with advertising, when the exigencies of the service require it; the validity of a contract, under such circumstances, does not depend upon the degree of skill or wisdom with which the discretion thus conferred is exercised.⁶⁰

(d) *Approval.*—Approval of contracts for departmental supplies, by some officer of the department, is, in many cases, essential to their validity.⁶¹

54. Limitation of recovery to amount of appropriation.—Bradley v. United States, 98 U. S. 104, 25 L. Ed. 105.

Where congress made an appropriation of \$1,800 for the rent for the year ending June 5, 1873, with a proviso "that the above sum shall not be deemed to be paid on account of any lease for years of said building; provided, however, that at the end of the present fiscal year the postmaster general be directed upon the demand of the lessor, to deliver up the possession of the said premises;" the lessor by the said proviso had seasonable notice that no more than \$1,800 would be paid to him as rent for the third year, and he, not having demanded the possession of the premises, must be held to have assented to the terms offered by said act. Bradley v. United States, 98 U. S. 104, 25 L. Ed. 105.

55. Mechanics' liens.—Hill v. American Surety Co., 200 U. S. 197, 203, 50 L. Ed. 436.

The act of August 13, 1894, 28 Stat. 278 was passed for the protection of persons furnishing material and labor for the construction of public works for the United States. Hill v. American Surety Co., 200 U. S. 197, 50 L. Ed. 436.

56. Negotiable paper.—The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169; Cooke v. United States, 91 U. S. 389, 396, 23 L. Ed. 237; United States v. State Bank, 96 U. S. 30, 36, 24 L. Ed. 647; Dean v. Nelson, 10 Wall. 158, 19 L. Ed. 926, case of a check drawn on a public depository, by an officer of the government in favor of a public creditor. United States v. Bank, 15 Pet. 277, 392, 10 L.

Ed. 774; United States v. United States Bank, 5 How. 382, 405, 12 L. Ed. 199. See the titles **BILLS**, **NOTES** AND **CHECKS**, vol. 3, pp. 269, 307; **MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES**, vol. 8, p. 775; **SET-OFF, RECOUPMENT AND COUNTERCLAIM**, vol. 10, p. 1127.

57. Sale of old material by navy department.—See ante, "Sales of Personality," V, C, 1.

Sale of hides from cattle slaughtered for Indians.—See ante, "Sales of Personality," V, C, 1.

58. Quantity to be delivered—Words "more or less."—See the title **SALES**, vol. 10, p. 1031.

Contract to furnish building stone.—See post, "Purchase of Building Stone," VII, I, 7, b, (3). See the title **WORKING CONTRACTS**.

59. Power to contract and validity.—United States v. Speed, 8 Wall. 77, 19 L. Ed. 449.

60. Advertisement for proposals.—United States v. Speed, 8 Wall. 77, 19 L. Ed. 449.

61. Approval.—A contract made by a surgeon and medical purveyor of a military department of the United States, with parties for furnishing ice, for the use of the sick and wounded in the hospitals of the United States in 1864, was invalid until approved by the secretary of war. Without such approval the surgeon could not bind the United States in any way. Parish v. United States, 8 Wall. 489, 19 L. Ed. 472.

Merger.—A contract thus approved being executed by the other parties, super-

(e) *Inspection*.—The government may at any time prescribe and enforce proper and reasonable regulations for the inspection of property offered for sale to any of its departments.⁶²

Delay in Making Inspection.—Where a delay by the government in making an inspection of supplies, agreed to be made at the place of shipping instead of at the place of delivery, is not the proximate cause of a loss of the supplies afterwards suffered, the loss must be borne by the party in whom the title to the supplies is vested; and, if still in the contractor, by him.⁶³ This rule applies even where supplies have been seized by the public enemy without any default of the owner.⁶⁴

Place.—Where a contract with the government to furnish to it supplies does not stipulate for an inspection at a place earlier than the place of delivery, it is optional with the contractor whether he will have the goods inspected at such earlier place.⁶⁵

As Passing Title.—An “inspection” at the place of shipping instead of at the place of delivery, by the officers of the United States, of supplies which a contractor has agreed to deliver at a distant point, does not pass the property to the United States so as to relieve the contractor from his obligation to deliver at such distant point.⁶⁶

(f) *Delivery*.—The time and place of delivery are usually governed by express provisions in the contract.⁶⁷

seded a previous contract signed by the surgeon, although the latter conformed strictly to proposals made by the parties, and accepted by the surgeon. *Parish v. United States*, 8 Wall. 489, 19 L. Ed. 472.

A letter of the commissary general expressing his satisfaction that the progress made with the contract is a virtual approval of the contract. *United States v. Speed*, 8 Wall. 77, 84, 19 L. Ed. 449.

62. Inspection.—*United States v. Wormer*, 13 Wall. 25, 20 L. Ed. 530; *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107.

New regulation for inspection of cavalry horses.—The adoption by the bureau of cavalry of new regulations for the inspection of horses tendered does not render it impossible for the contractor to purchase and deliver the number of horses which he had agreed to deliver. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107.

Nor did the adoption of those rules, after the contract was made, authorize the contractor to abandon his contract and sue for the profits which he might have made, though he neither bought, nor delivered, nor tendered any horses, as he had agreed to do. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107.

Such new rules did not disable the government from receiving and paying for the horses, nor was it a notification that the government would not have them. *Smoot's Case*, 15 Wall. 36, 21 L. Ed. 107. See, also, the title *SALES*, vol. 10, p. 1044.

The United States contracted with a dealer in horses for a large number of calvary horses; he to be paid on the completion of the contract, should congress make an appropriation for that

purpose. After the contract had been made, the government issued instructions which were better calculated to protect it against frauds than previous ones had been; and among the regulations was one that the horses should be placed in the inspection yard twenty-four hours before inspecting them, and another that the person appointed as inspector should brand with the letter R, on the shoulder, all horses “manifestly intended as a fraud on the government, because of incurable disease or any purposely concealed defect.” It was held that the new regulations were not unreasonable. If the contractor chose, under these circumstances, to abandon his contract, he must be content to suffer any incidental damage which he may have incurred in making preparations for its performance. It was a damage voluntarily sustained, and the maxim, *volenti non fit injuria*, applies to the case. *United States v. Wormer*, 13 Wall. 25, 20 L. Ed. 530.

63. Delay in making inspection.—*Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194.

64. *Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194.

65. Place.—*Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194.

66. As passing title.—*Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194.

67. Place of delivery.—The United States contracted to take the fresh beef needed at posts and camps “situated in the interior of the island.” In advertisement for proposals, pursuant to which the contract was made “posts remote from the sea coast” and “posts and camps in the interior of the island” were used as meaning the same thing. It was held that a camp, six or eight miles from

(g) *Price*.—Contracts for department supplies usually fix or prescribe a mode of fixing the price.⁶⁸

Where Vendor Waives Breach.—When a vendor who has been absolved from a contract with the United States to deliver certain property by the refusal of the proper officer to receive the articles when tendered, afterwards consents to deliver them under a threat of the officer that he will withhold money justly due to the vendor, he can only recover the contract price, whatever may have been the current market value of the articles.⁶⁹

Havana and about two and one-half miles from the beach of Marianao and connected with both points by rail, is not situated in the interior of the island within the meaning of the contract. *Simpson v. United States*, 199 U. S. 397, 398, 50 L. Ed. 345.

A prior conversation between a contractor and the commissary general in which that officer stated that it was the purpose and intent of the department to cover the entire beef supply for the Island of Cuba by two contracts, one for refrigerator beef delivered at points on the sea coast, the other for fresh beef needed for army posts or camps in the interior of Cuba cannot extend a written contract of the United States to take the fresh beef for camps in the interior, to cover the entire island when it is impossible to furnish refrigerator beef. *Simpson v. United States*, 199 U. S. 397, 398, 50 L. Ed. 345.

Verbal agreement to extend time of performance.—The act of June, 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid. *Salomon v. United States*, 19 Wall. 17, 22 L. Ed. 46.

When, under a written contract, made by a person to deliver such supplies as, ex gr., corn at one time fixed, the quartermaster in charge receives part of the corn from such person for the government, and then at a later date, no objection being made to the delay receives the rest, and gives a receipt and voucher for the amount and the price, and the government uses such part of it as it wants, and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher by the quartermaster. *Salomon v. United States*, 19 Wall. 17, 22 L. Ed. 46.

Extension of time implied from subsequent request to make alterations which necessarily requires time.—See *Manufacturing Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715.

Excuses for nondelivery or delay.—See the title SALES, vol. 10, p. 1044.

68. Price.—Where, in a contract with the secretary of war, for supplying the

troops of the United States with provisions, specific prices are stipulated for rations issued at certain places mentioned in the contract; and it is further provided, that "should any rations be required, at any places, not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor;" the contract must necessarily be presumed to refer to the actual state of things, at the time of its inception, inasmuch as there is nothing in it which shows that the parties had in contemplation any prospective changes; if the parties cannot agree upon the price for the rations thus required, a reasonable compensation is to be allowed, and is to be proved by competent evidence, and settled by a jury; and the contractor, upon the trial, is at liberty to show, that the sum allowed by the secretary of war is not a reasonable compensation. *United States v. Wilkins*, 6 Wheat. 135, 5 L. Ed. 225.

Contract containing clerical error.—A plaintiff in the court of claims alleged that he contracted in writing to furnish shucks to the government hospital at the rate of 60c per pound. He delivered them and they were consumed in the government service. Evidence on behalf of the United States established that shucks at the time of the contract were worth from three-fifths of a cent to one and three-fourths cents per pound; and that it was the custom of the government to buy shucks by the hundred weight. The government contended that the rate of 60c per pound mentioned in the contract was a clerical error, the real contract being that they were to be furnished at 60c per hundred weight but the claimant insisted that the price of 60c per pound was the price at which he intended to bid and being refused payment at the contract price, he sued therefor in a court of claims. It was held that he could not recover more than the market value of the shucks. *Hume v. United States*, 132 U. S. 406, 33 L. Ed. 393.

It makes no difference so far as the claimant is concerned, that such mistake was the result of the negligence or mistake of the government's agents, untainted by moral turpitude on their part. *Hume v. United States*, 132 U. S. 406, 414, 33 L. Ed. 393.

69. Where vendor waives breach.—*Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453.

(h) *Termination or Revocation*.—The government ordinarily reserves the right to terminate or revoke a contract for supplies for any department;⁷⁰ but such provision is not essential.⁷¹

(i) *Breach*.—A claimant who delivered part of the property and tendered the remainder to the proper officer who refused to receive it, is entitled to recover for any loss suffered by such refusal.⁷²

Profits.—See the title DAMAGES, vol. 5, pp. 182, 184.

Where Government's Interference Prevents Performance.—See the title CONTRACTS, vol. 4, p. 587, note 34.

Waiver of Breach by Vendor.—See ante, "Price," VII, I, 7, b, (2), (g).

(3) *Purchase of Building Stone*.—See note.⁷³

8. SERVICES, CONTRACTS FOR.—See ante, "Implied Contracts," VII, B, 5; "Power to Contract and Validity," VII, I, 7, b, (2), (a).

Fear that the quartermaster might buy the supplies in the market and hold back the difference in price from the money due for supplies already delivered, does not invalidate the contract which the contractor consented to fulfill after the expiration to avoid that result. *Gibbons v. United States*, 8 Wall. 269, 274, 19 L. Ed. 453.

70. **Termination or revocation**.—A commissioner of the internal revenue contracted for distillers' meters for the United States government, reserving the right at any time to revoke his order adopting the meter, and, on the part of the government, direct the discontinuance of its manufacture. On June 8, 1870, the commissioner revoked his previous order, except as to meters then on hand or in process of construction not exceeding twenty sets; and the manufacturer was informed that neither the government nor any department officer thereof was or would be responsible for or on account of any meters. The use of the meters was entirely discontinued June 8, 1871, at which time the manufacturer had 14½ sets on hand for the value of which he brought suit. It was held that the United States was not liable to pay for the meters after June 8, 1871. *Tice v. United States*, 99 U. S. 286, 25 L. Ed. 352.

In *St. Louis Hay, etc., Co. v. United States*, 191 U. S. 159, 48 L. Ed. 130, it was held that under the provisions of the contract in question respecting the reduction or suspension of orders for hay under the claimant's award, there was no breach of the contract, although the price of hay was much greater during the latter than the earlier part of the period within which hay was accepted under the award.

71. A contract for butchering and curing meat for the army, when for a definite amount of such work, is valid, though it contains no provision for its termination by the commissary general at his option. *United States v. Speed*, 8 Wall. 77, 19 L. Ed. 449.

72. **Breach**.—*Gibbons v. United States*, 8 Wall. 269, 272, 19 L. Ed. 453.

Where the government makes a con-

tract with an individual that he shall furnish all supplies needed at a certain post, and afterwards rescinds the contract, the individual cannot recover from the government for a breach of the contract unless he prove that supplies were needed at the post designated, after the rescinding order was made, and also the pecuniary loss he sustained in not being allowed to furnish them. *Grant v. United States*, 7 Wall. 331, 19 L. Ed. 194.

Expenditure towards performance.—See the title DAMAGES, vol. 5, pp. 172, 173.

Loss due to failure to furnish military protection—Profits.—Under a contract to sell and deliver hay in the Indian Territory, the United States to furnish guards and escorts to protect the contractor while engaged in the fulfillment of his contract, the obligation of the United States was not that of insurer against any loss the carrier might sustain from hostile forces, but to protect his person and property while engaged in the effort to perform his contract; and the United States are responsible for the full value of the property actually lost by him for want of it. But not for loss of speculative profits on grass that was never cut and hay that was never made or delivered or owned by the contractor and for work that was never done. *United States v. McKee*, 97 U. S. 233, 24 L. Ed. 911. See the title DAMAGES, vol. 5, p. 182.

In a case brought to recover such profits, the United States set up as a counterclaim the amount paid him for the loss of the hay and his other personal property. The court of claims gave judgment for the claimant, allowing in part the counterclaim. Both parties appealed. Held: 1. That the contract was for the sale and delivery of hay, and not for cutting and hauling grass. 2. That A was entitled to the full value of the property actually lost by him, and having been paid therefor, his petition and the counterclaim should be dismissed. *United States v. McKee*, 97 U. S. 233, 24 L. Ed. 911.

73. **Purchase of building stone**.—A contract for granite by which the United

9. **TRANSPORTATION CONTRACTS.**—The construction, operation and effect of contracts to transport government stores, supplies, troops, etc., and the liability of a breach thereof, with respect to the points of departure and delivery;⁷⁴ the freight to be furnished;⁷⁵ the compensation of the contractor and mode of as-

States assumed "damages to cutting on said stone while being transported," looks only to injuries to the smooth surface or the sharp edges of the cut granite in the course of transportation, and not to a loss, by a peril of the sea, of the granite with its cutting uninjured. Such a loss, as well as any expenses incurred in recovering the granite, falls upon the contractors by virtue of their agreement to deliver the granite. *Tillson v. United States*, 129 U. S. 101, 104, 52 L. Ed. 636.

A contract with the United States to deliver granite stipulated to pay "the sum of 65c per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet in each stone and 1c additional for every cubic foot of those having such dimensions exceeding twenty cubic feet." It was held that for stones whose dimensions do not exceed twenty cubic feet the contractor is entitled to payment at the rate of 65c a cubic foot; but for those whose dimensions exceed twenty cubic feet he is entitled for each cubic foot 65c, and 1c additional per cubic foot for every cubic foot. *United States v. Granite Co.*, 105 U. S. 37, 38, 26 L. Ed. 1005.

74. **Terms "posts, depots and stations."**—In a contract made for the transportation of military supplies and stores in the western country, and in the presence of actual war between the military department of the government and a private party, the terms "posts, depots, and stations" are to be taken in their military sense, and not in the sense of railway posts, depots, and stations. *Caldwell's Case*, 19 Wall. 264, 22 L. Ed. 114; *Black v. United States*, 91 U. S. 267, 269, 23 L. Ed. 324.

In such case a claim of the right of transporting supplies from railroad stations within the district which were not at the same time military posts, stations, or depots cannot be sustained. *Caldwell's Case*, 19 Wall. 264, 22 L. Ed. 114; *Black v. United States*, 91 U. S. 267, 269, 23 L. Ed. 324.

A military post or depot is not a point from which transportation of military stores was to be made, within the terms of such contract when it is not named, while other stations were particularly specified. *Caldwell's Case*, 19 Wall. 264, 269, 22 L. Ed. 114.

The specification of the points of departure, minutely described in an article of a contract for the transportation of military supplies, cannot be enlarged by the use of looser language in a following article, where another subject is provided for, and the points of departure men-

tioned in an incidental manner only. *Caldwell's Case*, 19 Wall. 264, 269, 22 L. Ed. 114.

When such a contract speaks of military posts or depots on the west bank of a river, posts, one of which is 92 miles west of the river, and another 132 miles, and a third 191 miles, cannot be considered as within the designation. *Caldwell's Case*, 19 Wall. 264, 22 L. Ed. 114.

A military post situated on the west bank of the Missouri River and which was a station or depot where military stores and supplies were collected and where troops were assembled at the time a contract for the transportation of military supplies was made; is not a point within the terms "at such points or places at which posts or depots shall be established during the continuance of this contract, on the west bank of the Missouri River." *Caldwell's Case*, 19 Wall. 264, 269, 22 L. Ed. 114.

75. A contractor who agrees with the quartermaster to furnish transportation to certain Indian posts for all supplies, etc., offered to him by the officers of the quartermaster's department, is not entitled to claim compensation for Indian supplies, never in the charge of the quartermaster's department for transportation, which were transported between places named in his contract, by another person under a contract with the commissioner of Indian affairs; although during the same time some Indian supplies are delivered by the commissioner of Indian affairs to the quartermaster's department, and by that department turned over to the claimant for transportation at the rate specified in his contract. *Hazlett v. United States*, 115 U. S. 291, 29 L. Ed. 382.

A quartermaster contracted with A to deliver to him for transportation all the corn his department required to be transported from Fort Leavenworth to Fort Union. The commissary of subsistence at Fort Leavenworth made a contract with B. and C. to deliver a quantity of corn at Fort Union. It was held, that the making of the second contract was no infringement of the first. Held, further, that the fact that B. and C. had borrowed from the quartermaster at Fort Leavenworth some of the corn which they delivered at Fort Union, under their contract (they having afterwards repaid it in kind), did not show that the government in making the second contract meant to evade its obligations under the first. *Shrewsbury v. United States*, 18 Wall. 664, 21 L. Ed. 850.

certaining same,⁷⁶ and damages for breach,⁷⁷ are governed by the rules of law applicable to contracts generally. Such contracts may provide for an inspection, report of causes of loss and estimate of the loss.⁷⁸

10. **VESSELS OF WAR, CONSTRUCTION, ARMAMENT OR EQUIPMENT.**—Where the secretary of the navy possesses the power, under the legislation of congress and the orders of the president, to enter into contracts for work connected with the construction, armament, or equipment of vessels of war, he can suspend the work contracted for when from any cause the public interest may so require; and, where such suspension is ordered, he is authorized to settle with the contractor upon the compensation to be paid for the partial performance of the contracts.⁷⁹

Ownership of Materials.—See the title **WORKING CONTRACTS**.

Matter Included by Release of Claims against United States upon Payment of Reserve Fund.—See the title **RELEASE**, vol. 10, p. 635, note 6.

11. **WARRANTY OF CHARACTER OF DOCK SITE.**—See the title **WORKING CONTRACTS**.

76. **Compensation.**—Where a contract with the United States for transportation of troops provided a certain mode by which the amount to be paid shall be ascertained, i. e., upon the certificate of the commanding officer, it is improper to receive other evidence to establish the claim unless proof is made that the commanding officer upon application for the proper certificates had refused to give them. *United States v. Robeson*, 9 Pet. 319, 326, 9 L. Ed. 142.

Where a contract for the transportation of government stores between certain points provided that the distance should be "ascertained and fixed by the chief quartermaster," the action of the chief quartermaster in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment, is conclusive. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg, etc., Ry. Co. v. March*, 114 U. S. 549, 550, 29 L. Ed. 255. See, also, *Sweeney v. United States*, 109 U. S. 618, 27 L. Ed. 1053; *United States v. Gleason*, 175 U. S. 588, 605, 44 L. Ed. 284. And see the title **WORKING CONTRACTS**.

Where a contract for the transportation of government stores provided that payment should be made for the full quantity of stores delivered, the compensation for transportation is not according to the number of pounds received for transportation, in all cases where the loss in weight, occurring during transportation, was without neglect upon the part of the carrier, but only for the number of pounds actually delivered by him. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106.

77. **Damages—Recovery of expenditures needlessly thrown upon contractor.**

—See the title **DAMAGES**, vol. 5, p. 184.
Profits.—See the title **DAMAGES**, vol. 5, p. 184.

78. A contract entered into between the government and a transporter of military stores provided that a board of survey should, on the arrival of the stores at their place of delivery, examine the quantity and condition of the stores transported, and "in case of loss, deficiency, or damage, investigate the facts and report the apparent causes, assess the amount of loss and injury, and state whether it was attributable to neglect or want of care on the part of the contractor or to causes beyond his control," a copy of which "shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made." Held, that a report which did not report investigation of facts and the apparent causes, nor state whether the loss was attributable to neglect or the want of care on the part of the contractor or to causes beyond his control, but which merely on its face found the deficiency and charged it accordingly would be supported; the contractor not having at the time objected either as to the form or the substance of the report, when it was made; and objecting only when he came and got his money; when witnesses were scattered and gone, and most of them difficult if not impossible to be found; and then notifying to the quartermaster nothing more definite than that he, the contractor, would claim a readjustment and full damages. *United States v. Shrewsbury*, 23 Wall. 508, 23 L. Ed. 78.

79. **Vessels of war, construction, amount or equipment.**—*United States v. Corliss Steam Engine Co.*, 91 U. S. 321, 23 L. Ed. 397.

When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it is equally binding upon the government and the contractor. *United States v. Corliss Steam Engine Co.*, 91 U. S. 321, 23 L. Ed. 397.

12. **WORKING CONTRACTS.**—As to working contracts to which United States is a party, see cross references in note.⁸⁰

J. Remedies.—In all cases of contract with the United States, they must have a right to enforce the performance of such contract, or to recover damages for their violation, by actions in their own name, unless a different mode of suit be prescribed by law.⁸¹

Contracts for Secret Service, or Involving Government Secrets.—See the title **COURTS**, vol. 4, p. 1024.

VIII. Claims.

A. Definition.—A claim is, in a judicial sense, a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time, an equally expressive, definition is "a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."⁸²

B. Claims by the United States—1. **INTEREST.**—By Rev. Stat., § 966, interest must be allowed to the United States, against claimants, under all circumstances to which that section applies, without regard to equities which might be considered between private parties.⁸³ Where the United States has long delayed an assertion of its rights, or prosecution of its claim without showing some reason or excuse for the delay, interest, recoverable not as a part of the contract, but by way of damages, may be properly withheld.⁸⁴

2. **WAIVER.**—Where the secretary of the treasury was authorized to deduct from the sum payable to a debtor to the United States a sum due to the United States, and he paid the debtor's assignee the whole sum, omitting to make the deduction of a debt due to the United States, the omission to exercise his authority to deduct from the sum payable to a debtor of the United States cannot bar the claim of the government.⁸⁵

C. Claims against the United States—1. **DEFINITION.**—A claim against the United States is a right to demand money from the United States.⁸⁶

2. **EXISTENCE AND LEGALITY**—a. *Claims Arising Out of Contract or under Statutes*—(1) *In General.*—This subject is treated elsewhere.⁸⁷

(2) *Claims by States.*—Interest paid to the canal fund by the state of New York on moneys borrowed for the purpose of raising and equipping troops for the national defense, and which could only be lawfully borrowed upon payment

80. Working contracts.—As to formation, construction, performance, or breach of working contracts to United States a party and actions thereon, see the title **WORKING CONTRACTS**.

Approval, inspection and certificate of performance.—See the title **WORKING CONTRACTS**.

Compensation and damages.—See the title **WORKING CONTRACTS**.

Partial performance.—See the title **WORKING CONTRACTS**. And see ante, "Vessels of War, Construction, Armament or Equipment," VII, I, 10.

Suspension of work.—See ante, "Vessels of War, Construction, Armament or Equipment," VII, I, 10.

Remission of penalty for delay.—See the title **WORKING CONTRACTS**.

Transfer.—See ante, "Assignment," VII, H.

81. Remedies.—*Dugan v. United States*, 3 Wheat. 172, 181, 4 L. Ed. 362. See, to the same effect, *United States v. Tingey*,

5 Pet. 115, 128, 8 L. Ed. 66; *United States v. Bradley*, 10 Pet. 343, 360, 9 L. Ed. 448.

82. Definitions.—*Prigg v. Pennsylvania*, 16 Pet. 539, 615, 10 L. Ed. 1060.

83. Interest.—*United States v. Verdier*, 164 U. S. 213, 41 L. Ed. 407.

84. United States v. Sanborn, 135 U. S. 271, 281, 34 L. Ed. 112, citing *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 28 L. Ed. 109, a case in which the United States was guilty of unreasonable delay to sue to recover back money.

85. Waiver.—*Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86. See the title **PUBLIC OFFICERS**, vol. 10, p. 363.

86. Definition.—*Hobbs v. McLean*, 117 U. S. 567, 575, 29 L. Ed. 940.

87. Generally, as to form, requisites and validity of contracts with the United States, see ante, "Contracts," VII.

Unauthorized contracts.—See the title **COURTS**, vol. 4, p. 1025.

Where such contract made by Indian

of interest thereon, is part of the expenses to be repaid by the United States under the act declaring that the states shall be indemnified by the general government for money so expended.⁸⁸

(3) *War Claims*.—(a) *In General*.—A claim “growing out of” the appropriation of property by the army engaged in the suppression of the rebellion, is a “war claim” within the meaning of the act of March 3, 1887.⁸⁹

(b) *Claims for Property Lost or Destroyed in Military Service*.—A capture of property by a band of hostile Indians is not necessarily a capture made “by an enemy,” within the meaning of the statute of March 3, 1849, providing “for the payment of horses and other property lost or destroyed in the military service of the United States.”⁹⁰

(4) *Claims for Abandoned or Captured Property*.—See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1.

(5) *Indian Depredation*.—See the title COURTS, vol. 4, p. 1036, et seq. Section 5 of the act of congress of 1891, providing that the court of claims shall determine in each case the value of the property taken or destroyed, etc., gives jurisdiction in case of Indian depredation but does not determine the rule of liability but only the duty of the court when the liability has been established.⁹¹

(6) *Claims by Indians*.—See the title INDIANS, vol. 6, p. 956.

(7) *Claim on Defective Loan Certificate*.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 775.

(8) *Claim for Recovery Back of Payment*.—The law of voluntary and compulsory payment is applicable to the case of a payment by an official to the United States government.⁹²

b. *Claims Arising from Torts*.—**Claims for Money or Property Obtained by Fraud**.—See ante, “Funds or Property of Innocent Person Obtained by Fraud,” V. B. 3.

Tort of Officers or Agents.—See the title PUBLIC OFFICERS, vol. 10, p. 432.

c. *Recognition by Congress*.—(1) *Empowering Court to Determine Validity or Invalidity*.—See the title COURTS, vol. 4, pp. 1026, 1036. An act of congress providing for the presentation of a claim to the court of claims and for a decision on the merits, does not of itself entitle the claimant to judgment against the United States in any sum. Such act neither recognizes the claim as a valid

agent, see the titles COURTS, vol. 4, p. 1025, note 65; INDIANS, vol. 6, p. 959.

88. **Claims by a state**.—United States v. New York, 160 U. S. 598, 619, 40 L. Ed. 551.

89. United States v. Winchester, etc., R. Co., 163 U. S. 244, 257, 41 L. Ed. 145. See the title COURTS, vol. 4, p. 1126.

90. **Claims for property lost or destroyed in military service**.—Stuart v. United States, 18 Wall. 84, 87, 21 L. Ed. 816. See, also, the title WAR.

91. Leighton v. United States, 161 U. S. 291, 293, 40 L. Ed. 703.

92. **Claims for recovery back of payments**.—United States v. Wilson, 168 U. S. 273, 276, 42 L. Ed. 464, distinguishing United States v. Mosby, 133 U. S. 273, 33 L. Ed. 625, and following and approving United States v. Lawson, 101 U. S. 164, 25 L. Ed. 860; United States v. Ellsworth, 101 U. S. 170, 25 L. Ed. 862 and Swift Co. v. United States, 111 U. S. 22, 28 L. Ed. 341; United States v. Edmondston, 181 U. S. 500, 510, 45 L. Ed. 971. See the title PAYMENT, vol. 9, p. 344.

In United States v. Lawson, 101 U. S. 164, 25 L. Ed. 860, and United States v.

Ellsworth, 101 U. S. 170, 25 L. Ed. 862, it appeared that a collector had received certain fees, some of which he was entitled to retain, but all of which he paid into the United States treasury upon the peremptory order of the commissioner of customs. This was held not to be a voluntary payment or sufficient to prevent a recovery of the moneys actually due him. United States v. Edmondston, 181 U. S. 500, 509, 45 L. Ed. 971.

A special agent of the treasury department for the collection of cotton, who was convicted of defrauding the United States, and sentenced to pay a fine. He paid the same and was then released. After his release he admitted that there was a larger sum due from him to the government than the fine and thereby secured a credit upon his account for the amount so paid, and accepted as compensation for his services, or as a gratuity, a portion of the balance justly due from him. It was held that such agent is estopped from questioning the legality of the collection of what he should have paid without prosecution or suit by the government. It was also held that he

one nor undertakes to pass upon its validity but empowers the court of claims to hear and determine whether the claim is valid or invalid.⁹³

(2) *Appropriating Less Amount than Reported Due.*—The fact that congress appropriated an amount less than that reported by the quartermaster general as the amount proper to be paid a claimant, does not amount to an adoption by congress of the report or recognition of a larger amount, as due.⁹⁴

(3) *Payment to Third Person.*—The fact that payment was made to a third person to avoid a controversy with the United States, furnishes a claimant no ground of recovery from the United States.⁹⁵

3. AUDITING OR ACCOUNTING—*a. Accounting Officers.*—The phrase “**accounting officers**” is a phrase well known as referring to the auditors and controllers of the treasury, who pass upon all claims against the government before they can be paid out of the public treasury.⁹⁶

b. Construction of Statutes.—Constructions of statutes, in relation to the accounts of individuals with the United States, made by the accounting officers of the treasury, especially when so long continued as to become a rule of departmental practice, are entitled to great consideration, and will in general be adopted by the federal supreme court.¹

c. Presentation and Allowance—(1) *Necessity.*—All claims paid out of the treasury of the United States must be audited by one of its officers and approved by one of its comptrollers.²

(2) *Necessity for Final Determination by Auditor.*—If claims against the United States are presented to the proper auditing department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is pending and awaiting final determination in the depart-

cannot recover back the amount so paid by him even if the original payment to the government was under duress, and the proceedings in which he was convicted illegal, for he had the right, subsequently, to agree, as he did, that what the government coerced him to pay was in fact, fairly due upon a proper settlement of his accounts. *Carver v. United States*, 111 U. S. 609, 612, 28 L. Ed. 540.

Fees paid to government by consul.—See the title **AMBASSADORS AND CONSULS**, vol. 1, p. 283. See, also, *United States v. Edmondston*, 181 U. S. 500, 510, 45 L. Ed. 971.

93. *Oakes v. United States*, 174 U. S. 778, 785, 43 L. Ed. 1169, following *United States v. Cumming*, 130 U. S. 452, 32 L. Ed. 1029. See *Chorpenning v. United States*, 94 U. S. 397, 24 L. Ed. 126. And see *Selma, etc., R. Co. v. United States*, 139 U. S. 560, 31 L. Ed. 266. See, also, the title **POSTAL LAWS**, vol. 9, p. 550.

So held as to an act waiving any defense founded upon the statute of limitations. *United States v. Cumming*, 130 U. S. 452, 454, 32 L. Ed. 1029.

From the repeal of the joint resolution of April 15, 1870 (16 Stat. 673), authorizing the postmaster general to adjust the accounts of George Chorpenning, and from the prohibition in the act of March 3, 1871 (16 Stat. 519), directing that no part of the money thereby appropriated for the use of the postoffice department

shall “be applied to the payment of what is known as the Chorpenning claim,” the implication is clear, that nothing more was to be paid to him on account of said claim, without further authority from congress. *Chorpenning v. United States*, 94 U. S. 397, 24 L. Ed. 126.

94. **Appropriating less amount than reported.**—*Nutt v. United States*, 125 U. S. 650, 31 L. Ed. 821.

95. **Payment to third persons.**—*White v. United States*, 154 U. S., appx., 661, 26 L. Ed. 178, 17 L. Ed. 227, citing *Silliman v. United States*, 101 U. S. 465, 25 L. Ed. 987.

96. **Accounting officers.**—*Moncure v. Zunts*, 11 Wall. 416, 422, 20 L. Ed. 181.

1. **Construction of statutes.**—*United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396.

But when, after such a construction of a particular class of statutes has been long continued, its application to a recent statute of the same class is prohibited by congress, and following the spirit of that prohibition, the accounting officers refuse to apply the disapproved construction to a still later statute of the same class, the federal supreme court will not enforce its application. *United States v. Gilmore*, 8 Wall. 330, 19 L. Ed. 396.

2. **Necessity.**—*United States v. Meigs*, 95 U. S. 748, 750, 24 L. Ed. 578. See, also, *United States v. Gilmore*, 7 Wall. 491, 19

ment, courts should not be called upon to interfere, at least, unless it ignores such claim or fails to pass upon it within a reasonable time.³

(3) *Construction of Language of Approval*.—A statement by the secretary of the treasury, in an approving voucher accompanying the account of a shipping commissioner for services and fees, that "the services enumerated appear to have been necessarily rendered," this being language which the statute required him to use in affixing his approval, applies only to the services which he approved, and not to those which he disapproved.⁴

(4) *Conclusiveness and Effect of Accounting Officer's Determination*.—(a) *In General*.—The government of the United States is not finally concluded by the results at which its accounting officers may arrive in auditing and approving accounts and claims against the United States.⁵ The action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice.⁶

(b) *Approval as Prima Facie Evidence of Correctness of Claim*.—The approval of a claim by the proper accounting officer is prima facie evidence that the amount so approved was due the claimant from the United States and the burden is upon the government to show that the allowance of the amount claimed was made through fraud or mistake on the part of such official.⁷

(c) *Revision by Superior Officer*.—A decision by the commissioner of inter-

L. Ed. 282. See the title SET-OFF, RECEIPT AND COUNTERCLAIM, vol. 10, p. 1126.

Under the 4th section of the act of March, 1797, ch. 368, no claim for any credit can be admitted, at the trial, which has not been presented to, and disallowed by, the accounting officer of the treasury (unless in the cases excepted by the act), although no proceedings have been had against the debtor, under the act of the 3d of March, 1795, ch. 289, by notification from the treasury department, requiring him to render to the auditor of the treasury his accounts and vouchers for settlement. *Walton v. United States*, 9 Wheat. 651, 6 L. Ed. 182.

Presentation of claim for taxes illegally collected to commissioner of internal revenue.—Under § 3220 of the Revised Statutes which authorizes the commissioner of internal revenue, "on appeal to him made, to remit, refund, and pay back all taxes * * * that appear to be unjustly assessed, or excessive in amount, or in any manner wrongfully collected," where it does not appear that this claim was ever presented to the accounting officers of the treasury for allowance, on appeal or otherwise, or that it has ever been disallowed, for this reason, notwithstanding its apparent equity, the credit was properly refused in this suit, under § 951, Rev. Stat., requiring the rejection of such claims when not so presented. *Railroad Co. v. United States*, 101 U. S. 543, 548, 29 L. Ed. 1068; *Halliburton v. United States*, 13 Wall. 63, 20 L. Ed. 533; *United States v. Giles*, 9 Cranch 212, 3 L. Ed. 708. See the title REVENUE LAWS, vol. 10, pp. 976, 978.

3. Necessity for final determination by auditor.—*United States v. Fletcher*, 147 U. S. 664, 37 L. Ed. 322. See, also, *New*

Orleans v. Paine, 147 U. S. 261, 37 L. Ed. 162.

4. Construction of language of approval.—*United States v. Gunnison*, 155 U. S. 389, 392, 39 L. Ed. 195, holding that such language cannot be construed as approving items for clerk hire where the only amount approved excluded the clerk's pay. See the title SHIPS AND SHIPPING, vol. 10, p. 1209.

5. Conclusiveness and effect of determination of executive officers.—*Chorpenning v. United States*, 94 U. S. 397, 399, 24 L. Ed. 126.

6. Wisconsin, etc., R. Co. v. United States, 164 U. S. 190, 205, 41 L. Ed. 399; *United States v. Harmon*, 147 U. S. 268, 37 L. Ed. 164; *Hunter v. United States*, 5 Pet. 173, 8 L. Ed. 86; *United States v. Jones*, 8 Pet. 387, 8 L. Ed. 983; *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774.

The decision of an accounting officer with respect to the validity of a claim against the United States is not conclusive upon the courts. *United States v. Wallace*, 116 U. S. 398, 29 L. Ed. 675.

The action of the treasury officer in allowing or refusing to allow a claim proves nothing as to which of the great constitutional divisions, executive, legislative or judicial, the claimant belongs. *United States v. Meigs*, 95 U. S. 748, 750, 24 L. Ed. 578.

Conclusiveness of allowance by commissioners of claim on account of special tax stamps.—See the title REVENUE LAWS, vol. 10, p. 1015.

Allowance of claim by commissioner of internal revenue for taxes illegally collected.—See the title REVENUE LAWS, vol. 10, p. 979.

7. Approval as prima facie evidence of correctness of claim.—*Logan County v. United States*, 169 U. S. 255, 257, 43 L.

nal revenue authorizing the refunding of certain taxes, which was reported to the secretary of the treasury for his consideration and advisement, is not a final decision or award, binding the government, but subject to a revision by the secretary.⁸

(d) *Reopening in Court of Claims.*—The election of the claimant, under the act of congress of March 3, 1891, to reopen in the court of claims, a case heard and determined by the commissioner of Indian affairs, after an award and allowance therein by the secretary of the interior, opens for consideration and judgment both the amount of the depredation and the fact of liability precisely as though there had been no action on the part of the secretary of the interior. The claimant by his election reopens the whole case as though there had been no action on the part of the secretary of the interior or decision by the commissioner, and assumes the burden of proof.⁹

(e) *Re-Examination under Subsequent Act.*—The commission of an error in auditing and allowing, under the act of congress of June 16, 1890, the amount paid to the city of Louisville under the act of March 3, 1891, for taxes on surplus, by the rejection of an item included in the claim to audit which the act of 1890 was passed, does not, under the act of February 25, 1893, which included such rejected items, confer upon the officers of the treasury power to re-examine the correctness of the claim paid by virtue of the act of 1891, or to reverse that action on the ground that a mistake of law had been made in the decision reported to congress upon which it passed the act last named.¹⁰

4. INTEREST.—The rule that interest is recoverable between citizens if a payment of money is unreasonably delayed has no application to the government,¹¹

Ed. 737; *United States v. Savings Bank*, 104 U. S. 728, 733, 26 L. Ed. 908; *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792; *Chesebrough v. United States*, 192 U. S. 253, 263, 48 L. Ed. 432.

The cases of *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792, and *United States v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908, hold that where the claim had been allowed by the officers named in the statute, "the allowance may be used as the basis of an action against the United States in the court of claims, where it will be prima facie evidence of the amount that is due, and put on the government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the commissioner in this class of cases is not the simply passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of congress." *United States v. Savings Bank*, 104 U. S. 728, 733, 26 L. Ed. 908. The question of the conclusiveness of the action of the officers of the government under their general powers is also referred to in *Wisconsin, etc., R. Co. v. United States*, 164 U. S. 190, 41 L. Ed. 399; *Logan County v. United States*, 169 U. S. 255, 257, 43 L. Ed. 737.

In *United States v. Jones*, 134 U. S. 483, 33 L. Ed. 1007, it was held "that the approval of the commissioner's account by the circuit court of the United States is prima facie evidence of its correctness, and in the absence of clear and unequivocal proof of mistake on the part of the court, should be conclusive, although the approval of such court is not a prerequisite to the institution of a suit in a court of claims, or, since the act of March 3, 1887, 24 Stat. 505, c. 359, in a circuit or district court, for the recovery of the amount claimed. *United States v. Knox*, 128 U. S. 230, 32 L. Ed. 465." *United States v. Ewing*, 140 U. S. 142, 144, 35 L. Ed. 388.

8. *Revision by superior officer.*—*Stotesbury v. United States*, 146 U. S. 196, 36 L. Ed. 940; *New Orleans v. Paine*, 147 U. S. 261, 267, 37 L. Ed. 162.

9. *Reopening in court of claims.*—*Leighton v. United States*, 161 U. S. 291, 293, 40 L. Ed. 703; *Price v. United States*, 174 U. S. 373, 375, 43 L. Ed. 1011.

10. *Re-examination under subsequent act including item erroneously rejected.*—*United States v. Louisville*, 169 U. S. 249, 253, 42 L. Ed. 735. This was not the case of an allowance of an ordinary claim against the government by an ordinary accounting officer, any more than was the case of *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792, or that of *United States v. Savings Bank*, 104 U. S. 728, 26 L. Ed. 908.

11. *Interest.*—*Tillson v. United States*, 100 U. S. 43, 47, 25 L. Ed. 543; *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159.

for whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor; and delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes.¹² Hence the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect;¹³ and the established practice of the government is not to allow interest on claims against it,¹⁴ whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by congress on special application,¹⁵ up to the time of the rendition and entry of judgment.¹⁶ The only

12. *United States v. Sherman*, 98 U. S. 565, 567, 25 L. Ed. 235.

13. *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159; *United States v. North Carolina*, 136 U. S. 211, 217, 34 L. Ed. 336.

14. This practice has long prevailed in the departments, except it is in some way specially provided for. *Tillson v. United States*, 100 U. S. 43, 47, 25 L. Ed. 543; *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159; *United States v. North Carolina*, 136 U. S. 211, 217, 34 L. Ed. 336; *Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35; *Harvey v. United States*, 113 U. S. 243, 248, 28 L. Ed. 987; *United States v. McKee*, 91 U. S. 442, 450, 23 L. Ed. 326.

Unliquidated and disputed claims.—See *United States v. McKee*, 91 U. S. 442, 450, 23 L. Ed. 326.

Interest is not to be collected from the United States in the absence of language specially providing for its payment. *United States v. Sherman*, 98 U. S. 565, 25 L. Ed. 235; *United States v. Verdier*, 164 U. S. 213, 41 L. Ed. 407; *District of Columbia v. Johnson*, 165 U. S. 330, 338, 41 L. Ed. 734.

15. *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159; *United States v. North Carolina*, 136 U. S. 211, 217, 34 L. Ed. 336.

Where the postmaster general fails to readjust a postmaster's salary, the postmaster cannot hold the United States liable for interest prior to the liquidation upon the amount found due him. *United States v. Verdier*, 164 U. S. 213, 41 L. Ed. 407.

In *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159, the federal supreme court held that on money received by the secretary of state from a foreign government under an international award, invested by him in interest-bearing securities of the United States, and ultimately paid to the petitioner, interest was not payable, because the money was in effect withheld by the United States. *United States v. North Carolina*, 136 U. S. 211, 217, 34 L. Ed. 336.

"No claim for the allowance of interest can be predicated in this case upon the language of any notification or circular or letter which issued from the depart-

ment of state. No binding contract for the payment of interest was thereby created, and the present secretary was at liberty to act on his own judgment in the premises, irrespective of anything contained in any such notification, circular, or letter." *Angarica v. Bayard*, 127 U. S. 251, 261, 32 L. Ed. 159.

When court grants certificate of probable cause.—Where, under § 8 of the act of July 28, 1866 (14 Stat. 329), the court grants a certificate that there was probable cause for the acts done by an officer of the United States, for which the judgment was rendered against them, the amount payable out of the treasury does not include any interest which had accrued upon the judgment before such certificate was given. When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government. But not until then. *United States v. Sherman*, 98 U. S. 565, 25 L. Ed. 235.

Illegal tax repaid.—When a person from whom an internal revenue tax had been illegally exacted, accepted from the government the precise amount of the sum thus illegally exacted, he thereby gave up his right to sue for interest as incidental damages. *Stewart v. Barnes*, 153 U. S. 456, 38 L. Ed. 781; *Pacific Railroad v. United States*, 158 U. S. 118, 121, 39 L. Ed. 918.

Estoppel to claim interest on judgment under Rev. Stat., § 1090, by accepting sum appropriated in full satisfaction of the judgment. *Pacific Railroad v. United States*, 158 U. S. 118, 39 L. Ed. 918. See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 992.

16. By Rev. Stat., § 1091, no interest can be allowed upon any claim against the United States up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest. *United States v. Verdier*, 164 U. S. 213, 218, 41 L. Ed. 407; *Tillson v. United States*, 100 U. S. 43, 47, 25 L. Ed. 543; *Harvey v. United States*, 113 U. S. 243, 248, 28 L. Ed. 987; *United States v. New York*, 160 U. S. 598, 619, 40 L. Ed. 551.

In *United States v. New York*, 160 U. S. 598, 619, 40 L. Ed. 551, it was held

recognized exceptions are, where the government stipulates to pay interest¹⁷ and where interest is given expressly by an act of congress, either by the name of interest or by that of damages.¹⁸ Not only is this the general principle and settled rule of the executive department of the government, but it has been the rule of the legislative department, because congress, though well knowing the rule observed at the treasury, and frequently invited to change it, has refused to pass any general law for the allowance and payment of interest on claims against

that payment of the sum of \$91,320.84 paid by the state of New York, as interest on money borrowed for the purpose of raising troops for the national defense, was payment of a principal sum and not interest within the prohibition. Rev. Stat., § 1091. It is a claim within the meaning of the act of congress of July 17, 1890, ch. 11.

In *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 78, 28 L. Ed. 100, a plaintiff obtained a verdict against the United States, for the recovery of money illegally exacted for custom dues, which verdict was subject to the opinion of the court on a case to be made. About 29 years later the plaintiff caused judgment to be entered on the verdict. The supreme court held that interest could not be recovered except from the time of the entry of judgment.

17. *Angarica v. Bayard*, 127 U. S. 251, 32 L. Ed. 140; *Tilman v. United States*, 100 U. S. 43, 47, 25 L. Ed. 543; *United States v. North Carolina*, 136 U. S. 211, 217, 34 L. Ed. 336; *United States v. New York*, 160 U. S. 598, 619, 40 L. Ed. 451.

Indian claims interest provided for in treaty.—When, on an Indian claim against the United States, the demand of interest formed a subject of difference while the negotiations were being carried on, the determination of which was provided for in the treaty itself, and was accepted as valid and binding by the United States, interest was allowed by the supreme court. *United States v. Old Settlers*, 148 U. S. 427, 478, 37 L. Ed. 509.

Under the treaty of 1846 the Cherokees agreed to submit to the senate of the United States, as umpire, the question whether interest should be allowed on the sums found due them by the account taken under the treaties of 1835, 1836. In pursuance of the finding of the senate, the court of claims, under jurisdiction conferred by § 68 of the act of congress of July 1, 1902, to adjudicate claims which the Cherokees might have under treaty stipulations, against the United States, properly allowed 5 per cent interest on this sum from June 12, 1848. Although under § 1091, Rev. Stat., no interest "can be allowed on any claim up to the time of rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest," in this case, the demand of interest formed a subject of difference while

the negotiations were being carried on, the determination of which was provided for in the agreement itself. *United States v. Cherokee Nation*, 202 U. S. 101, 50 L. Ed. 949.

The treaty of August 8, 1831, with the Shawnee Indians, bound the government to pay a five per cent annuity until the dissolution of the fund obtained by sale of lands ceded to the government. If the government had originally accounted for the whole amount for which it was held to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity continued until the money was paid over. *United States v. Blackfeather*, 155 U. S. 160, 193, 39 L. Ed. 114.

18. *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159; *United States v. North Carolina*, 136 U. S. 211, 217, 34 L. Ed. 336; *United States v. New York*, 160 U. S. 598, 619, 40 L. Ed. 551.

"The rule, however, is not uniform, and especially it is not so in regard to claims allowed by special acts of congress, or referred by such acts to some department or officer for settlement." *United States v. McKee*, 91 U. S. 442, 450, 23 L. Ed. 326. And see *Gordon v. United States*, 7 Wall. 188, 19 L. Ed. 35.

Special statutes allowing interest.—The claim of the heirs and legal representatives of Colonel Francis Vigo against the United States, on account of supplies by him furnished in 1778 to the regiment under the command of George Rogers Clarke, who was acting under a commission from the state of Virginia, was, by an act of congress approved June 8, 1872 (17 Stat. 687), referred to the court of claims, with the direction that the court, in settling it, should be governed by the rules and regulations theretofore adopted by the United States in the settlement of like cases. Held, that as the case is like those in which interest was to be allowed by the fifth section of the act of Aug. 5, 1790 (1 Stat. 179), under which this case would have come but for the bar of time in that act, the claimants are entitled to recover the principal sum with interest thereon. *United States v. McKee*, 91 U. S. 442, 23 L. Ed. 326. And see *United States v. North Carolina*, 136 U. S. 211, 218, 34 L. Ed. 336.

Special statutes by which interest not allowed.—In *Harvey v. United States*,

the government. Such statutes for the payment of interest as have been passed, apply to specific cases enumerated in the several statutes.¹⁹

5. ASSIGNMENT—*a. Voluntary Assignment*—(1) *In Absence of Statute*.—There is no law of congress which authorizes the assignment of claims on the United States; and it is presumed that if such assignment is sanctioned by the treasury department, it is only viewed as an authority to receive the money, and not as vesting in the assignee a legal right. But whatever may be the usage of the treasury department on this subject, it is clear that such an assignment, as between individuals, on common-law principles, cannot be regarded as transferring to the assignee a right to bring an action at law, on the account, in his own name; or to plead it, by way of set-off, to an action brought against him, either by an individual or the government.²⁰

(2) *Under Federal Statutes*—(a) *In General*.—By the first section of the act of congress of February 26, 1853, § 3477, Rev. Stat., all transfers of any part of any claim against the United States, or any interest therein, whether absolute or conditional, is absolutely null and void, unless executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant therefor.²¹

(b) *Construction and Operation*.—All transfers or assignments of claims against the United States are under the act of 1853 null and void, unless executed in the manner prescribed by it,²² and confer no right that the United States are

113 U. S. 243, 247, 248, 28 L. Ed. 987, it was held that there was nothing in the special statute act of August 14, 1876, ch. 279, 19 Stat. 490, which takes the case out of the rule prescribed by § 1091 of the Revised Statutes.

Claims against the District of Columbia for payment of which the United States bound itself by the act of February 13, 1895, ch. 87, 28 Stat. 664, do not bear interest from the date of the completion of the work out of which they arose some twenty years before the passage of the above act. *District of Columbia v. Johnson*, 165 U. S. 330, 338, 41 L. Ed. 734; *United States v. Sherman*, 98 U. S. 565, 25 L. Ed. 235; *United States v. Verdier*, 164 U. S. 213, 41 L. Ed. 407.

19. *Angarica v. Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159.

20. *In the absence of statute*.—*United States v. Robeson*, 9 Pet. 319, 325, 9 L. Ed. 142; *United States v. Gillis*, 95 U. S. 407, 412, 24 L. Ed. 503. See, also, *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719; *Ball v. Halsell*, 161 U. S. 72, 80, 40 L. Ed. 622. See the title SET-OFF, REC-OUPIEMENT AND COUNTERCLAIM, vol. 11, p. 1128.

A. employed B. to collect a claim against the United States. Before its allowance, or the issue of a warrant for its payment, he drew, in favor of C., an order on B., payable out of any moneys coming into his hands on account of said claim. B. accepted it, and D. became the holder of it in good faith and for value. A. refused to recognize its validity after the warrant in his favor had been issued, or to indorse the latter. D. thereupon filed his bill against A. and B. to enforce payment of the order. Held, that the order became, upon its acceptance, and

in the absence of any statutory prohibition, an equitable assignment pro tanto of the claim. *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032.

21. *Under the federal statutes*.—*Trist v. Child*, 21 Wall. 441, 447, 22 L. Ed. 623; *United States v. Gillis*, 95 U. S. 407, 413, 24 L. Ed. 503; *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 506, 32 L. Ed. 163; *Nutt v. Knut*, 200 U. S. 12, 19, 50 L. Ed. 348. See, also, *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Ball v. Halsell*, 161 U. S. 72, 40 L. Ed. 622; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 28 L. Ed. 861; *Price v. Forrest*, 173 U. S. 410, 43 L. Ed. 749.

22. *Construction and operation*.—*United States v. Gillis*, 95 U. S. 407, 413, 24 L. Ed. 503; *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115; *Prairie State Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412.

The act of Feb. 24, 1855 (10 Stat. 612), establishing the court of claims, does not expressly or by necessary implication repeal any of the provisions of the act of Feb. 26, 1853, or make claims assignable which, before its enactment, were incapable of assignment. *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503.

Congress has given a legislative construction of the act of 1853, by including and re-enacting it in § 3477 of the Revised Statutes. *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503.

The object of congress by § 3477 was

bound to regard.²³ The words of this act embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented. It covers all claims against the United States in whatever tribunal they may be asserted.²⁴ So far from giving new potency to assignments of rights of action, and from changing the rule of the common law touching such rights, that act denies any effect to powers of attorney, orders, transfers, and assignments which before were good in equity, and which a debtor,

to protect the government, and not the claimant, and to prevent frauds upon the treasury. *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988; *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 506, 32 L. Ed. 163. There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. *Price v. Forrest*, 173 U. S. 410, 423, 43 L. Ed. 749.

"The legislation shows that the intent of congress was that the assignment of naked claims against the government for the purpose of suit, or in view of litigation or otherwise, should not be countenanced." *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719; *Ball v. Halsell*, 161 U. S. 72, 80, 40 L. Ed. 622.

"The mischiefs designed to be remedied by this section were declared by Mr. Justice Miller in *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229, to be mainly two; first, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; second, that by a transfer of such claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the congress, as desperate cases, where the award is contingent on success, so often suggest." *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719. See post, "Attorney's Contingent Fee Agreement," VIII, C, 12, b.

23. *McKnight v. United States*, 98 U. S. 179, 186, 25 L. Ed. 115.

24. *United States v. Gillis*, 95 U. S. 407, 413, 24 L. Ed. 503; *Spofford v. Kirk*, 97 U. S. 484, 489, 24 L. Ed. 1032; *Price v. Forrest*, 173 U. S. 410, 420, 43 L. Ed. 749.

"At the first term of this court after the passage of the act of 1853, it was said by this court, speaking by Mr. Justice Grier, that 'this act annuls all champertous contracts with agents of private claims.' *Marshall v. Baltimore, etc., R. Co.*, 16 How. 314, 336, 14 L. Ed. 953. And the act has since been held by this court to include all specific assignments, in whatever form, of any claim against the United States under a statute or treaty, whether to be presented to one

of the executive departments, or to be prosecuted in the court of claims; and to make every such assignment void, unless it has been assented to by the United States. *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115; *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 28 L. Ed. 861; *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719." *Ball v. Halsell*, 161 U. S. 72, 78, 40 L. Ed. 622.

Transfer by mortgage and judicial sale.—A voluntary transfer by way of a mortgage of a claim against the United States for the security of a debt, finally completed and made absolute by a judicial sale, is within the purview of the prohibition contained in § 3477, Rev. Stat., and cannot be made the basis of an action against the government in the court of claims. Such a voluntary assignment to secure a specific debt is within the mischiefs which that section was intended to remedy. *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 736, 28 L. Ed. 861; *Flint, etc., R. Co. v. United States*, 112 U. S. 737, 28 L. Ed. 862.

A claim for services rendered by a railroad company under a contract for conveying the mail. *Butler v. Goreley*, 146 U. S. 303, 313, 36 L. Ed. 981; *Price v. Forrest*, 173 U. S. 410, 422, 43 L. Ed. 749.

A power of attorney to collect a claim against the United States is embraced by the statute and may be disregarded by the officers of the government. *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 506, 32 L. Ed. 163.

Assignment of lease and rent therefrom.—A lease made to the United States created in favor of the lessor what, in some sense, is a "claim upon the United States" for each year's rent as it fell due, and is embraced in the statute. *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 505, 32 L. Ed. 163.

Claims on account of Indian depredations.—A voluntary transfer of part of a claim against the United States on account of the depredations of certain Indians on the property of the claimant, is within the prohibition of § 3477, U. S. Rev. Stat. *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. Ed. 622.

Claims for proceeds of captured or abandoned property.—In *United States v.*

when they were brought to his notice, was bound to regard.²⁵ But the act has been held not to apply to transfers of a claim against an officer of the United States personally, though they were to be paid out of the fund to be realized by such officer from the government;²⁶ nor to invalidate a contract of partnership in furnishing supplies to the United States, or a promise by one to another of the partners to pay a sum, already due him under the partnership articles, out of money to be received from the United States for such supplies;²⁷ nor to affect the right of a mortgagee of real estate leased to the United States, or of a pledgee of the rents thereof, to recover from the mortgagors or pledgors the amount of rents paid to them by the United States.²⁸

(c) *Waiver of Right of Government*.—An agreement to waive the objection to validity of such an assignment, express or implied, looking to the future, is without validity. There can be no consideration for it, and no one has authority to make it. The statute is conclusive upon the subject.²⁹

Effect of Part Payment to Assignee.—The United States, by paying a part of the claim to the assignees, does not waive its right to withhold from them the residue. The payment of part was not a waiver of the objection as to the residue.³⁰

(d) *Right of Parties to Insist upon Invalidity*.—aa. *Assignment Not Recognized by United States*.—Where the officers of the government have not recognized the assignment, the parties to it are at liberty to insist upon its invalidity.³¹

bb. *Assignment Recognized by United States*.—Where the United States

Gillis, 95 U. S. 407, 416, 24 L. Ed. 503, the question was as to the validity of the voluntary transfer of the legal title to a claim under the abandonment and captured property act of March 12, 1863, for the proceeds of certain cotton seized by the military forces of the United States. It was adjudged that he could not maintain the action. *Price v. Forrest*, 173 U. S. 410, 420, 43 L. Ed. 749. See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 6.

25. *United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503.

26. So held as to transfers of drafts drawn upon accounts for services rendered by deputies to a United States marshal and accepted by the latter not payable until he received fund for the use of the drawers, or rather applicable to the services rendered by them. Such transfers are not assignments of claims against the United States. The claims of the deputies for services are against the marshal personally and stand upon the same footing as those of an ordinary employee against his employer and are not claims against the United States. *Douglas v. Wallace*, 161 U. S. 346, 349, 40 L. Ed. 727.

27. *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940; *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. Ed. 622.

28. *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 32 L. Ed. 163; *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. Ed. 622.

29. **Waiver of right of government.**—*McKnight v. United States*, 98 U. S. 179, 183, 25 L. Ed. 115.

30. **Effect of part payment to assignee.**

—*McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115.

Counterclaim of amount so paid in suit for balance.—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1129.

31. In *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032, the owner of a claim against the United States for military supplies had, before its allowance or the issue of a warrant for its payment, drawn upon the attorneys employed by him to prosecute it an order to pay to a third person a certain sum out of any moneys coming into their hands on account of the claim; the order had been accepted by the drawees, and sold by the payee to a purchaser in good faith for value; and the drawer and acceptors, after the issue of the treasury warrant, declined to admit the validity of the order. It was adjudged that the accepted order, otherwise an equitable assignment, was void, by reason of the statute, and therefore passed no right in the fund, and could not be enforced against the drawer and acceptors. That decision has never been overruled or questioned by the court. *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. Ed. 622. See, to the same effect, *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988.

In *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032, no question arose as to what would have been the effect upon the rights of the claimant had the officers of the government recognized the assignment of *Spofford*. *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988.

The assignor of a lease to the United States and the rents therefrom before the

government has recognized an assignment of a claim against it, parties to it cannot insist that such assignment is invalid;³² nor does the act enable the original claimant to recover of the United States a sum once paid by the United States to his attorney in fact, holding a power of attorney, made before the allowance of the claim and the issue of the warrant, and remaining unrevoked.³³

(e) *Rights of Third Parties to Insist on Invalidity.*—Where an assignment of a claim against the United States is recognized by the proper officers of the government, although not executed in the manner prescribed by law, third parties cannot insist upon its invalidity.³⁴

b. *Transfer of Title by Operation of Law.*—The act of congress of February 26, 1853 (10 Stat. 170), to prevent frauds upon the treasury of the United States, applies only to cases of voluntary assignment of demands against the government, and does not embrace cases where the title is transferred by operation of law.³⁵ The passing of claims to heirs, devisees,³⁶ assignees in bankruptcy,³⁷

allowance of the claim and the issuing of the warrant, may disregard such an assignment altogether. *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 505, 32 L. Ed. 163.

32. Assignment recognized by United States.—*Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 98, distinguishing *Spofford v. Kirk*, 97 U. S. 484, 24 L. Ed. 1032; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 503, 32 L. Ed. 163.

A, who had a contract with the United States, agreed with B, in 1847, that the latter should perform it, and that the profits should be equally divided between them. Thereupon they and C executed an instrument in which the agreement was recited, and A, for the due fulfillment thereof, assigned the contract to C as trustee. A controversy having arisen as to the amount due upon the contract, congress, in 1870, authorized C as such trustee to sue the United States therefor, and subsequently made an appropriation to pay the judgment which he recovered. Held, that as the assignment was thus recognized by the government, the parties to the agreement and those claiming under them are precluded from setting up that the contract was not assignable. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229.

33. *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988; *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. Ed. 622.

Such payment is good, notwithstanding the provisions of the act of July 29th, 1846, entitled "An act in relation to the payment of claims," and the act of February 26th, 1853, entitled "An act to prevent frauds upon the treasury of the United States." 9 Stat. 41, and 10 Stat. 170. *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988.

34. Right of third parties to insist on invalidity.—*Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 32 L. Ed. 163.

Assignment of lease.—An assignment

of a lease of real estate of which the United States is lessee and of rent under it, which is recognized by the government through its proper officers, is not invalidated, for the benefit of a third party, by § 3477, U. S. Rev. Stat. *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 505, 32 L. Ed. 163.

35 Transfer of title by operation of law.—*Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Butler v. Goreley*, 146 U. S. 303, 311, 36 L. Ed. 981; *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988; *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 736, 28 L. Ed. 861; *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719; *Price v. Forrest*, 173 U. S. 410, 421, 43 L. Ed. 749; *Hoffeld v. United States*, 186 U. S. 273, 277, 46 L. Ed. 1160. See *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503.

"There are devolutions of title by force of law, without any act of parties, or involuntary assignments compelled by law," to which the statute does not apply. *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503; *Price v. Forrest*, 173 U. S. 410, 420, 43 L. Ed. 749; *Butler v. Goreley*, 146 U. S. 303, 312, 36 L. Ed. 981.

36. *Hager v. Swayne*, 147 U. S. 242, 247, 37 L. Ed. 719.

It does not include a passing by will. *Goodman v. Niblack*, 102 U. S. 556, 560, 26 L. Ed. 229; *Price v. Forrest*, 173 U. S. 410, 421, 43 L. Ed. 749.

The following cases use the term "devisees." *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988; *Butler v. Goreley*, 146 U. S. 303, 312, 36 L. Ed. 981; *Hoffeld v. United States*, 186 U. S. 273, 277, 46 L. Ed. 1160.

37. Section 3477, U. S. Rev. Stat., does not apply to assignments by operation of law to an assignee in bankruptcy. *Butler v. Goreley*, 146 U. S. 303, 311, 36 L. Ed. 981; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988; *St. Paul, etc., R. Co. v. United States*,

or insolvency,³⁸ is not included in the act. And it has been held not to apply to general assignments made by a debtor of all his property for the benefit of his creditors, whether under a bankrupt or insolvent law, or otherwise.³⁹ Nor does it apply to a receiver.⁴⁰ They are not within the evil at which the statute

112 U. S. 733, 736, 28 L. Ed. 861; *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719; *Goodman v. Niblack*, 102 U. S. 556, 560, 26 L. Ed. 229; *Price v. Forrest*, 173 U. S. 410, 421, 43 L. Ed. 749; *Hoffeld v. United States*, 186 U. S. 273, 277, 46 L. Ed. 1160.

Where cotton was captured by the military forces of the United States and sold, and the proceeds were paid into the treasury, the claim of the owner against the government constitutes property, and passes to his assignee in bankruptcy, though, by reason of the bar arising from the lapse of time, it cannot be judicially enforced. *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Price v. Forrest*, 173 U. S. 410, 420, 43 L. Ed. 749. See the title *BANKRUPTCY*, vol. 2, p. 902.

Where suit was brought to recover on a contract with the government by one partner who was adjudicated a bankrupt and died pending suit and his assignee was substituted in place of his administratrix and the other partners brought suit against the assignee for their share of the amount recovered, it was held that the assignee was entitled to no allowance for his services, expenses and attorneys' fees in recovering the fund. *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940.

Where suit was brought to recover on a contract with the government by one partner who was adjudicated bankrupt and died pending suit and his assignee in bankruptcy was substituted in place of his administratrix and the other partners testified that they had no interest in the claim except notes of the deceased, it was held in a suit against the assignee by such partners that they were not estopped from claiming their share of the amount recovered by the assignee by reason of such testimony. *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940.

38. *Hager v. Swayne*, 149 U. S. 242, 247, 37 L. Ed. 719; *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981.

39. *Ball v. Halsell*, 161 U. S. 72, 79, 40 L. Ed. 622; *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229; *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981; *Hoffeld v. United States*, 186 U. S. 273, 277, 46 L. Ed. 1160.

And a voluntary assignment by an insolvent debtor, for the benefit of creditors, is valid to pass title to a claim against the United States. *Butler v. Goreley*, 146 U. S. 303, 36 L. Ed. 981.

A. made in 1860 a voluntary assignment of his property for the benefit of creditors, including his rights, credits, effects, and estate of every description.

The assignment embraced a claim of the assignor arising under a contract with the United States. Held, that the assignment, although it covered whatever might be due to him under his contract with the government, was not within the prohibition of the act of Feb. 26, 1853 (10 Stat. 170, enacted in § 3477, Rev. Stat.), nor in violation of public policy, and passed the title to the claim against the United States; a voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor, of all his effects, which must, if it be honest, include a claim against the government, does not differ from the assignment which is made in bankruptcy. Such a meritorious act does not come within the evil which congress sought to suppress by the act of 1853. *Goodman v. Niblack*, 102 U. S. 556, 26 L. Ed. 229, citing *Wyman v. Halstead*, 109 U. S. 654, 27 L. Ed. 1068; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64, and *Williams v. Heard*, 140 U. S. 529, 540, 35 L. Ed. 550. See, to the same effect, *Butler v. Goreley*, 146 U. S. 303, 313, 36 L. Ed. 981; *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988; *St. Paul, etc., R. Co. v. United States*, 112 U. S. 733, 736, 28 L. Ed. 861.

40. The title to the moneys of a claimant against the government in the treasury of the United States may, under the laws of the state and the decree of its courts, pass from the claimant and his heirs, and become vested in a receiver. *Price v. Forrest*, 173 U. S. 410, 43 L. Ed. 749; *United States v. Borchertling*, 185 U. S. 223, 233, 46 L. Ed. 884.

There is nothing in the words or object of § 3477, U. S. Rev. Stat., which prevents any court of competent jurisdiction as to subject matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the United States from withdrawing the proceeds of such claim from the reach of his creditors; provided such order does not interfere with the examination and allowance or rejection of such claim by the proper officers of the government, nor in any wise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States. If a court, in an action against such claimant by one of his creditors, should, for the protection of the creditor forbid the claimant from collecting his demand except through a receiver who should hold the proceeds subject to be disposed of according to law under the order of court, such action would not be incon-

aimed.⁴¹ Nor does the construction given deny to such parties a standing in the court of claims,⁴² but permits them to be sued on in the court of claims, in name of the assignee.⁴³

c. *Suit by Assignee*.—Claims against the United States cannot be voluntarily assigned, so as to enable the assignee to bring suit in his own name in the court of claims.⁴⁴ The act of February 24, 1855, suggests that claims against the United States which are assignable may be sued in the court of claims in the name of the assignee, without undertaking to declare what claims may be assigned. That there may be such claims is clearly stated in the act of February 26, 1853, and there are devolutions of title by force of law, without any act of parties or involuntary assignment compelled by law which may have been in view.⁴⁵

6. PAYMENT—*a. Necessity for Appropriation*.—No officer of the government can pay a debt due by the United States without an appropriation by congress.⁴⁶

b. Duty of Officers to Make Payment.—Where an act of congress requires the secretary of treasury to pay a claimant a specific sum of money, for a specified purpose, he cannot refuse to pay it.⁴⁷

sistent with § 3477. *Price v. Forrest*, 173 U. S. 410, 423, 43 L. Ed. 749.

The transfer to the receiver is the act of the law, and whatever remains, whether of property or of money in his hands after satisfying the judgment and the taxes, costs or expenses of the receivership as might be ordered by the court, will be held by him as trustee for those entitled thereto, and his duty will be to bring such balance into court to the credit of the cause to be there disposed of according to law. *Price v. Forrest*, 173 U. S. 410, 422, 43 L. Ed. 749.

Where a state court appoints a receiver and directs the collection of a claim against the United States to be made through the receiver, the receiver and not the heir is entitled to receive whatever sum was found to be due the claimant on the adjustment of his accounts. *Price v. Forrest*, 173 U. S. 410, 424, 43 L. Ed. 749.

41. *Erwin v. United States*, 97 U. S. 392, 397, 24 L. Ed. 1065; *Price v. Forrest*, 173 U. S. 410, 420, 43 L. Ed. 749; *Hoffeld v. United States*, 186 U. S. 273, 277, 46 L. Ed. 1160.

The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. The voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must if it be honest, include a claim against the government, does not differ in this respect from the assignment which is made in bankruptcy. *Price v. Forrest*, 173 U. S. 410, 421, 43 L. Ed. 749.

42. *Erwin v. United States*, 97 U. S. 392, 397, 24 L. Ed. 1065; *Butler v. Goreley*, 146 U. S. 303, 312, 36 L. Ed. 981; *Price v. Forrest*, 173 U. S. 410, 420, 43

L. Ed. 749; *Hoffeld v. United States*, 186 U. S. 273, 277, 46 L. Ed. 1160.

43. *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503; *Butler v. Goreley*, 146 U. S. 303, 312, 36 L. Ed. 981.

44. *Suit by assignee*.—*United States v. Gillis*, 95 U. S. 407, 24 L. Ed. 503; *Bailey v. United States*, 109 U. S. 432, 437, 27 L. Ed. 988; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494, 505, 32 L. Ed. 163.

There is no privity between the United States and an equitable holder of a claim against the government, obtained by him through an assignment. *United States v. Gillis*, 95 U. S. 407, 412, 24 L. Ed. 503.

Assignee of claim for proceeds of captured or abandoned property.—See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 6.

45. *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503. See, also, *Butler v. Goreley*, 146 U. S. 303, 312, 36 L. Ed. 981.

46. *Reeside v. Walker*, 11 How. 272, 13 L. Ed. 693.

47. **Duty of officers to make payment**.—*United States v. Price*, 116 U. S. 43, 44, 29 L. Ed. 541; *United States v. Jordan*, 113 U. S. 418, 28 L. Ed. 1013; *United States v. Louisville*, 169 U. S. 249, 42 L. Ed. 735; *Buchanan v. Patterson*, 190 U. S. 353, 366, 47 L. Ed. 1093.

In *United States v. Jordan*, 113 U. S. 418, 28 L. Ed. 1013, it was held that, when an act of congress directed the secretary of the treasury to pay to a certain person a specific sum of money, the amount of taxes assessed upon and collected from him contrary to the provisions of certain treasury regulations, "no discretion was vested in the secretary, or in any court, to determine whether the sum specified was or was not the amount of the tax assessed contrary to the provisions of such regulations," and that consequently the payment must be made, whether the amount stated by congress

c. *Persons to Whom Payment Made*—(1) *Payment to Claimant or Agent or Attorney*.—It is competent for congress to provide that any sums ascertained to be due to claimants shall be paid directly to them and not pass through the hands of agents or attorneys.⁴⁸

(2) *Receivers*.—See the title RECEIVERS, vol. 10, p. 546. Payment may be required to be made to a receiver appointed by a court having jurisdiction of the person of the claimant.⁴⁹

(3) *Assignee in Bankruptcy or for Benefit of Creditors*.—See ante, "Transfer of Title by Operation of Law," VIII, C, 5, b; post, "Grants by Way of Gratiuity," VIII, C, 6, c, (7). See the title BANKRUPTCY, vol. 2, p. 902.

(4) *Executors or Administrators*.—See post, "Allowance to a Claimant or His Heirs," VIII, C, 6, c, (6); "Grants by Way of Gratiuity," VIII, C, 6, c, (7); "Locality of Debt—Place of Payment," VIII, C, 6, e.

(5) *Specific Sum Appropriated to Named Person*.—Where the appropriation was to the party named in the act and a specific sum was directed to be paid to such party, it is not a payment to him in trust for some other and unidentified members of a class to which he belongs, but a positive and absolute direction by congress to pay to the individual named in the act the amount stated therein. In such cases there is no subject for identification of the members of any class and no occasion for the further action of any one before payment is to be made.⁵⁰

(6) *Allowance to a Claimant "or His Heirs"*.—Under an act of congress making an allowance to a claimant, "or his heirs" to reimburse him for moneys advanced to the government as an accommodation, the heirs of the claimant upon his death are not entitled, as against his personal representative, by virtue of such act, to such balances as then remained to his credit in the treasury on the adjustment made of his accounts under the act.⁵¹

(7) *Grants by Way of Gratiuity*.—A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir. And if the government from motives of public policy, or any other considerations, should think

was the true amount collected or not. *United States v. Price*, 116 U. S. 43, 44, 29 L. Ed. 541.

48. *Payment to claimant as agent or attorney*.—*Spalding v. Vilas*, 161 U. S. 483, 490, 40 L. Ed. 780, following *Ball v. Halsell*, 161 U. S. 72, 40 L. Ed. 622.

49. *Receivers*.—Where the secretary of the treasury was duly advised of an order of a court of the state in which the claimant was domiciled appointing a receiver of the property and choses in action due to or held in trust for and restraining him from receiving any part of the debt due him from the United States, payment to the creditor by the secretary of the treasury is no defense to an action in the court of claims brought by the receiver to recover from the United States the amount so paid. *United States v. Borchertling*, 185 U. S. 223, 46 L. Ed. 884.

The supreme court of the District of Columbia entered an order enjoining a creditor of the United States from receiving or collecting the sum due him. Afterwards an ex parte modification of such order, so as to permit the payment of creditors resident in that district was made. The treasury of the United States had prior notice of the appointment by

a state court of chancery where the creditor of the United States was domiciled and personally served with process, of a receiver of his personal property, and of an order restraining such creditor from receiving any of such debts. It was held, that such ex parte modification of the order of the supreme court of the District of Columbia did not justify the treasury of the United States in paying creditors of such claimant resident in said district. *United States v. Borchertling*, 185 U. S. 223, 46 L. Ed. 884.

50. *Specific sums appropriated to named party*.—*Buchanan v. Patterson*, 190 U. S. 353, 366, 47 L. Ed. 1093; *United States v. Jordan*, 113 U. S. 418, 28 L. Ed. 1013; *United States v. Price*, 116 U. S. 43, 29 L. Ed. 541; *United States v. Louisville*, 169 U. S. 249, 42 L. Ed. 735.

51. *Allowance to a claimant "or his heirs"*.—*Price v. Forrest*, 173 U. S. 410, 425, 43 L. Ed. 749, distinguishing *Emerson v. Hall*, 13 Pet. 409, 10 L. Ed. 223; *The Josefa Segunda*, 10 Wheat. 312, 6 L. Ed. 329, and *Briggs v. Walker*, 171 U. S. 466, 43 L. Ed. 243. See, also *Blagge v. Balch*, 162 U. S. 439, 458, 40 L. Ed. 1032, distinguishing *Emerson v. Hall*, 13 Pet. 409, 10 L. Ed. 223.

proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation—a donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government.⁵² This distinction between mere grants by the government by way of gratuity and debts or claims of right was likewise recognized by the federal supreme court in the French spoliation cases, where it was held that the payments prescribed by the acts of congress were gratuities, and that creditors, legatees and assignees in bankruptcy could be rightfully excluded.⁵³

d. *Time of Payment*.—The act of February 13, 1895, ch. 87, providing “that in the adjudication of claims * * * against the District of Columbia, and conferring jurisdiction on the court of claims to hear the same” the rates established and paid by the board of public works shall be allowed, bestowed a pure gratuity to the amount of the difference between the contract price and the board rates upon persons included within its provision; and the claims under it become “due and payable” only from the time when the act which gave it was passed.⁵⁴

e. *Locality of Debt—Place of Payment*.—The debts due from the government of the United States have no locality at the seat of government.⁵⁵

f. *Transfer of Credits and Cancellation*.—A debtor of the United States, who puts evidences of debts due to himself, into the hands of a public officer of the United States, to collect and to apply the money, when received, to the credit of such debtor, in account with the United States, is not entitled to such credit, until the money gets into the hands of a public officer of the United States, entitled to receive it. Its being in the hands of an agent of a person who, at the time when the claims were put into his hands for collection, was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct, before the money was received by his agent, is not suffi-

52. Grants by way of gratuity.—*Emerson v. Hall*, 13 Pet. 409, 413, 10 L. Ed. 223; *Blagge v. Balch*, 162 U. S. 439, 458, 40 L. Ed. 1032; *United States v. Borchering*, 185 U. S. 223, 233, 46 L. Ed. 884.

The case of *Emerson v. Hall*, 13 Pet. 409, 10 L. Ed. 223, was within the category of payments by way of gratuity, payments as to grace and not of right; the government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor, it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require. And under the title of an act “for the relief of the heirs of Emerson,” it directed, in the body of the act, the money to be paid to his legal representatives. It was held, that the heirs were intended by this designation is clear; and the payment which has been paid to them under his act had been rightfully made; and that the fund cannot be considered as assets in their hands for the payment of debts. *United States v. Borchering*, 185 U. S. 223, 232, 46 L. Ed. 884.

In *Emerson's Case*, the decision was placed partly on the ground that the title of the act of 1831 indicated that congress, in using the words “legal representatives” in the body of the act, had in mind the heirs of Emerson and Lorrain, and not

technically their personal representatives. It is a fact not without significance that the money awarded by the above act of 1831 did not replace any moneys taken by Emerson and Lorrain from their respective estates for the benefit of the government. They had only rendered meritorious services for the public upon which no claim of creditors could be based, but which services congress chose to recognize by making a gift to their heirs. This was substantially the view taken of the case of *Emerson v. Hall*, 13 Pet. 409, 10 L. Ed. 223 in the recent case of *Blagge v. Balch*, 162 U. S. 439, 458, 40 L. Ed. 1032. *Price v. Forrest*, 173 U. S. 410, 428, 43 L. Ed. 749.

53. *United States v. Borchering*, 185 U. S. 223, 232, 46 L. Ed. 884; *Blagge v. Balch*, 162 U. S. 439, 40 L. Ed. 1032.

54. Time of payment.—*District of Columbia v. Johnson*, 165 U. S. 330, 338, 41 L. Ed. 734, reaffirmed in *District of Columbia v. Hall*, 165 U. S. 340, 41 L. Ed. 738, and *District of Columbia v. Dickson*, 165 U. S. 341, 41 L. Ed. 738.

55. Locality of debt—Place of payment.—*Vaughan v. Northup*, 15 Pet. 1, 10 L. Ed. 639; *United States v. Borchering*, 185 U. S. 223, 233, 46 L. Ed. 884.

Assets in hands of executor or administrator.—Situs—Place of payment.—See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 129.

cient to entitle such debtor to a credit in account with the United States therefor.⁵⁶

g. *Effect of Part Payment on Right to Withhold Residue.*—See the title PAYMENT, vol. 9, p. 344.

h. *Recovery Back of Payment.*—The government is not bound by the act of its officers in making an unauthorized payment under misconstruction of the law.⁵⁷

7. **FINALITY OF SETTLEMENT.**—See the title COMPROMISE AND SETTLEMENT, vol. 3, p. 992. See, also, the title ACCORD AND SATISFACTION, vol. 1, p. 69. Settled accounts where the United States has acted on the settlement and paid the balance found due on the basis of that settlement, cannot be opened or set aside, merely because some of the prescribed steps in the accounting which it was the duty of a head of a department to see had been taken, has been in fact omitted; nor can they be so opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party against the United States is barred by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any act of limitation.⁵⁸

8. **ARBITRATION AND AWARD.**—**What Constitutes and Conclusiveness.**—See the title ARBITRATION AND AWARD, vol. 2, p. 466, note 3; p. 476, notes 53, 56; pp. 480, 481, notes 82, 83; p. 482, notes, 89, 90. The report of the commissioner under the acts of the Virginia Assembly of March 11, 1834, to the governor touching unsatisfied revolutionary claims of the state on the government of the United States, though approved by the governor of Virginia, is not an award or judgment which is either obligatory in law or conclusive as evidence against the United States.⁵⁹

9. **ABANDONMENT AND WAIVER.**—To create an abandonment of a claim against the United States there must not only be an omission to prosecute, but an intention to forego.⁶⁰

Waiver of Right to Compensation by Contractor for Carrying Mails.—See the title POSTAL LAWS, vol. 9, p. 571.

10. **COLLECTION IN COURT OF CLAIMS**—a. *Jurisdiction and Mode of Procedure.*—See the title COURTS, vol. 4, p. 1021, et seq. See, also, post, "Waiver," VIII, C, 10, b, (2), (a), bb.

b. *Limitation of Actions*—(1) *In General.*—Every claim cognizable by the court of claims must be determined with reference to the limitation prescribed

⁵⁶. *United States v. Patterson*, 7 Cranch 575, 3 L. Ed. 444.

⁵⁷. **Recovery back of payments.**—*Wisconsin, etc., R. Co. v. United States*, 164 U. S. 190, 41 L. Ed. 399; *Logan County v. United States*, 169 U. S. 255, 257, 43 L. Ed. 737.

If a claimant, by falsely representing that he is a creditor of the United States, obtains a certificate in his favor, the government may affirm the transaction, waive the tort, and recover the value of the certificate in an action of assumpsit; and the interest if any has been paid may be recovered back, under a count for money had and received. *Fenimore v. United States*, 3 Dall. 357, 1 L. Ed. 634.

No authority given to sue for recovery.—Where an act of congress requires the secretary of treasury to pay to a claimant a specific sum of money, for a specified purpose, and no authority is given any one to sue to recover it back, no suit can be brought to recover back the money,

although congress may have required the payment to be made under a mistake, or although the claim was not a just one; until congress abrogates the law or directs such suit to be brought until congress takes such action, the conclusive presumption is that there was no mistake and the claimant is under no obligation to pay back what he recovered. *United States v. Price*, 116 U. S. 43, 44, 29 L. Ed. 541.

⁵⁸. *United States v. Johnston*, 124 U. S. 236, 254, 31 L. Ed. 389.

⁵⁹. *Williams v. United States*, 137 U. S. 113, 135, 34 L. Ed. 590.

⁶⁰. **Abandonment and waiver.**—*New York Indians v. United States*, 170 U. S. 1, 35, 42 L. Ed. 927.

Where there has been no intention on part of Indians to abandon a claim against the United States for land, nor any indication on part of congress that it considers the same abandoned, such claim cannot be held to be abandoned.

for claims of the class to which it belongs, unless congress, by statute, otherwise directs.⁶¹

(2) *The Six Year Statute*—(a) *Operation and Effect*—aa. *As a Bar*.—Section 1069, Rev. Stat., prescribing a limitation of six years for filing or submitting a claim against the United States, is not merely a statute of limitations but also jurisdictional in its nature, and limits the cases of which the court of claims can take cognizance.⁶² The general rule that limitation does not operate by its own force as a bar, but is a defense, and that the party making such a defense must plead the statute if he wishes the benefit of its provisions, has no application to suits in the court of claims against the United States. Since the government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the court of claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous.⁶³ The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition, for the statute makes it a condition or qualification of the right to a judgment against the United States that—except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the government.⁶⁴

bb. *Waiver*.—The United States congress may waive a defense based upon the statute of limitations respecting suits against the United States in the court of claims;⁶⁵ but it has not authorized any officer to do so either expressly or by failing to plead the statute.⁶⁶

New York Indians v. United States, 170 U. S. 1, 35, 42 L. Ed. 927.

A claimant who was told that unless he waived a claim for compensation for extra services another contract which he held with the same department would be abrogated, but who continued to press his claim without remission, cannot be held to have waived such claim, although the other contract was not abrogated by the government. *Alvord v. United States*, 95 U. S. 356, 359, 24 L. Ed. 414.

61. *United States v. Wardwell*, 172 U. S. 48, 52, 43 L. Ed. 360; *Finn v. United States*, 123 U. S. 227, 31 L. Ed. 128.

62. *Finn v. United States*, 123 U. S. 227, 232, 31 L. Ed. 128; *De Arnaud v. United States*, 151 U. S. 483, 495, 38 L. Ed. 244.

63. *Finn v. United States*, 123 U. S. 227, 233, 31 L. Ed. 128; *United States v. New York*, 160 U. S. 598, 617, 40 L. Ed. 551. See, to the same effect, *De Arnaud v. United States*, 151 U. S. 483, 495, 38 L. Ed. 244.

64. *Finn v. United States*, 123 U. S. 227, 232, 31 L. Ed. 128; *United States v. New York*, 160 U. S. 598, 618, 40 L. Ed. 551. See *Kendall v. United States*, 107 U. S. 123, 125, 27 L. Ed. 437.

"As the United States are not liable to be sued, except with their consent, it was competent for congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. *Nichols v. United States*, 7 Wall.

122, 126, 19 L. Ed. 125." *Finn v. United States*, 123 U. S. 227, 232, 31 L. Ed. 128.

65. *United States v. Cumming*, 130 U. S. 452, 454, 32 L. Ed. 1029, citing *Erwin v. United States*, 97 U. S. 392, 24 L. Ed. 1065; *Tillson v. United States*, 100 U. S. 43, 25 L. Ed. 543, and *McClure v. United States*, 116 U. S. 145, 29 L. Ed. 572, construing the act of congress of February 26, 1885, 23 Stat. 639, c. 167, and holding the same to be such a waiver. *Austin v. United States*, 155 U. S. 417, 433, 39 L. Ed. 206; *Ford v. United States*, 116 U. S. 213, 217, 29 L. Ed. 608.

Under the proviso contained in the act of March 3, 1883, c. 111, 22 Stat. 804, authorizing the court of claims to adjust and settle the claims of the successors in interest and legal representatives of A, deceased, for cotton taken during the Civil War, "any statute of limitation to the contrary notwithstanding," the establishment of loyalty in fact on the part of A, as contradistinguished from innocence in law produced by pardon, was a prerequisite to jurisdiction. *Austin v. United States*, 155 U. S. 417, 433, 39 L. Ed. 206.

66. "An individual may waive such a defense, either expressly or by failing to plead the statute, but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by the statute upon suits against the United States in the court of claims." *De Arnaud v.*

(b) *Actions to Which Applicable.*—The statute of limitation of six years applies to actions in general in the court of claims.⁶⁷

Claims Referred to Court of Claims by Heads of Executive Department.—Limitation is not pleadable in the court of claims against a claim cognizable therein, and which has been referred by the head of an executive department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued; that is, within six years after suit could be commenced thereon against the government. In such case the delay of the department does not affect the claimant's rights. But if the claim is not presented to the department before the expiration of the period, it is barred by the statute and the court of claims cannot entertain jurisdiction of it.⁶⁸

Claims Referred by Either House of Congress.—The clause of § 1059,

United States, 151 U. S. 483, 495, 38 L. Ed. 244; *Finn v. United States*, 123 U. S. 227, 233, 31 L. Ed. 128.

67. *United States v. Clark*, 96 U. S. 37, 24 L. Ed. 696; *United States v. Smith*, 105 U. S. 620, 26 L. Ed. 1161.

Action for relief where public money stolen.—The statute of limitation as found in § 1069, Rev. Stat., is applicable to an action in the court of claims under third clause of §§ 1059, 1062, Rev. Stat., to establish a right to relief of public money stolen from claimant who was a paymaster in the army. *United States v. Smith*, 105 U. S. 620, 26 L. Ed. 1161.

Petition for relief by paymaster from whom public funds stolen.—The statute of limitations of six years bars a petition filed in the court of claims for relief under §§ 1059, 1062, Rev. Stat., by a paymaster in the army, from whom public funds had been stolen, the amount of which he had subsequently paid to his chief paymaster, pursuant to the order of the paymaster general. *United States v. Smith*, 105 U. S. 620, 26 L. Ed. 1161.

Use of patent.—Where a contract between the United States and a patentee was not a contract to pay for the use of the patent at the expiration thereof, but the right to recover accrued with each use, the statute of limitations barred a recovery for all uses of the invention prior to six years before the commencement of suit in the court of claims. *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530.

Suit for proceeds of sale of cotton consigned to supervising special agent of treasury department.—A. residing in New Orleans and B. in Mobile during the whole rebellion, consigned cotton which they owned to C., a supervising special agent of the treasury department. It arrived at Mobile on the last of July or the first of August, 1865, when it was claimed by them. It was consigned to him to facilitate its arrival, as the government had at that time charge of the railroads. C. having received orders from the treasury department to ship all cotton received by him, shipped in the latter

month that of A. and B. to New York, where it was sold. The net proceeds were paid into the treasury. A. and B. brought suit for them against the United States in the court of claims, March 27, 1872. Held, that the suit was barred by the statute of limitations. *Clark v. United States*, 99 U. S. 493, 25 L. Ed. 481.

Actions brought under special acts.—An action brought February 17, 1886, under the provisions of the special act of February 5, 1877, for the relief of Robert Erwin, authorizing the court of claims to take jurisdiction of the claims of said Erwin against the United States, is barred by the six years statute of limitations. *Rice v. United States*, 122 U. S. 611, 30 L. Ed. 793, judgment of court of claims affirmed by a divided court.

Any right which a claim of an informer to a share in a fine, penalty, or forfeiture under the act of July 13, 1866, 14 Stat. 145, which was presented to the secretary of the treasury, and determined against the claimant by him twelve years before action was brought thereon, is barred by the six years statute of limitations. *United States v. Connor*, 138 U. S. 61, 34 L. Ed. 860. See *Finn v. United States*, 123 U. S. 227, 31 L. Ed. 128.

Suit for surplus of sales under direct tax act of Aug. 5, 1861, ch. 45, 12 Stat. 292.—*United States v. Taylor*, 104 U. S. 216, 26 L. Ed. 721; *United States v. Lawton*, 110 U. S. 146, 147, 25 L. Ed. 109; *United States v. Cooper*, 120 U. S. 124, 30 L. Ed. 606; *United States v. Wardwell*, 172 U. S. 48, 52, 43 L. Ed. 360.

Action for recovery of illegal or erroneously assessed internal revenue tax.—See the title REVENUE LAWS, vol. 10, p. 979. See, also, the title TAXATION, ante, p. 356.

68. *United States v. New York*, 160 U. S. 598, 617, 40 L. Ed. 551; *United States v. Lippitt*, 100 U. S. 663, 25 L. Ed. 747; *Finn v. United States*, 123 U. S. 227, 231, 31 L. Ed. 128.

“Where the claim is of such a character that it may be allowed and settled by an executive department, or may, in

Rev. Stat., investing the court of claims with jurisdiction to hear and determine all claims referred to it "by either house of congress," must be interpreted in the light of other clauses defining its jurisdiction, and fixing in respect of all claims, the period within which they must be asserted against the United States.⁶⁹

(c) *When Statute Begins to Run and Suspension of Operation*—aa. *In General*.—A claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run.⁷⁰

bb. *Suit to Establish a Set-Off*.—The statute of limitations of suits in the court of claims (Rev. Stat., § 1069) is not applicable to a suit under §§ 1059, 1062, because such a suit is brought to establish, not a claim in the just sense of a word, but a peculiar defense to a cause of action of the United States against

the discretion of the head of such department, be referred to the court of claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases the statement of the facts upon which the claim rests, in the form of a petition, is only another mode of asserting the same demand which had previously, and in due time, been presented at the proper department for settlement." *Finn v. United States*, 123 U. S. 227, 231, 31 L. Ed. 128; *United States v. Lippitt*, 100 U. S. 663, 668, 25 L. Ed. 747; *United States v. New York*, 160 U. S. 593, 617, 40 L. Ed. 551.

The cases transmitted for judicial determination are, in the sense of the act, commenced against the government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the court of claims, they are to be "proceeded in as other cases pending in said court." *Finn v. United States*, 123 U. S. 227, 231, 31 L. Ed. 128; *United States v. Lippitt*, 100 U. S. 663, 668, 25 L. Ed. 747; *United States v. New York*, 160 U. S. 593, 617, 40 L. Ed. 551. See, also, *Ford v. United States*, 116 U. S. 213, 29 L. Ed. 608; *United States v. McDougall*, 121 U. S. 89, 30 L. Ed. 861.

In *United States v. Lippitt*, 100 U. S. 663, 668, 669, 25 L. Ed. 747, it was held that a claim that accrued in 1864, and which was presented to the war department in 1865, and in 1878 was transmitted to the court of claims as one involving controverted questions of law, the decision whereof would affect a class of cases, was not barred. *United States v. New York*, 160 U. S. 593, 617, 40 L. Ed. 551.

Where a claim of the state of New York was presented to the treasury department before it was barred by limitation, its transmission by the secretary of the treasury to the court of claims for adjudication was only a continuation of the original proceeding commenced in that department in 1862. The delay by the department in disposing of the mat-

ter before the expiration of six years after the cause of action accrued, could not impair the rights of the state. Of course, if the claim had not been presented to the treasury department before the expiration of that period the court of claims could not have entertained jurisdiction of it. *United States v. New York*, 160 U. S. 593, 618, 40 L. Ed. 551.

^{69.} *Ford v. United States*, 116 U. S. 213, 217, 29 L. Ed. 608.

The court of claims has jurisdiction to hear and determine a claim referred to it by either house of congress, because, and only because, the law-making power has so declared; but unless congress otherwise prescribes, that reference will not itself entitle the claimant to a judgment, if his claim is not well founded in law, or, when so referred, was barred by limitation. He acquires no new right by the reference, except to demand that his claim be heard and determined by the court, just as would have been done had it been one of which the court could have taken cognizance by the voluntary suit of the claimant. Had he chosen, before going to congress, to sue in the court of claims, he would have been confronted with the statute of limitations. He cannot avoid that obstacle by procuring from one branch of congress a reference of his claim to that court. *Ford v. United States*, 116 U. S. 213, 218, 29 L. Ed. 608.

It is undoubtedly within the power of congress to place claims referred to the court of claims by the senate or by the house of representatives, on a better footing than other claims, by providing that they may be determined upon their merits, without reference to lapse of time, or any previous bar by limitation. But congress had no purpose by its general legislation to establish such a policy. It has, in special cases, invested the court of claims with jurisdiction to determine a claim, relieved of the bar of limitation. *Ford v. United States*, 116 U. S. 213, 216, 29 L. Ed. 608.

^{70.} *Rice v. United States*, 122 U. S. 611, 617, 30 L. Ed. 793.

the petitioner, and so long as the United States neglects to bring suit to establish such cause of action, so long must he be allowed to set up any defense thereto not in itself a separate demand.⁷¹

cc. *Trusts*.—In case of an express trust, the limitation prescribed in § 1069, Rev. Stat., does not begin to run until there is a direct repudiation thereof by the government, and such repudiation is brought to the knowledge of the cestui que trust, after which the statute runs against him.⁷²

dd. *Continuing Promises*.—Sections 306, 307, 308, Rev. Stat., contains a continuing promise, binding the United States to holders of government paper, to hold the money thus covered in the treasury for the benefit of the owner until such time as he shall call for it; and the limitation prescribed by § 1069, Rev. Stat., does not begin to run until the contract created by the provision in §

71. *United States v. Clark*, 96 U. S. 37, 24 L. Ed. 696; *United States v. Smith*, 105 U. S. 620, 26 L. Ed. 1161.

In *United States v. Clark*, 96 U. S. 37, 24 L. Ed. 696, the United States were suing Clark, in a court of general jurisdiction, on his bond, to recover a sum whereof he alleged that he had been robbed, he had refused to pay, and had never paid it or accounted for it, and he sued in the court of claims to establish a set-off. It was held that his right to sue in the court of claims did not accrue until the accounting officers held him liable for the sum lost, by refusing to credit his account therewith; and their final action was within six years before he brought this suit. *United States v. Smith*, 105 U. S. 620, 26 L. Ed. 1161.

In the language of the statute, the officer is not held responsible for this amount until the accounting officers reject it as a credit, and it is only when he has been or is so held that he is authorized to sue in the court of claims to establish his defense. *United States v. Clark*, 96 U. S. 37, 43, 24 L. Ed. 696; *United States v. Smith*, 105 U. S. 620, 26 L. Ed. 1161.

72. *United States v. Wardwell*, 172 U. S. 48, 52, 43 L. Ed. 360; *United States v. Taylor*, 104 U. S. 216, 26 L. Ed. 721; *United States v. Cooper*, 120 U. S. 124, 30 L. Ed. 606.

Under the direct tax act of August 5, 1861, ch. 45, § 36, 12 Stat. 292, a suit for a surplus of the proceeds remaining after satisfying the tax, costs, etc., may be brought at any time within six years after the application of the owner to the secretary of the treasury for such surplus, although the sale occurred more than six years before the suit was brought. In *United States v. Taylor*, 104 U. S. 216, 26 L. Ed. 721, the owner did not apply for the surplus until more than six years had elapsed from the closing up of the sale and the deposit of the money in the treasury, and it was held that § 1069 did not bar his action. This was reaffirmed in *United States v. Cooper*, 120 U. S. 124, 30 L. Ed. 606; *United States v. Wardwell*, 172 U. S. 48, 56, 43 L. Ed. 360; *United States v. Lawton*, 110 U. S. 146, 149, 28 L. Ed. 100.

So much of the direct tax act of congress of August 5, 1861, c. 45 (12 Stat. 282), as provides that the surplus of the proceeds of the sale of real estate sold for a direct tax due to the United States shall, after satisfying the tax, costs, charges, and commissions, be deposited in the treasury, to be there held for the use of the owner of the property, was not repealed by the act of June 7, 1862, c. 98, Id. 422. Prior to the application of the owner to the secretary of the treasury for the surplus such owner had no claim thereto which could be enforced by suit against the United States; and the statute of limitations began to run against it only from the date of his application. *United States v. Taylor*, 104 U. S. 216, 26 L. Ed. 721; *United States v. Cooper*, 120 U. S. 124, 30 L. Ed. 606; *United States v. Wardwell*, 172 U. S. 48, 56, 43 L. Ed. 360; *United States v. Lawton*, 110 U. S. 146, 149, 28 L. Ed. 100.

"This section limits no time within which application must be made for the proceeds of the sale. The secretary of the treasury was not authorized to fix such a limit. It was his duty, whenever the owner of the land or his legal representatives should apply for the money, to draw a warrant therefor without regard to the period which had elapsed since the sale. The fact that six or any other number of years had passed did not authorize him to refuse payment. The person entitled to the money could allow it to remain in the treasury for an indefinite period without losing his right to demand and receive it. It follows that if he was not required to demand it within six years, he was not required to sue for it within that time." *United States v. Taylor*, 104 U. S. 216, 221, 26 L. Ed. 721.

In analogy to the rule applicable to trustees, the right of the owner of the land to recover the money which the government held for him as his trustee did not become a claim on which suit could be brought, and such as was cognizable by the court of claims, until demand therefor had been made at the treasury. Upon such demand the claim first accrued. As the suit was brought within six years from the date of demand, it

308 is broken, at which time a claim for the breach of such contract accrues.⁷³ *ee. Action by State against United States.*—The statute of limitations does not bar the action of a state in the court of claims to recover moneys received by the United States from sales of swamp lands granted to the state by the act of September 28, 1850, until six years after the amount is ascertained from proofs of the sales before the commissioner of the general land office. The action of the commissioner of the general land office, under § 2 of the act of 1855, in determining, on proof by the agent of the state, that any of the swamp land had, within the meaning of the act, been sold by the United States, so as to bring into force the requirement that the purchase money should be paid over to the state, is necessary to a right of action for the money on the part of the state.⁷⁴ An action by the state of Louisiana against the United States in the court of claims to recover five per cent of the net proceeds of sales of the lands of the United States which by the act of February 20, 1811, were to be applied in laying out and constructing roads and levees in the state, was barred after the lapse of six years from the credit of the amount to the state on the books of the treasury department.⁷⁵

(d) *Suspension of Operation of Statute*—aa. *Persons under Disability.*—The statute of limitations respecting actions in the court of claims contains a provision suspending its operation in favor of infants, idiots, lunatics, insane persons and persons beyond seas, at the time the claims accrued. But no other disabilities than those enumerated can prevent any claim from being barred, nor can any of the said disabilities operate cumulatively.⁷⁶

Subsequent Disability.—A disability subsequently arising does not suspend the operation of the statute; the saving clause in the statute suspending its operation in favor of persons laboring under certain specified disabilities is only in favor of those laboring under the specified disabilities at the time the claim accrued.⁷⁷

bb. *War.*—The time intervening between the accruing of the claim and the promulgation of the amnesty proclamation, during which the claimant was un-

falls within the terms of the section giving jurisdiction to the court of claims, and is not cut off by the lapse of time. *United States v. Taylor*, 104 U. S. 216, 222, 26 L. Ed. 721. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 981, 984.

73. *United States v. Wardwell*, 172 U. S. 48, 52, 53, 43 L. Ed. 360.

74. *United States v. Louisiana*, 123 U. S. 32, 37, 31 L. Ed. 69; *United States v. Louisiana*, 127 U. S. 182, 190, 32 L. Ed. 66.

Where no such proof is had, the statute does not begin to run against the claims of the state for the money received for the sale of such lands until the amount was ascertained in some other equally convincing mode, as by having recourse to the filed notes of the survey of the state. *United States v. Louisiana*, 123 U. S. 32, 31 L. Ed. 69; *United States v. Alabama*, 123 U. S. 39, 31 L. Ed. 73; *United States v. Mississippi*, 123 U. S. 39, 31 L. Ed. 73.

As such action in *United States v. Louisiana*, 123 U. S. 32, 31 L. Ed. 69, did not occur more than six years before the bringing of the suit, the limitation prescribed by § 1069 of the Revised Statutes

did not apply. *United States v. Louisiana*, 127 U. S. 182, 190, 32 L. Ed. 66.

75. *United States v. Louisiana*, 127 U. S. 182, 32 L. Ed. 66.

76. *De Arnaud v. United States*, 151 U. S. 483, 496, 38 L. Ed. 244; *Kendall v. United States*, 107 U. S. 123, 125, 27 L. Ed. 437, holding that the court cannot interpolate exceptions not enumerated in the statute. *United States v. Greathouse*, 166 U. S. 601, 41 L. Ed. 1130.

The act of March 3, 1887, 24 Stat. 505, ch. 359, known as the Tucker act does not repeal the proviso of § 1069, Rev. Stat., "that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased." *United States v. Greathouse*, 166 U. S. 601, 41 L. Ed. 1130.

77. *De Arnaud v. United States*, 151 U. S. 483, 496, 38 L. Ed. 244. See *Bauserman v. Blunt*, 147 U. S. 647, 37 L. Ed. 316.

So held as to mental incapacity of plaintiff not beginning until after his

able to sue in the court claims by reason of his connection with the rebellion, must be included in the computation of the six years within which claims against the United States may be asserted in that court.⁷⁸

(3) *How Question Raised.*—**Demurrer.**—The claimant's petition will be dismissed on demurrer upon the ground that claims were barred, when it appears therefrom that his right of action against the United States is barred by the six years statute of limitations.⁷⁹

11. JURISDICTION OF STATE COURT OF CONTROVERSY BETWEEN HEIRS AND CREDITORS OF CLAIMANT.—See ante, "Receivers," VIII, C, 6, c, (2). It is competent for a state court of the domicil of a creditor of the United States having jurisdiction over his person, to decide a controversy between his heirs and creditors as to the right to receive moneys held in trust by the United States.⁸⁰

12. ATTORNEY'S FEES—*a. Imposition of Condition by Congress.*—Congress may prohibit or restrict the compensation of attorney for prosecuting or collecting claims against the government.⁸¹ Where such prohibition or restriction is imposed by congress and accepted by the claimant after a contract for services in prosecuting the claim have been entered into between the claimant and an attorney, the transaction is in the nature of a compromise or adjustment between the parties, nor is the government liable to such attorney for the amount agreed to be paid for his services, although the government was aware of his contract at the time such prohibition was imposed.⁸²

b. Attorney's Contingent Fee Agreement.—Contracts by attorneys for compensation in prosecuting claims against the United States, in one of the execu-

claim had accrued. *De Arnaud v. United States*, 151 U. S. 483, 496, 38 L. Ed. 244.

78. *Kendall v. United States*, 107 U. S. 123, 27 L. Ed. 437.

79. *Kendall v. United States*, 107 U. S. 123, 124, 27 L. Ed. 437. See ante, "Operation and Effect," VIII, C, 10, b, (2), (a).

80. *Price v. Forrest*, 173 U. S. 410, 43 L. Ed. 749; *United States v. Borchering*, 185 U. S. 223, 233, 46 L. Ed. 884.

81. *Ball v. Halsell*, 161 U. S. 72, 82, 40 L. Ed. 622; *Wailes v. Smith*, 157 U. S. 271, 39 L. Ed. 698; *Kendall v. United States*, 7 Wall. 113, 188, 19 L. Ed. 85.

Congress may enforce such restriction as one of the terms and conditions upon which consent to sue the United States is given. *Ball v. Halsell*, 161 U. S. 72, 82, 40 L. Ed. 622.

A proviso of the act of congress of March 2, 1891, c. 496, 26 Stat. 822, for refunding to the states and territories the amounts collected by the federal government under "the direct tax act of 1861," that no part thereby appropriated should be paid to any attorney or agent under any contract for services, is a condition which congress had a right to impose; and is binding upon a state which accepts the money, and any attorney who rendered services in collecting it. *Wailes v. Smith*, 157 U. S. 271, 39 L. Ed. 698.

The Indian depredation act of March 3, 1891, ch. 538, contains such a prohibition. *Ball v. Halsell*, 161 U. S. 72, 83, 40 L. Ed. 622.

The act of Sept. 30, 1850, c. 91, making an appropriation to pay the Western

Cherokee claims provided for by the treaty of 1846, contained such prohibition. *Kendall v. United States*, 7 Wall. 113, 19 L. Ed. 85; *Ball v. Halsell*, 161 U. S. 72, 77, 40 L. Ed. 622.

Act of June 23d, 1874, c. 459, establishing the court of commissioner of Alabama claims, contains such prohibition. *Bachman v. Lawson*, 109 U. S. 659, 27 L. Ed. 1067.

82. An attorney by making a contract with claimants to prosecute a judgment against the government of the United States, does not thereby acquire such a hold on that government, as not only makes the claim good to that extent, but prevents it from compromising or settling the claimant on the best terms to be obtained, without incurring any liability to him. *Kendall v. United States*, 7 Wall. 113, 117, 19 L. Ed. 85; *Ball v. Halsell*, 161 U. S. 72, 77, 40 L. Ed. 622. See, also, the title LIENS, vol. 7, p. 893.

The United States is not liable to an attorney for an amount agreed to be paid for services rendered a tribe of Indians in prosecuting a claim which the tribe set up against the United States although the government of the United States was aware of the contract between the attorney with the Indians providing that the money paid in a settlement of the claims should be paid to Indians individually and failing to reserve and pay over to the attorney the per cent which by that contract he had a right to claim of the Indians. *Kendall v. United States*, 7 Wall. 113, 118, 19 L. Ed. 85; *Ball v. Halsell*, 161 U. S. 72, 77, 40 L. Ed. 622.

tive departments, is not void because the amount of it is made contingent upon success, or upon the sum recovered. Such agreements are not in violation of law or public policy, and a liberal compensation is allowable.⁸³

Effect of § 3477, Rev. Stat., Prohibiting Assignment of Claims against United States.—If such agreement amounts to an order on the government to pay the percentage out of the fund to be appropriated, or assignment of such percentage to the attorney, as in the case of a debt due by an ordinary person, would constitute a lien on the fund, it is void under the act of February 26th, 1853, but where the agreement is merely personal and does not constitute a lien on the funds to be appropriated, there being no order on the government to pay the percentage out of the fund appropriated, nor any assignment to the party of such percentage, it is without the purview of that section.⁸⁴

c. *Lien on Fund.*—See ante, "Attorney's Contingent Fee Agreement," VIII, C, 12, b.

d. *Effect of Prohibition of Assignment of Claims against United States.*—See ante, "Attorney's Contingent Fee Agreement," VIII, C, 12, b.

Assignments Not Creating an Equitable Lien.—See the titles ASSIGNMENTS, vol. 2, p. 554; LIENS, vol. 7, pp. 891, 893, note 8, 9.

e. *Allowance by Court.*—The court of claims may in rendering the judgment make an allowance from the amount recovered to the attorney and counsel of an Indian tribe as his compensation for prosecuting a claim against the United States government.⁸⁵

f. *Termination of Contract for Services.*—An agreement between a claimant and certain persons in Washington, whereby the claimant agreed to allow those

83. *Ball v. Halsell*, 161 U. S. 72, 80, 40 L. Ed. 622; *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; *Taylor v. Demiss*, 110 U. S. 42, 28 L. Ed. 64; *Wylie v. Cox*, 15 How. 415, 14 L. Ed. 753; *Wright v. Tebbits*, 91 U. S. 252, 23 L. Ed. 320; *Nutt v. Knut*, 200 U. S. 12, 21, 50 L. Ed. 348. See, also, *Delaware City, etc., Nav. Co. v. Reybold*, 142 U. S. 636, 35 L. Ed. 1141. See the title ATTORNEY AND CLIENT, vol. 2, pp. 724, 725.

Reason for upholding validity of such agreement.—*Taylor v. Bemiss*, 110 U. S. 42, 45, 28 L. Ed. 64; *Ball v. Halsell*, 161 U. S. 72, 80, 40 L. Ed. 622.

Validity as dependent upon nature of source.—See the title ATTORNEY AND CLIENT, vol. 2, pp. 725, 726.

Prohibition with respect to Alabama claims construed and held not to extend to a mere personal agreement to pay as compensation for attorneys, a sum of money equal to a certain percentage of the amount recovered. *Bachman v. Lawson*, 109 U. S. 659, 27 L. Ed. 1067.

84. *Trist v. Child*, 21 Wall. 441, 22 L. Ed. 623. See the title ATTORNEY AND CLIENT, vol. 2, pp. 711, 730.

A clause of a contract for the prosecution of a claim against the United States, making the payment of the attorney's compensation a lien upon the claim asserted against the government and upon any draft, money or evidence of indebtedness issued thereon, is void, being within the prohibition of § 3477, U. S. Rev. Stat., prohibiting the assignment of such

claims upon the United States. *Nutt v. Knut*, 200 U. S. 12, 20, 50 L. Ed. 348.

An agreement on part of a claimant to pay an attorney for his services in the prosecution and collection of a claim against the United States, a percentage of the amount allowed is not in violation of § 3477, Rev. Stat., prohibiting the assignment of claims against the United States and is not rendered void by a clause in the same contract making the payment of the attorney's compensation a lien upon the claim asserted against the government and upon any draft, money or evidence of indebtedness issued thereon. *Nutt v. Knut*, 200 U. S. 12, 20, 50 L. Ed. 348.

Such an agreement did not give the attorney any interest or share in the claim itself nor any interest in the particular money paid over to the claimant by the government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the claimant, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to public policy established by its provisions. *Nutt v. Knut*, 200 U. S. 12, 21, 50 L. Ed. 348.

85. **Allowance by court.**—*United States v. Blackfeather*, 155 U. S. 180, 39 L. Ed. 114; *Ball v. Halsell*, 161 U. S. 72, 82,

persons a proportion of what might be recovered, was terminated when the United States and Great Britain made a convention, providing for the appointment of a board of commissioners to decide upon claims, in which the one in question was included. The agreement looked only to the services in Washington of the persons employed and the facts of the case indicate that such was the intention of the parties.⁸⁶

g. Indian Claim.—See ante, "Allowance by Court," VIII, C, 12, e. See the title INDIANS, vol. 6, p. 960.

13. OFFENSES RESPECTING CLAIMS.—**Presenting False Affidavit.**—Presenting an instrument which purports to be an affidavit made before a justice of the peace to the auditor of the treasury in support of a fictitious or fraudulent claim against the United States constitutes an offense under § 5438, Rev. Stat., although the person described as justice of the peace had no authority to administer such oath.⁸⁷

IX. Suits by the United States.

A. Power to Sue and Forms of Action Available.—The United States may sue in their own name whenever it appears, not only on the face of the instrument but from all the evidence, that they alone are interested in the subject matter of the controversy.⁸⁸ Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every state of the Union, they have the same right to have it protected by the local laws that other persons have.⁸⁹

Suit in Equity.—The government of the United States has the right to in-

40 L. Ed. 622. See the title ATTORNEY AND CLIENT, vol. 2, p. 724.

86. *Pemberton v. Lockett*, 21 How. 257, 16 L. Ed. 137.

87. *Ingraham v. United States*, 155 U. S. 434, 39 L. Ed. 213. See the title PENSIONS, vol. 9, p. 378, note 39.

88. **Power to sue and forms of action available.**—*Dugan v. United States*, 3 Wheat. 172, 173, 4 L. Ed. 362; *United States v. Verdier*, 164 U. S. 213, 219, 41 L. Ed. 407; *Cotton v. United States*, 11 How. 229, 231, 13 L. Ed. 675.

89. *Cotton v. United States*, 11 How. 229, 231, 13 L. Ed. 675.

It is competent for the United States to sue any of its debtors in a court of law. *Murray v. Hoboken, etc., Imp. Co.*, 18 How. 272, 283, 15 L. Ed. 372.

Money or property illegally obtained from officer.—An action may be brought by the United States to recover property or the value thereof obtained from its officers illegally or by mistake. In such case the defendant is charged with knowledge of the illegality of the transaction. *Steele v. United States*, 113 U. S. 128, 28 L. Ed. 952.

A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, became indebted to the United States, and they may recover the amount. *United States v. State Bank*, 96 U. S. 30, 35, 24 L. Ed. 647, citing *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997.

When money of the United States has

been received by one public agent, from another public agent, whether it was received in an official or private capacity, there can be no doubt but that it was received to the use of the United States, and they may maintain an action against the receiver for the same. *United States v. Buford*, 3 Pet. 12, 7 L. Ed. 585. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 916.

No statute is necessary to authorize the United States to sue to recover back an allowance, alleged to be illegal, made by a head of a department; the right to sue is independent of statute, and it may be done by the direction of the incumbent of the department. *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774.

Trespass quare clausum fregit.—The United States have a right to bring an action of trespass quare clausum fregit against a person for cutting and carrying away trees from the public lands. *Cotton v. United States*, 11 How. 229, 13 L. Ed. 675.

In the *United States v. Gear*, 3 How. 120, 11 L. Ed. 523, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned. *Cotton v. United States*, 11 How. 229, 231, 13 L. Ed. 675.

Where assignee of nonnegotiable claim.—The United States can maintain a suit in their own name upon a nonnegotiable claim assigned to them. *United States v.*

stitute a suit in equity where it has a pecuniary interest in the remedy sought or is under some obligation to the party who will be benefited by an action for his use.⁹⁰

Pecuniary Interest Not Necessary.—Although the government has no pecuniary interest in a controversy, it may sue to restrain wrongs which affect the public at large and are in respect to matters entrusted to the care of the nation by the constitution.⁹¹

B. Powers and Duties of Attorney General.—See the title ATTORNEY GENERAL, vol. 2, p. 740.

C. Rules of Decision.—When the United States comes into court to enforce its rights, it comes as any other suitor, and the courts decide on the rights of a citizen in controversy with the government according to equity and good conscience between citizens. The ordinary rules prevail as in actions between private individuals.⁹²

D. Parties Defendant.—Upon a bill filed by the United States, proceeding as ordinary creditors, against the debtor of their debtor, for an account, etc., the original debtor to the United States ought to be a party, and the account taken between him and his debtor.⁹³

E. Set-Off.—In a few adjudged cases where the United States was plaintiff, the defendants have been permitted to assert demands of various kinds by way of set-off.⁹⁴ But if a balance was found in favor of defendant, no judgment could be rendered against the government for such balance.⁹⁵

F. Costs.—And if the United States shall sue an individual in any of her courts, and fail to establish a claim, no judgment can be rendered for the costs expended by the defendant in his defense.⁹⁶ and of course no bond, obligation

Thompson, 98 U. S. 486, 499, 25 L. Ed. 194; United States v. Buford, 3 Pet. 12, 7 L. Ed. 585.

Where payee of note.—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 273.

Bill, note or check indorsed to agent of United States.—See the title BILLS, NOTES AND CHECKS, vol. 3, p. 357.

Suits to set aside patents.—Patent for invention, see the title PATENTS, vol. 9, p. 315. Patent for land, see the title PUBLIC LANDS, vol. 10, p. 252.

90. Curtner v. United States, 149 U. S. 662, 672, 37 L. Ed. 890.

91. In re Debs, 158 U. S. 564, 39 L. Ed. 1092, a case in which the United States sought relief by injunction; Louisiana v. Texas, 176 U. S. 1, 19, 44 L. Ed. 347; Missouri v. Illinois, 180 U. S. 208, 209, 45 L. Ed. 497. See, also, United States v. Marshall Silver Min. Co., 129 U. S. 579, 32 L. Ed. 734.

92. Rules of decision.—Rhode Island v. Massachusetts, 12 Pet. 657, 737, 9 L. Ed. 1233; Brent v. Bank, 10 Pet. 569, 614, 9 L. Ed. 547; Mitchel v. United States, 9 Pet. 711, 9 L. Ed. 283; United States v. Castillero, 2 Black 17, 320, 17 L. Ed. 360.

93. Parties defendant.—United States v. Howland, 4 Wheat. 108, 4 L. Ed. 526.

94. Set-Off.—Gibbons v. United States, 8 Wall. 269, 275, 19 L. Ed. 453. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, pp. 1124, 1128.

Questions of set-off, where the United States are plaintiffs, must be determined

wholly by the acts of congress, as the local laws have no application in such cases. Hall v. United States, 91 U. S. 559, 562, 23 L. Ed. 446; United States v. Eckford, 6 Wall. 484, 490, 18 L. Ed. 920; United States v. Robeson, 9 Pet. 319, 324, 9 L. Ed. 142.

Settlement of officer's accounts.—See post, "Credits," XII, C, 2, c, (1); "Set-Off," XII, C, 2, d, (2).

95. United States v. Thompson, 98 U. S. 486, 489, 25 L. Ed. 194; Reeside v. Walker, 11 How. 272, 13 L. Ed. 693; United States v. Boyd, 5 How. 29, 12 L. Ed. 36; United States v. Eckford, 6 Wall. 484, 488, 18 L. Ed. 920; DeGroot v. United States, 5 Wall. 419, 18 L. Ed. 700; Case v. Terrell, 11 Wall. 199, 201, 20 L. Ed. 134; Schaumburg v. United States, 103 U. S. 667, 30 L. Ed. 599. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1128.

96. Costs.—United States v. Thompson, 98 U. S. 486, 489, 25 L. Ed. 194; Stanley v. Schwalby, 162 U. S. 255, 272, 40 L. Ed. 960; United States v. Barker, 2 Wheat. 395, 4 L. Ed. 271; The Antelope, 12 Wheat. 546, 550, 6 L. Ed. 723; United States v. Ringgold, 8 Pet. 150, 163, 8 L. Ed. 899; United States v. Boyd, 5 How. 29, 51, 12 L. Ed. 36; Reeside v. Walker, 11 How. 272, 13 L. Ed. 693; United States v. Verdier, 164 U. S. 213, 219, 41 L. Ed. 407; DeGroot v. United States, 5 Wall. 419, 431, 18 L. Ed. 700. See the title COSTS, vol. 4, p. 822.

The fees and compensation to the marshal, where the government is a party to

or other security for costs can be required of the United States; although it recovers them.⁹⁷

X. Suits against the United States.

A. Immunity from Suit without Consent of Congress—1. **GENERAL RULE.**—The United States cannot be sued as a party defendant without its consent given by act of congress,⁹⁸ in any court whatever, whether one of its own or that of a state,⁹⁹ either at law or in equity,¹ by individuals or by another state;² and whoever institutes a suit against them must bring his case within

the suit, and his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges. The Antelope, 12 Wheat. 546, 6 L. Ed. 723. See the title UNITED STATES MARSHALS.

97. *United States v. Verdier*, 164 U. S. 213, 219, 41 L. Ed. 407.

98. **General rule.**—*Kansas v. Colorado*, 206 U. S. 46, 85, 51 L. Ed. 956; *Kansas v. United States*, 204 U. S. 331, 341, 51 L. Ed. 510; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *United States v. Ringgold*, 8 Pet. 150, 8 L. Ed. 899; *United States v. Macdaniel*, 7 Pet. 1, 16, 8 L. Ed. 587; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *Murray v. Hoboken, etc., Imp. Co.*, 18 How. 272, 285, 15 L. Ed. 372; *Hill v. United States*, 9 How. 386, 13 L. Ed. 185; *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628; *United States v. Eckford*, 6 Wall. 484, 488, 18 L. Ed. 920; *Nichols v. United States*, 7 Wall. 122, 126, 19 L. Ed. 125; *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *Gibbons v. United States*, 8 Wall. 269, 274, 19 L. Ed. 453; *Ex parte Morris*, 9 Wall. 605, 607, 19 L. Ed. 799; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Case v. Terrell*, 11 Wall. 199, 20 L. Ed. 134; *United States v. O'Keefe*, 11 Wall. 178, 182, 20 L. Ed. 131; *DeGroot v. United States*, 15 Wall. 419, 431, 18 L. Ed. 700; *Carr v. United States*, 98 U. S. 433, 437, 25 L. Ed. 209; *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010; *McElrath v. United States*, 102 U. S. 426, 26 L. Ed. 189; *United States v. Lee*, 106 U. S. 196, 207, 27 L. Ed. 171; *Kendall v. United States*, 107 U. S. 123, 125, 27 L. Ed. 437; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 451, 27 L. Ed. 992; *Finn v. United States*, 123 U. S. 227, 232, 31 L. Ed. 128; *United States v. Jones*, 131 U. S. 1, 33 L. Ed. 90; *Hans v. Louisiana*, 134 U. S. 1, 17, 33 L. Ed. 842; *Williams v. Heard*, 140 U. S. 529, 543, 35 L. Ed. 550; *Stanley v. Schwalby*, 147 U. S. 508, 512, 37 L. Ed. 259; *Hill v. United States*, 149 U. S. 593, 598, 37 L. Ed. 862; *Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108; *Ball v. Halsell*, 161 U. S. 72, 83, 40 L. Ed. 622; *Belknap v. Schild*, 161 U. S. 10, 16, 40 L. Ed. 599; *Tindal v. Wesley*, 167 U. S. 204, 42 L. Ed. 137; *Naganab v. Hitchcock*, 202 U. S. 473, 476, 50 L. Ed. 1113;

Oregon v. Hitchcock, 202 U. S. 60, 50 L. Ed. 935; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954; *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. Ed. 834.

"The United States can be sued for such cases and in such courts only as they have by act of congress permitted. Neither the court of claims nor this court can hear and determine any claim against the United States, except in the cases, and under the conditions, defined by congress." *United States v. Gleeson*, 124 U. S. 255, 258, 31 L. Ed. 421.

As to common-law doctrine of exemption of sovereign from suit, grounds upon which the same rests, applicability to United States, etc., see the following cases: *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108; *United States v. Clarke*, 8 Pet. 436, 444, 8 L. Ed. 1001; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *Hill v. United States*, 9 How. 386, 13 L. Ed. 185; *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *Nations v. Johnson*, 24 How. 195, 16 L. Ed. 628; *Nichols v. United States*, 7 Wall. 122, 126, 19 L. Ed. 125; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *United States v. O'Keefe*, 11 Wall. 178, 182, 20 L. Ed. 131; *United States v. Lee*, 106 U. S. 196, 207, 27 L. Ed. 171; *In re Ayers*, 123 U. S. 443, 505, 31 L. Ed. 216; *Hans v. Louisiana*, 134 U. S. 1, 17, 33 L. Ed. 842; *Williams v. Heard*, 140 U. S. 529, 35 L. Ed. 550; *Stanley v. Schwalby*, 147 U. S. 508, 542, 37 L. Ed. 259; *Belknap v. Schild*, 161 U. S. 10, 40 L. Ed. 599; *Ball v. Halsell*, 161 U. S. 72, 83, 40 L. Ed. 622; *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. Ed. 834.

99. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960; *Stanley v. Schwalby*, 147 U. S. 508, 512, 37 L. Ed. 259.

Power of state.—Certainly no state can pass a law, which would have any validity, for making the government suable in its courts. *Carr v. United States*, 98 U. S. 433, 437, 25 L. Ed. 209.

1. *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *United States v. Clarke*, 8 Pet. 436, 444, 8 L. Ed. 1001; *Belknap v. Schild*, 161 U. S. 10, 16, 40 L. Ed. 599.

2. *Ball v. Halsell*, 161 U. S. 72, 83, 40 L. Ed. 622; *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *In re Ayers*, 123 U. S. 443, 505, 31 L. Ed. 216; *Hans v.*

the authority of some act of congress, or the court cannot exercise jurisdiction.³

The judicial power of the United States extends to cases in which it is a party defendant, for while the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy.⁴

2. **WHETHER UNITED STATES REAL PARTY IN INTEREST CONTROLS.**—The question whether the United States is a party to a controversy in suits is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.⁵

3. **IMMUNITY FROM SUITS IN REM AGAINST PROPERTY OF UNITED STATES.**—No suit in rem can be maintained against the property of the United States

Louisiana, 134 U. S. 1, 17, 33 L. Ed. 842. But see *United States v. Texas*, 143 U. S. 621, 36 L. Ed. 285.

Under the judiciary act, suits cannot be commenced against the United States in any of the federal courts, citing *Briscoe v. Bank*, 11 Pet. 257, 321, 9 L. Ed. 709; *Cohens v. Virginia*, 6 Wheat. 264, 411, 5 L. Ed. 257; *Reeside v. Walker*, 11 How. 272, 287, 13 L. Ed. 693; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *Hill v. United States*, 9 How. 386, 389, 13 L. Ed. 185; *Nations v. Johnson*, 24 How. 195, 204, 16 L. Ed. 628; *United States v. Eckford*, 6 Wall. 484, 488, 18 L. Ed. 920.

Injunction.—Unless expressly permitted by act of congress, no injunction can be granted against the United States. *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599, citing *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *Hill v. United States*, 9 How. 386, 13 L. Ed. 185, and *Case v. Terrell*, 11 Wall. 199, 20 L. Ed. 134.

Enjoining judgment in favor of United States.—A judgment in favor of the United States cannot be enjoined. *United States v. Thompson*, 98 U. S. 486, 489, 25 L. Ed. 194; *Hill v. United States*, 9 How. 386, 13 L. Ed. 185.

A circuit court cannot entertain a bill on the equity side of the court, praying that the United States may be perpetually enjoined from proceeding upon a judgment obtained by them. *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *Hill v. United States*, 9 How. 386, 389, 13 L. Ed. 185.

This is so although a circuit court, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made. *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977, followed in *Hill v. United States*, 9 How. 386, 389, 13 L. Ed. 185; *Reeside v. Walker*, 11 How. 272, 290, 13 L. Ed. 693; *United States v. Eckford*, 6 Wall. 484, 488, 18 L. Ed. 920; *United States v. Lee*, 106 U. S. 196, 207, 227, 27 L. Ed. 171.

The United States, as indorsees of a

promissory note, recovered judgment against the makers thereof, who thereupon filed a bill upon the equity side of the court, and obtained an injunction to stay proceedings. It was held that this injunction was improvidently allowed. The United States were made directly parties defendants; process was prayed immediately against them, and they were called upon to answer the several allegations in the bill; the bill must, therefore, be dismissed. *Hill v. United States*, 9 How. 386, 13 L. Ed. 185.

The courts have no jurisdiction of an injunction suit brought by a member of an Indian tribe against the secretary of the interior that is in effect a suit against the United States to control the disposition of pine lands ceded by the Indians of Minnesota, the title to which is still in the United States government, and for an account under the act of January 4, 1889, for the land held, sold and disposed of, where the United States, the real party in interest, has not waived in any manner its immunity or consent to be sued concerning the land in question. *Naganab v. Hitchcock*, 202 U. S. 473, 50 L. Ed. 1113, following *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. Ed. 935, distinguishing *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954.

Injunctions against secretary of war by a state.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 277; INJUNCTIONS, vol. 6, p. 1028.

Suit to compel the issue and delivery of patent for land.—See the title COURTS, vol. 4, p. 1033.

Enforcement of maritime liens on property of United States.—See the title MARITIME LIENS, vol. 8, p. 242.

3. *United States v. Clarke*, 8 Pet. 436, 8 L. Ed. 1001; *United States v. Eckford*, 6 Wall. 484, 488, 18 L. Ed. 920; *The Siren*, 7 Wall. 152, 153, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Carr v. United States*, 98 U. S. 433, 434, 437, 25 L. Ed. 209; *Stanley v. Schwalby*, 147 U. S. 508, 512, 37 L. Ed. 259; *Belknap v. Schild*, 161 U. S. 10, 16, 40 L. Ed. 599.

4. *Kansas v. United States*, 204 U. S. 331, 342, 51 L. Ed. 510; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954.

5. *Kansas v. United States*, 204 U. S.

when it would be necessary to take such property out of the possession of the government by any writ or process of the court;⁶ but proceedings in rem to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court.⁷ Hence a claim against a vessel of the United States is incapable of enforcement.⁸ So, also, express contract liens upon the property of the United States are incapable of enforcement.⁹

331, 341, 51 L. Ed. 510; *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. Ed. 935; *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954. And see *Tindal v. Wesley*, 167 U. S. 204, 213, 42 L. Ed. 137; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171.

6. Immunity from suits in rem against property of United States.—*The Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *Case v. Terrell*, 11 Wall. 199, 201, 20 L. Ed. 134; *Carr v. United States*, 98 U. S. 433, 437, 25 L. Ed. 209.

The same exemption from judicial process extends to the property of the United States, for the reason that there is no distinction between suits against the government directly and suits against its property. *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 129; *United States v. Clarke*, 8 Pet. 436, 444, 8 L. Ed. 1001; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Carr v. United States*, 98 U. S. 433, 437, 25 L. Ed. 209; *Stanley v. Schwalby*, 147 U. S. 508, 512, 37 L. Ed. 259; *Belknap v. Schild*, 161 U. S. 10, 16, 40 L. Ed. 599.

In other words no suit or direct legal proceedings can be maintained against the United States, or against their property in any court, without express authority of congress. *Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960; *Stanley v. Schwalby*, 147 U. S. 508, 512, 37 L. Ed. 259; *Belknap v. Schild*, 161 U. S. 10, 40 L. Ed. 599; *Carr v. United States*, 98 U. S. 433, 439, 25 L. Ed. 209; *The Siren*, 7 Wall. 152, 154, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 19 L. Ed. 875.

7. *The Davis*, 10 Wall. 15, 19 L. Ed. 875, explaining *The Siren*, 7 Wall. 152, 19 L. Ed. 129, which is not inconsistent with this. *Case v. Terrell*, 11 Wall. 199, 201, 20 L. Ed. 134.

"The possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession." *The Davis*, 10 Wall. 15, 21, 19 L. Ed. 875; *Carr v. United States*, 98 U. S. 433, 437, 25 L. Ed. 209.

This is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and

its possession from disturbance by virtue of judicial process. *The Davis*, 10 Wall. 15, 21, 19 L. Ed. 875.

8. *The Siren*, 7 Wall. 152, 157, 19 L. Ed. 129.

Claim for damages for collision.—*The Siren*, 7 Wall. 152, 155, 19 L. Ed. 129.

A lien for salvage services cannot be enforced by a proceeding in rem when the possession of the property can only be had by taking it out of the actual possession of the officers or agents of the government charged therewith. *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Carr v. United States*, 98 U. S. 433, 439, 25 L. Ed. 209.

But it may be enforced by a proceeding in rem where the process of the court can be enforced without disturbing the possession of the government, which, being thus compelled to appear in the court to assert its claim, must discharge the lien before the property will be delivered to it. *The Davis*, 10 Wall. 15, 19 L. Ed. 875.

In *The Davis*, 10 Wall. 15, 19 L. Ed. 875, "'The Davis' and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The government appeared as claimant; and it was held that the cotton, like other cargo, was justly liable to pay its proportion of the salvage services." *Carr v. United States*, 98 U. S. 433, 439, 25 L. Ed. 209.

Some of the expressions in the opinion in *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447, were criticised in the subsequent case of *United States v. Lee*, 106 U. S. 196, 244, 27 L. Ed. 171, and also in *In re Ayers*, 123 U. S. 443, 487, 488, 31 L. Ed. 216, where the objectionable expressions were examined and held to have been mere dicta. It has not been overruled, however, but, on the contrary, it has been cited with approval and relied upon as authority in a number of subsequent cases; and the underlying principles of it are regarded as sound. In *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623, the same principle was applied. *Pennoyer v. McConaughy*, 140 U. S. 1, 12, 35 L. Ed. 363.

9. A mortgage upon property, the title to which had subsequently passed to the United States, is incapable of enforcement by legal proceedings. *The United*

4. **PROPERTY SOLD BY UNITED STATES.**—If the government, having the title to land subject to the mortgage of the previous owner, should transfer the property, the jurisdiction of the court to enforce the lien would at once attach, as it existed before the acquisition of the property by the government.¹⁰

5. **ADJUDICATION OF PRIOR RIGHTS OF OTHERS WHERE UNITED STATES INSTITUTES SUIT**—a. *Suits to Establish or Reclaim Right in Property.*—**In General.**—When the government of the United States seeks the aid of the courts to establish or reclaim its rights in property, the prior rights of others to the same property will be adjudicated and allowed.¹¹

Proceedings in Rem.—When the United States proceed in rem, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy.¹²

States, possessing the fee, would be an indispensable party to any suit to foreclose the equity of redemption, or to obtain a sale of the premises. *The Siren*, 7 Wall. 152, 157, 19 L. Ed. 129.

10. **Property sold by United States.**—*The Siren*, 7 Wall. 152, 158, 19 L. Ed. 129; *Chamberlain v. St. Paul, etc., R. Co.*, 92 U. S. 299, 306, 23 L. Ed. 715.

11. **Where United States seeks to establish or reclaim right in property.**—*Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209; *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 19 L. Ed. 875.

The cases in which public property may be subjected to claims against it are those in which it is, by the act of the government, in judicial possession, or has become so without violating the possession of the government, and the latter seeks the aid of the court to establish or reclaim its rights therein. In such case it is equitable that the prior rights of others to the same property should be adjudicated and allowed. *Carr v. United States*, 93 U. S. 433, 25 L. Ed. 209; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 452, 27 L. Ed. 992. Of this class of cases are *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 19 L. Ed. 875, and *Clark v. Barnard*, 108 U. S. 436, 27 L. Ed. 780.

12. **Proceedings in rem.**—*The Siren*, 7 Wall. 152, 154, 19 L. Ed. 129.

The cases in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected. *Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209.

In *The Siren*, 7 Wall. 152, 19 L. Ed. 129, and *The Davis*, 10 Wall. 1, 19 L. Ed. 875, it was held that in a case in admiralty, where the res was rightfully before

the court, and was taken into possession by its officer without the necessity of suit or process against the United States, it could be subjected to certain maritime liens, though the ownership was in the government. But in these cases the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others. *Case v. Terrell*, 11 Wall. 199, 201, 20 L. Ed. 134.

This doctrine was applied in the case of the *St. Jago de Cuba*, 9 Wheat. 409, 6 L. Ed. 122, where a libel was filed by the United States to forfeit the vessel for violation of the laws prohibiting the slave trade. Claims of seamen for wages, and of material men for supplies, when the parties were ignorant of the illegal voyage of the vessel, were allowed and paid out of the proceeds. These claims arose subsequent to the illegal acts which created the forfeiture, yet they were not superseded by the claim of the government. *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129.

In case of wreck and salvage the forfeiture would be superseded and there is no ground on which to preclude any other maritime claim. This doctrine applies both to claims arising out of contract and to claims arising out of torts committed after the capture of the offending vessel. *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129.

Claims for damages for a maritime tort.—A claim for damages exists against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although, for reasons of public policy, the claim cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The government, in such a case, stands, with reference to the rights of the defendants or

b. *Judicial Sale at Instance of United States*.—So if property belonging to the government, upon which claims exist, is sold upon judicial decree, and the proceeds are paid into the registry, the court would have jurisdiction to direct the claims to be satisfied out of them. Such decree of sale could only be made upon application of the government, and by its appearance in court it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors.¹³

c. *Set-Off*.—See ante, "Set-Off," IX, E. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 10, pp. 1124, 1128.

6. *TORT ACTIONS AGAINST OFFICERS AND AGENTS OF UNITED STATES*—a. *In General*.—The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States.¹⁴ Another class of cases is, where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.¹⁵

b. *Suits Involving Lawfulness of Possession*.—This exemption cannot be successfully pleaded in favor of officers and agents of the United States, when sued by private persons for property in their possession as such officers and agents.¹⁶

c. *Infringement of Patent*.—Officers or agents of the United States, although

claimants, as do private suitors, except that it is exempt from costs, and from affirmative relief against it, beyond the demand or property in controversy. *The Siren*, 7 Wall. 152, 19 L. Ed. 129.

In the case of *The Siren*, 7 Wall. 152, 19 L. Ed. 129, a prize, after capture and before condemnation, had collided with another vessel and was in fault, and it was held that as the government had brought the prize into the court for condemnation, and was before the court as plaintiff, and had placed the res in possession of the court, the lien for the damages growing out of the collision could be enforced against the United States. *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Carr v. United States*, 98 U. S. 433, 435, 439, 25 L. Ed. 209.

13. *Sale under judicial decree at instance of United States*.—*The Siren*, 7 Wall. 152, 158, 19 L. Ed. 129.

14. *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *The Flying Fish*, 2 Cranch 170, 2 L. Ed. 243.

15. *Meigs v. McClung*, 9 Cranch 11, 3 L. Ed. 639; *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *Brown v. Huger*, 21 How. 305, 16 L. Ed. 125; *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, are illustrations of this principal; *Cunningham v. Macon*, etc., R. Co., 109 U. S. 446, 452, 27 L. Ed. 992; *Vir-*

ginia Coupon Cases, 114 U. S. 269, 287, 29 L. Ed. 185. See, to the same effect, *Hagood v. Southern*, 117 U. S. 52, 70, 29 L. Ed. 805; *In re Ayers*, 123 U. S. 443, 500, 31 L. Ed. 216; *Stanley v. Schwalby*, 147 U. S. 508, 518, 37 L. Ed. 259; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 391, 28 L. Ed. 1014; *Belknap v. Schild*, 161 U. S. 10, 19, 40 L. Ed. 599; *Tindal v. Wesley*, 167 U. S. 204, 218, 219, 42 L. Ed. 137.

16. *Suits involving lawfulness of possession*.—*United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, distinguishing *The Siren*, 7 Wall. 152, 19 L. Ed. 129; *The Davis*, 10 Wall. 15, 19 L. Ed. 875, and *Carr v. United States*, 98 U. S. 433, 25 L. Ed. 209.

The doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit. *United States v. Lee*, 106 U. S. 196, 207, 27 L. Ed. 171.

In such cases, a court of competent jurisdiction over the parties before it may inquire into the lawfulness of the possession of the United States as held by such officers or agents, and give judgment according to the result of that inquiry. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171.

Such suits, if commenced elsewhere, are by existing laws always removable into a court of the United States, in which injustice to the government will neither be

acting under order of the United States, are personally liable to be sued for

presumed nor permitted. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171.

The evils which it is suggested may arise from interference of state or other courts with the exercise of powers essential to government, are illusory, and are insignificant in comparison with the proposition that no relief can be granted when it is asserted that the United States has authorized the wrong. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171.

The owner of property may maintain an action against the agents of the United States to enjoin them from selling it and to determine his right to it where they are seizing or attempting to sell and deliver it as public property. Their authority to act for the government and the ownership of the property which they asserted a right to seize are questions imminently proper to be decided by a court of the United States. *Wells v. Nickles*, 104 U. S. 444, 26 L. Ed. 825.

"The proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264; *Brown v. Huger*, 21 How. 305, 16 L. Ed. 125, and *Grisar v. McDowell*, 6 Wall. 363, 18 L. Ed. 863, it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions." *United States v. Lee*, 106 U. S. 196, 215, 27 L. Ed. 171, overruling expressions in the opinion of the court in the case of *Carr v. United States*, 98 U. S. 433, 25 L. Ed. 209, asserts a different doctrine and is quoted in *Tindal v. Wesley*, 167 U. S. 204, 214, 42 L. Ed. 137.

The decisions of the English courts in this subject are of but little value as precedents. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171.

"*Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Poindexter v. Green-*

how, 109 U. S. 63, 27 L. Ed. 860; *Virginia Coupon Cases*, 114 U. S. 269, 29 L. Ed. 185. In all these cases the effect was to show, and the court held, that the suits were not against the state or the United States, but against the individuals; conceding that if they had been against either the state or the United States, they could not be maintained." *Hans v. Louisiana*, 134 U. S. 1, 16, 33 L. Ed. 842. See the title *STATES*, vol. 11, p. 33.

In *Stanley v. Schwalby*, 162 U. S. 255, 40 L. Ed. 960, the action in the state court was directly against officers of the United States, and ultimately against the government itself. Jurisdiction was sustained upon that ground. *Avery v. Popper*, 179 U. S. 305, 313, 45 L. Ed. 203. See, also, *Tindal v. Wesley*, 167 U. S. 204, 219, 42 L. Ed. 137.

Ejectment.—The owner of land held and occupied by the United States for public uses, but under a defective title, may maintain, against the officers in possession of the land under authority of the United States, an action of ejectment, notwithstanding the interposition of the attorney general in behalf of the United States. *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171; *Belknap v. Schild*, 161 U. S. 10, 19, 40 L. Ed. 599; *Tindal v. Wesley*, 167 U. S. 204, 213, 42 L. Ed. 137.

To this class belongs also the recent case of *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, *Strong and Kaufman*, being sued individually as trespassers, set up their authority as officers of the United States, which the federal supreme court held to be unlawful, and therefore insufficient as a defense. *Stanley v. Schwalby*, 147 U. S. 508, 518, 37 L. Ed. 259; *Cunningham v. Macon*, etc., *R. Co.* 109 U. S. 446, 452, 27 L. Ed. 992; *Belknap v. Schild*, 161 U. S. 10, 19, 40 L. Ed. 599; *Tindal v. Wesley*, 167 U. S. 204, 218, 219, 42 L. Ed. 137.

The judgment in *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession. *Cunningham v. Macon*, etc., *R. Co.*, 109 U. S. 446, 452, 27 L. Ed. 992; *Belknap v. Schild*, 161 U. S. 10, 19, 40 L. Ed. 599; *Tindal v. Wesley*, 167 U. S. 204, 209, 218, 42 L. Ed. 137.

In the case of *United States v. Lee*, 106 U. S. 196, 27 L. Ed. 171, the plaintiffs had been wrongfully dispossessed of their real estate by defendants, claiming to act under the authority of the United

their own infringement of a patent.¹⁷

7. POWER OF CONGRESS TO PRESCRIBE TERMS AND SPECIFY CASES.—In granting such consent congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination.¹⁸ In other words congress may give such consent upon such terms and under such restrictions as it may think just or choose to impose, and may withdraw its consent whenever it may suppose justice to the public requires it.¹⁹

States. That authority could exist only as it was conferred by law, and as they were unable to show any lawful authority under the United States, it was held that there was nothing to prevent the judgment of the court against them as individuals, for their individual wrong and trespass. This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government of the United States, where the objection has been interposed that the United States were the real defendants, and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character. In *re Ayers*, 123 U. S. 443, 501, 31 L. Ed. 216.

An action of ejectment may be maintained against federal officers to recover land unlawfully appropriated for military purposes. *Meigs v. McClung*, 9 Cranch 11, 3 L. Ed. 639; *United States v. Lee*, 106 U. S. 196, 210, 27 L. Ed. 171.

Grisar v. McDowell, 6 Wall. 363, 18 L. Ed. 863, was an action in the circuit court against General McDowell to recover possession of property held by him as an officer of the United States which had been set apart and reserved for military purposes. Though this was set up by him as part of his defense, it does not appear that in the argument of counsel for the government, or in the opinion of the court, any importance was attached to this circumstance; but the opinion of Mr. Justice Field, in the federal supreme court examines the case elaborately on the question whether plaintiff or the government had the title to the land. If the doctrine now contended for is sound, the case should have proceeded no further on the suggestion, nor denied that the property was held for public use by a military officer under orders from the president. *Brown v. Huger*, 21 How. 305, 16 L. Ed. 125, is of a precisely similar character, for the possession of the military arsenal at Harper's Ferry, in which, while the fact of its possession by the United States was set out in the

bill of exceptions, no attention is given to that fact in the opinion of the court, which consists of an elaborate examination of plaintiff's title, held to be insufficient. *United States v. Lee*, 106 U. S. 196, 214, 27 L. Ed. 171.

Right of United States not res adjudicata by reason of such adjudication.—See the title RES ADJUDICATA, vol. 10, p. 753.

17. **Infringement of patent.**—*Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Cammeyer v. Newton*, 94 U. S. 225, 235, 24 L. Ed. 72.

18. **Power of congress to prescribe terms and specified causes in which it consents to suit.**—*Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108.

19. *Murray v. Hoboken, etc., Imp. Co.*, 18 How. 272, 284, 15 L. Ed. 372; *United States v. Lee*, 106 U. S. 196, 205, 27 L. Ed. 171; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Beers v. Arkansas*, 20 How. 527, 529, 15 L. Ed. 991; *Ball v. Halsell*, 161 U. S. 72, 83, 40 L. Ed. 622; *In re Ayers*, 123 U. S. 443, 505, 31 L. Ed. 216; *Hans v. Louisiana*, 134 U. S. 1, 17, 33 L. Ed. 842.

If the privilege be granted at all, necessarily the regulations concerning it and the mode of proceeding may be prescribed by them. *United States v. O'Keefe*, 11 Wall. 178, 182, 20 L. Ed. 131.

It is competent for congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period. *Finn v. United States*, 123 U. S. 227, 232, 31 L. Ed. 128; *Nichols v. United States*, 7 Wall. 122, 126, 19 L. Ed. 125.

Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government. *Schillinger v. United States*, 155 U. S. 163, 166, 39 L. Ed. 108.

Though both the marshal and the government are exempt from suit, for anything done by the former in obedience to legal process, still congress may provide by law that both or either shall, in a particular class of cases and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination. The United States may thus place the government upon the same ground which is occupied by private persons who pro-

8. **POWER OF OFFICERS TO WAIVE IMMUNITY.**—There is vested in no officer or body the authority to consent that the United States shall be sued except in the law-making power.²⁰ But when the United States, through the executive of the nation, waives their right to exemption from suit, and asks the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, the government is bound by the submission, and it is the duty of the court to proceed to the final determination of all the questions legitimately involved.²¹

B. Suits on Contracts.—The United States, by successive acts of congress, have consented to be sued upon their contracts, either in the court of claims, or in a circuit or district court of the United States.²²

C. Suits for Tort.—The United States have not consented to be sued for

ceed to take extrajudicial remedies for their wrongs, and they may do so to such extent, and with such restrictions, as may be thought fit. *Murray v. Hoboken, etc., Imp. Co.*, 18 How. 272, 284, 15 L. Ed. 372.

20. Power of officers to waive immunity.—*United States v. Lee*, 106 U. S. 196, 205, 27 L. Ed. 171; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209.

Neither the secretary of war nor the attorney general, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. *Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960; *Case v. Terrell*, 11 Wall. 199, 202, 20 L. Ed. 134; *Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209; *United States v. Lee*, 106 U. S. 196, 205, 27 L. Ed. 171.

The district attorney of the United States cannot consent to have its title determined in a suit brought against them, and though he may deem it prudent to assist the officers who were sued he will be held to have done so without intending to waive any of the rights of the government, which, in fact, he has no authority to waive. *Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209.

Instructions from the attorney general of the United States to a district attorney in reference to an action of trespass to try title brought against officers of the United States in a state court "to appear and defend the interests of the United States involved;" does not authorize the district attorney to make the United States a party defendant in the cause, and liable to have judgment rendered against them. *Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960, following *The Exchange*, 7 Cranch 116, 147, 3 L. Ed. 287.

21. *The Nuestra Senora De Regla*, 108 U. S. 92, 103, 27 L. Ed. 662.

22. Suits upon contracts.—*Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; Acts of February 24, 1855, c. 122, § 1; 10 Stat. 612; March 3, 1863, c. 92, § 2; 12

Stat. 765; Rev. Stat., § 1059; Act of March 3, 1887, c. 359, §§ 1, 2; 24 Stat. 505. And see *United States v. Jones*, 131 U. S. 1, 15, 16, 33 L. Ed. 90. See the title COURTS, vol. 4, p. 1024.

Where a party contracting with the United States is dissatisfied with the course pursued towards him by the officers of the government charged with the fulfillment of the contract, his only remedy, except in the limited class of cases cognizable in the court of claims, is by petition to congress. *United States v. Eckford*, 6 Wall. 484, 488, 18 L. Ed. 920; *Briscoe v. Bank*, 11 Pet. 257, 321, 9 L. Ed. 709; *Cohens v. Virginia*, 6 Wheat. 284, 411, 412, 5 L. Ed. 257; *Reeside v. Walker*, 11 How. 272, 287, 13 L. Ed. 693; *United States v. McLemore*, 4 How. 286, 11 L. Ed. 977; *Hill v. United States*, 9 How. 386, 389, 13 L. Ed. 185.

No judgment for the payment of money can be rendered against the United States in any court other than the court of claims without a special act of congress conferring jurisdiction. *Case v. Terrell*, 11 Wall. 199, 20 L. Ed. 134, citing *De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700; *United States v. Eckford*, 6 Wall. 484, 18 L. Ed. 920; *The Siren*, 7 Wall. 152, 19 L. Ed. 129, and *The Davis*, 10 Wall. 15, 19 L. Ed. 875. See the title COURTS, vol. 4, p. 1021, et seq.

Debts due, not suable in the ordinary courts of justice for claims and debts due. *Stanley v. Schwalby*, 147 U. S. 508, 517, 37 L. Ed. 259; *Comegys v. Vasse*, 1 Pet. 193, 216, 7 L. Ed. 108; *Williams v. Heard*, 140 U. S. 529, 543, 35 L. Ed. 550.

Use of patent under contract.—"The United States may accordingly be sued by a patentee for their use of his invention under a contract made with him by the United States or by their authorized officers. *United States v. Burns*, 12 Wall. 246, 20 L. Ed. 388; *United States v. Palmer*, 128 U. S. 262, 32 L. Ed. 442; *United States v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530." *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599.

Specific performance.—No jurisdiction is given by any statute to the supreme court of the District of Columbia of a suit against the United States or a public

torts, or wrongs done by their officers, though in the discharge of their official duties.²³ Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract.²⁴

D. Injunction.—See ante, "General Rule," X, A, 1.

E. Suits to Enforce Equitable Rights and Liens.—Treated elsewhere.²⁵

officer for the specific performance of a contract made by the United States. *Levey v. Stockslager*, 129 U. S. 470, 478, 32 L. Ed. 785.

23. Suits for tort.—*Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599; *Bigby v. United States*, 188 U. S. 400, 407, 47 L. Ed. 519; *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453; *Morgan v. United States*, 14 Wall. 531, 534, 20 L. Ed. 738; *Langford v. United States*, 101 U. S. 341, 25 L. Ed. 1010; *United States v. Jones*, 131 U. S. 1, 16, 18, 33 L. Ed. 90; *German Bank v. United States*, 148 U. S. 573, 579, 580, 37 L. Ed. 564; *Hill v. United States*, 149 U. S. 593, 37 L. Ed. 862; *Dooley v. United States*, 182 U. S. 222, 227, 45 L. Ed. 1074.

Not liable for the misconduct, misfeasance or laches of its officers or employees.—*Bigby v. United States*, 188 U. S. 400, 407, 47 L. Ed. 519.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. *Bigby v. United States*, 188 U. S. 400, 407, 47 L. Ed. 519.

As, in the *United States v. Russell*, 13 Wall. 623, 628, 20 L. Ed. 474, which was an action to recover for the use of certain steamers used in the business of the government pursuant to an understanding with the owner that he should be compensated; or in *United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846, in which it appeared that certain private property was appropriated by officers of the government for public use, pursuant to an act of congress, the title of the owner being recognized or not disputed; or, in *United States v. Palmer*, 128 U. S. 262, 269, 32 L. Ed. 442, which was an action to recover for the use of a patent which the government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the government would pay for such use. *Bigby v. United States*, 188 U. S. 400, 407, 47 L. Ed. 519.

Some legislative sanction to a claim of an officer for damage done by the order of his superior, or some recognition by

congress of a right to it, would seem an indispensable preliminary to its allowance in any form in the judicial tribunals against the government. *United States v. Buchanan*, 8 How. 83, 106, 12 L. Ed. 997; *United States v. Peters*, 5 Cranch 115, 3 L. Ed. 53; *Meigs v. McClung*, 9 Cranch 11, 3 L. Ed. 639, and *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204, had all involved the same question, and in the first and last of these cases the principle was fully discussed, and in the other necessarily decided in the negative. And in *Governor of Georgia v. Madrazo*, 1 Pet. 110, 7 L. Ed. 73, the court had referred to these cases, and again asserted the principle, quoting the language of them. *United States v. Lee*, 106 U. S. 196, 212, 27 L. Ed. 171.

Infringement of patent.—The United States, therefore, are not liable to a suit for an infringement of a patent, that being an action sounding in tort. *Schillinger v. United States*, 155 U. S. 163, 39 L. Ed. 108; *United States v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 39 L. Ed. 530; *Belknap v. Schild*, 161 U. S. 10, 17, 40 L. Ed. 599.

24. Hill v. United States, 149 U. S. 593, 598, 37 L. Ed. 862, citing *Gibbons v. United States*, 8 Wall. 269, 274, 19 L. Ed. 453; *Langford v. United States*, 101 U. S. 341, 346, 25 L. Ed. 1010, and *United States v. Jones*, 131 U. S. 1, 16, 33 L. Ed. 90; *Dooley v. United States*, 182 U. S. 222, 227, 45 L. Ed. 1074.

In *Hill v. United States*, 149 U. S. 593, 37 L. Ed. 862, it was held that a claim for damages for the use and occupation of land under tidewater, for the erection and maintenance of a lighthouse, without the consent of the owner, but not showing that the United States had acknowledged any right of the property in him as against them, was a case sounding in tort, of which the circuit court had no jurisdiction under the Tucker act.

"An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been no relation of contract between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser." *Dooley v. United States*, 182 U. S. 222, 227, 45 L. Ed. 1074.

25. Suits to enforce equitable rights.—See the title COURTS, vol. 4, p. 1033. And see ante, "General Rule," X, A, 1; "Immunity from Suits in Rem against Property of United States," X, A, 3.

F. Petition of Right.—See note.²⁶

G. Reconvention.—The United States cannot be sued in reconvention.²⁷

H. Order to Refund Money.—Where money has been improperly distributed among a number of parties, including the United States, the supreme court of the United States in ordering the parties to restore the money so received, has no authority to order the United States to refund.²⁸

I. Suit in State Courts.—The United States, by various acts of congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a state in any case.²⁹

J. Suits by State.—It does not follow that because a state may be sued by the United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion.³⁰

K. Rules of Decision.—The United States, by consenting to be sued, and submitting the decision to judicial action, have considered the controversy as a purely judicial question, which must be decided as between man and man, on

26. Bill of right.—The act of 1822, ch. 96, §§ 6-9, authorizes the proprietors of land directed by that act to be disposed of to make certain improvements in the City of Washington or persons lawfully claiming titles under them, to institute a bill in equity, in the nature of a petition of right against the United States in the circuit court for the District of Columbia. *Van Ness v. Washington*, 4 Pet. 232, 7 L. Ed. 842.

27. The case of the United States v. King, 3 How. 773, 11 L. Ed. 824; S. C., 7 How. 833, 844, 12 L. Ed. 934, was not an action to quiet title of the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute; and as the United States cannot be sued in reconvention, if the defendant had claimed an equitable title in that case, it would have been no defense, because he could not make the United States a defendant, and himself a plaintiff, by a suit in reconvention. *Surgett v. Lapice*, 8 How. 48, 65, 12 L. Ed. 982.

28. Order to refund money.—Ex parte Morris, 9 Wall. 605, 607, 19 L. Ed. 799.

29. Suit in state court.—*Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960; *Case v. Terrell*, 11 Wall. 199, 202, 20 L. Ed. 134; *Carr v. United States*, 98 U. S. 433, 438, 25 L. Ed. 209; *United States v. Lee*, 106 U. S. 196, 205, 27 L. Ed. 171.

In an action of trespass to try title for an undivided part and for joint possession of the whole land against officers of the United States, occupying the land as a military station, and to which the United States also sets up title, a judg-

ment in favor of the plaintiff is a judgment against the United States and against their property; and where the United States have not voluntarily submitted to the jurisdiction, it is beyond the power of a state court to render such judgment. *Stanley v. Schwalby*, 162 U. S. 255, 270, 40 L. Ed. 960.

30. Suit by state.—*Kansas v. United States*, 204 U. S. 331, 342, 51 L. Ed. 510. But see *United States v. Texas*, 143 U. S. 621, 36 L. Ed. 285.

A state cannot maintain a suit in the supreme court of the United States against the secretary of the interior and commissioner of the general land office, to enjoin them from allotting and patenting to Indians, lands within the Indian reservation, claimed by the state under the swamp lands act, in the absence of an act of congress waiving the immunity of the United States or consenting that it may be sued in respect thereto. *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. Ed. 935, following *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954. And see *Nagamb v. Hitchcock*, 202 U. S. 473, 50 L. Ed. 1113.

Oregon v. Hitchcock, 202 U. S. 60, 50 L. Ed. 935, was distinguished from *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. Ed. 954, in the fact that in the Minnesota case, the jurisdiction to sue the secretary of the interior was sustained because of the consent on the part of the United States to be sued in respect to school lands within an Indian reservation and an acceptance by the government of full responsibility for the result of the decision so far as the Indians were concerned. Act of March 2, 1901, 31 Stat. 950. In this case, as in the Oregon case, the legal title to all the tracts of land in question is still in the government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question, and there is no act of congress in anywise authorizing this action. *Nagamb v. Hitchcock*, 202 U. S. 473, 476, 50 L. Ed. 1113.

the same subject matter, and by the rules which congress themselves have prescribed.³¹

L. Set-Off and Counterclaim.—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1128.

M. Costs.—See ante, "Costs," IX, F.

XI. Panama Canal Zone.

Under the commerce clause of the constitution; congress has power to construct the Panama Canal through the canal zone acquired from the Republic of Panama by the treaty of November 18, 1903.³²

XII. Executive Departments.

A. Power and Discretion of Heads of Departments—1. **IN GENERAL.**—A practical knowledge of any one of the great departments of the government, must convince every person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion; he is limited in the exercise of his powers, by the law, but it does not follow, that he must show a statutory provision for everything he does; no government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government, would evince a most unpardonable ignorance of the subject; whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers; there are numberless things which must be done, that can neither be anticipated nor defined; and which are essential to the proper action of the government; hence, of necessity, usages have been established in every part of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits; and no change of such usages can have a retrospective effect, but must be limited to the future.³³

2. **JUDICIAL CONTROL.**—A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.³⁴ Where the decision of questions of fact is committed by congress to the

31. Rules of decision.—United States *v.* Arredondo, 6 Pet. 691, 711, 8 L. Ed. 547. So held where congress had empowered a court of the United States to hear and determine claims against the government for land, the title to which was involved in a boundary dispute between the United States and Spain.

32. Wilson *v.* Shaw, 204 U. S. 24, 51 L. Ed. 351.

Although the title of the United States to the Panama Canal Zone was not acquired as provided for in the act of congress of June 28, 1902, by treaty with the Republic of Columbia, the acts of the executive in that respect have been subsequently ratified by congress and such subsequent ratification is equivalent to original authority. The acts of congress which show a ratification of what had been done by the executive are 33 Stat. 2234, ratifying the treaty ceding the canal zone; 33 Stat. 429, providing a temporary government for said zone; 33 Stat. 843, fixing the status of merchandise coming into the United States from the canal zone; and 34 Stat. 611, prescribing the

type of canal. Wilson *v.* Shaw, 204 U. S. 24, 32, 51 L. Ed. 351.

The title of the United States to the Panama Canal Zone under the treaty of November 18, 1903, with the Republic of Panama, is not imperfect because of the omission from the treaty of some of the technical terms used in ordinary conveyances of real estate. Wilson *v.* Shaw, 204 U. S. 24, 33, 51 L. Ed. 351.

The title of the United States to the Panama Canal Zone is not affected by the failure to accurately describe the boundaries of the zone in the treaty; the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter, and the fact that there may possibly be in the future some dispute as to the exact boundary on either side is immaterial. Wilson *v.* Shaw, 204 U. S. 24, 33, 51 L. Ed. 351.

33. Power and discretion of heads of departments.—United States *v.* Macdaniel, 7 Pet. 1, 8 L. Ed. 587.

34. Judicial control.—The case of *Marbury *v.* Madison*, 1 Cranch 137, 2 L. Ed.

judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.³⁵

3. LEGISLATIVE CONTROL.—Where the head of one of the executive departments, appointed by resolution of congress to settle a claim made against the government, exceeds, in making his award, the powers conferred upon him, congress may revoke, by a repeal of the resolution appointing him, the authority conferred on him. And if, by the repealing act, it refer the case to the court of claims, it comes to that court with whatever limitations congress by its resolution may prescribe; and the court must accept the resolution as the law of that case.³⁶

4. SUPERINTENDENCE BY PRESIDENT—*a. In General.*—The president's duty, in general, requires his superintendence of the administration, yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services, which, nevertheless, he is, in a correct sense, by the constitution and laws required and expected to perform.³⁷ The postmaster general is not subject to the direc-

60 furnishes an illustration. *Mississippi v. Johnson*, 4 Wall. 475, 498, 18 L. Ed. 437. See the titles INJUNCTIONS, vol. 6, p. 1022; MANDAMUS, vol. 8, p. 1.

35. *Bates, etc., Co. v. Payne*, 194 U. S. 106, 109, 48 L. Ed. 893.

It would practically arrest the executive arm of the government if the heads of departments were required to obtain the sanction of the courts upon the multifarious questions arising in their departments, before actions were taken, in any matter which might involve the temporary disposition of private property. Each executive department has certain public functions and duties, the performance of which is absolutely necessary to the existence of the government, but it may temporarily, at least, operate with seeming harshness upon individuals. But it is wisely indicated that the rights of the public must in these particulars override the rights of individuals, provided there be reserved to them an ultimate recourse to the judiciary. *Public Clearing House v. Coyne*, 194 U. S. 497, 515, 48 L. Ed. 1092.

In the early case of *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559, it was said that the official duties of the head of an executive department, whether imposed by act of congress or resolution, are not mere ministerial duties; and, as was said by the federal supreme court in the recent case of *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324, 47 L. Ed. 1074: "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction." *Bates, etc., Co. v. Payne*, 194 U. S. 106, 108, 48 L. Ed. 893.

Due process of law is not denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. *Public Clearing House v. Coyne*, 194 U. S. 497, 508, 48 L. Ed. 1092; *Bates, etc., Co. v. Payne*, 194 U. S. 106, 48 L. Ed. 893.

Where a duty cast upon the treasury department is the performance of an executive function, requiring skill and the exercise of judgment and discretion, judicial inquiry into the correctness of the decision is precluded. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority. The whole subject is confided by the law exclusively to the jurisdiction of the executive officers charged with the duty; and their action cannot be otherwise questioned. *Hadden v. Merritt*, 115 U. S. 25, 27, 29 L. Ed. 333.

36. Legislative control.—*De Groot v. United States*, 5 Wall. 419, 18 L. Ed. 700.

37. *Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

Advance of money to disbursing officer.—The act of congress passed January 31st, 1823, prohibiting the advance of pub-

tion and control of the president of the United States with respect to the execution of duties imposed on him by law because of the obligation imposed on the president to see the laws faithfully executed.³⁸

b. *Presumption That Acts of Executive Heads Are Those of President.*—There can be no doubt that the president, in the exercise of his executive power under the constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts.³⁹

5. RELATION OF HEADS OF DEPARTMENTS TO BUREAU OFFICERS.—The general relation of the heads of the executive departments to their bureau officers is governed in each case by its own statute, upon a full view of all the statutory provisions intended to explain the meaning of the legislature. In respect to some bureaus the connection with the departments seem almost clerical, and one of mere obedience to direction, while in that of others the action of the of-

lic money in any case whatsoever to the disbursing officers of government, except under the special direction of the president, does not require the personal and ministerial performance of this duty, to be exercised in every instance by the president under his own hand; but instructions may be given by the president to the secretary of the treasury to make advances from time to time upon the basis of average estimates or upon requisition showing the necessity of advances to meet the public services. *Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

Such a practice, if it were possible, would absorb the duties of the various departments of the government in the personal action of the one chief executive officer, and be fraught with mischief to the public service. *Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

Evidence is proper that the president specially authorized and directed, in writing, the secretary of the treasury to make such advances, and that such paper was destroyed, when the treasury building was burned. It is sufficient if the witness states his belief that it was so destroyed. *Williams v. United States*, 1 How. 290, 11 L. Ed. 135. See, also, *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264; *Riggs v. Tayloe*, 9 Wheat. 483, 486, 6 L. Ed. 140.

38. *Kendall v. United States*, 12 Pet. 524, 613, 9 L. Ed. 1181.

39. *Runkle v. United States*, 122 U. S. 543, 547, 557, 30 L. Ed. 1167; *Wilcox v. McConnell*, 13 Pet. 498, 513, 10 L. Ed. 264; *United States v. Eliason*, 16 Pet. 291, 302, 10 L. Ed. 968; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320; *United States v. Farden*, 99 U. S. 10, 19, 25 L. Ed. 267; *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915.

"The acts of the heads of departments, within the scope of their powers, are in law the acts of the president." *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915; *Wilcox v. McConnell*, 13 Pet. 498, 503, 10 L. Ed. 264.

"The president speaks and acts through

the heads of the several departments in relation to subjects which appertain to their respective duties." *Wolsey v. Chapman*, 101 U. S. 755, 770, 25 L. Ed. 915; *Wilcox v. McConnell*, 13 Pet. 498, 503, 10 L. Ed. 264; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320. The same doctrine is asserted in *United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968.

The act of the proper head of a department within the scope of his powers, reserving public land, is in law the act of the president. *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915.

"It follows necessarily from the decision in *Wilcox v. McConnell*, 13 Pet. 498, 503, 10 L. Ed. 264, that such an order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the president's own order to the same effect." *Wolsey v. Chapman*, 101 U. S. 755, 770, 25 L. Ed. 915; *Wood v. Beach*, 156 U. S. 548, 39 L. Ed. 528.

"In *Wilcox v. McConnell* (13 Pet. 498, 10 L. Ed. 264), the question was directly presented whether a reservation from sale by an order from the war department was a reservation 'by order of the president,' and the court held it was." *Wolsey v. Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915; *Wood v. Beach*, 156 U. S. 548, 39 L. Ed. 528.

Where, by an act of congress, all lands reserved from sale by order of the president were exempted from pre-emption, the federal supreme court ruled that a request for a reservation made by the secretary of war for the use of the Indian department, must be considered as made by the president within the meaning of the act. *Wilcox v. McConnell*, 13 Pet. 498, 10 L. Ed. 264; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320.

A direction given by the attorney general to seize property liable to confiscation under the act of congress must be regarded as a direction given by the president. *Confiscation Cases*, 20 Wall. 92, 108, 22 L. Ed. 320.

ficer, although a subordinate, is entirely independent, and, so far as executive control is concerned, conclusive and irreversible.⁴⁰

6. POWER AS TO CONSTRUCTION OF LAWS.—If a suit should come before the supreme court, which involved the construction of any of the laws imposing duties on the heads of the executive departments, the court certainly would not be bound to adopt the construction given by the head of a department; and if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But the judgment of the court upon the construction of a law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress, in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment, in any case where the law authorized him to exercise his discretion or judgment; nor can it, by mandamus, act directly upon the officer, or guide and control his judgment or discretion, in the matters committed to his care, in the ordinary discharge of his official duties; the interference of the court with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and this power was never intended to be given to them.⁴¹ One secretary of a department has the same power as another to give a construction to an act which relates to the business of his department.⁴²

7. POWER TO PRESCRIBE REGULATIONS HAVING FORCE OF LAW.—“Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the time a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.”⁴³

8. REVIEW OF PROCEEDINGS BY OFFICER HIMSELF OR SUCCESSOR—*a. In General.*—Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.⁴⁴

b. Supervision of Allowances and Contracts of Predecessor.—The head of a department cannot supervise the allowances and contracts of his predecessor;

40. Relation of heads of departments to their bureau officers.—*Butterworth v. Hoe*, 112 U. S. 50, 56, 28 L. Ed. 656.

When a secretary of the government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed made by him when it is made under his sanction and direction. *Miller v. New York*, 109 U. S. 385, 394, 27 L. Ed. 971.

The hearing and determination of a matter by the proper assistant postmaster general is equivalent to determination by the postmaster general. *Alvord v. United States*, 95 U. S. 356, 358, 24 L. Ed. 414.

The direction of the commissioner to execute a new bond must be considered as the direction of the secretary. *Soule*

v. United States, 100 U. S. 8, 12, 25 L. Ed. 536.

41. Power as to construction of statutes.—*Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559.

42. *United States v. Macdaniel*, 7 Pet. 1, 8 L. Ed. 587.

43. Power to prescribe regulations having the force of laws.—*United States v. Eaton*, 144 U. S. 677, 688, 36 L. Ed. 591.

44. Review of proceedings by officer himself or successor.—*New Orleans v. Paine*, 147 U. S. 261, 37 L. Ed. 162; *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589, 594, 42 L. Ed. 591.

In *New Orleans v. Paine*, 147 U. S. 261, 37 L. Ed. 162, the question was presented as to the power of the department to order a new survey, and it was held that “if the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another.” *Michigan Land, etc., Co. v. Rust*, 168 U. S. 589, 594, 42 L. Ed. 591.

and more especially must this be the case where the allowances have not only been made for services rendered but credited to the party on the books of the department.⁴⁵

c. *Power to Correct Clerical Mistake.*—A power to correct a clerical mistake, the existence of which is shown plainly by the record, is a necessary power in the administration of every department.⁴⁶

B. Actions against Heads of Departments.—The head of an executive department when engaged in the discharge of duties imposed upon him by law, is not personally liable to civil suits for damages arising from acts done in the course of the performance of his functions, or on account of official communications within his authority, although his motives may have been malicious.⁴⁷

C. Treasury Department—1. **OFFICERS**—a. *Secretary of Treasury*—(1) *Collection of Revenue.*—It is the duty of the secretary of the treasury to superintend the collection of the revenue.⁴⁸

(2) *Effect of Regulations Prescribed by Secretary of Treasury.*—The regulations prescribed by the secretary of the treasury, under a power given to him by act of congress are also “regulations prescribed by law.”⁴⁹

(3) *Regulations of Custody, Use and Preservation of Records.*—Under § 161, Rev. Stat., U. S. Comp. Stats. 1901, p. 80, the secretary of treasury may adopt a regulation providing for the custody, use and preservation of the records and papers of his department. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of congress.⁵⁰

b. *Comptroller of Treasury.*—It is the duty of the comptroller of the treasury to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for all debts which may be due to the United States.⁵¹ The comptroller in the treasury department decides whether or not the items are authorized by statute, and are legally chargeable. He has no power to review, revise and alter items expressly allowed by statute, nor items of expenditures or allowances made upon the judgment and discretion of other of-

45. Supervision of allowances and contracts of predecessor.—*Kendall v. Stokes*, 3 How., appx. 787, 792; *United States v. Bank*, 15 Pet. 377, 400, 10 L. Ed. 774.

The head of a department has the same power, and no more, over the credits allowed by his predecessor, if allowed within the scope of his official authority, as given by law to the head of the department; this right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact, arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals must be resorted to, to construe the law under which the allowance was made; and to settle the right between the United States, and the party to whom the credit was given; it is no longer a case between one officer's judgment, and that of his successor. *United States v. Bank*, 15 Pet. 377, 10 L. Ed. 774. See, also, *Kendall v. Stokes*, 3 How., appx. 787, 793.

46. Power to correct clerical mistakes.—*Bell v. Hearne*, 19 How. 252, 262, 15 L. Ed. 614.

47. Actions against.—*Spalding v. Vilas*, 161 U. S. 483, 498, 40 L. Ed. 780.

“As in the case of a judicial officer, we recognize a distinction between actions taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision.” *Spalding v. Vilas*, 161 U. S. 483, 498, 40 L. Ed. 780.

“The act of the head of one of the departments of the government in calling the attention of any person having business with such department to a statute relating in any way to such business, cannot be made the foundation of a cause of action against such officers.” *Spalding v. Vilas*, 161 U. S. 483, 493, 40 L. Ed. 780.

48. Collection of revenue.—*Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909.

49. Effect of regulation prescribed by secretary of treasury.—*Aldridge v. Williams*, 3 How. 1, 11 L. Ed. 469. See the title REVENUE LAWS, vol. 10, p. 838.

50. Regulations of custody, use and preservation of records.—*Boske v. Comingore*, 177 U. S. 459, 469, 44 L. Ed. 846.

51. Comptroller of treasury.—*Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909.

ficers charged with the duty of expending the money or of making the allowances. His duty extends no further than to see that the officers charged with that duty have authorized the expenditures or have made the allowances.⁵²

c. *Auditor*.—The auditor in the treasury department merely examines and audits accounts, neither allowing nor disallowing the same, certifies balances and transmits the same to the comptroller for his decision thereon.⁵³

d. *The Commissioner*.—The commissioner is a subordinate officer of the treasury department.⁵⁴

e. *Inspector of Immigration*.—Inspectors of immigration under the act of 1891 must be appointed by the secretary of the treasury; and appointments of such officers by the superintendent of immigration can be upheld only by presuming them to be made with the concurrence or approval of the secretary of the treasury, his official head.⁵⁵

f. *Receivers and Depositaries of Public Money*—(1) *In General*.—Receivers and depositaries are required to keep accounts of their contingent expenses. Those accounts are separate and distinct from those of their receipts and disbursements of the public moneys.⁵⁶

(2) *States as Depositaries*.—No authority has been conferred upon the secretary of treasury, by subsequent legislation, to use any surplus revenue accruing after January 1, 1839, for the purpose of meeting the fourth installment of deposit of the surplus revenue that the state required by the act of January 23, 1836, there not being in the treasury on January 1, 1839, a sufficient amount, available and applicable to proper parties, after paying necessary appropriations for the expenses of the government, to meet that installment. The act of January 23, 1836, created no debt or legal obligation upon the part of the government, but only made the states the depositaries, temporarily of a portion of the public revenue not needed, as was then supposed, for the purposes of the United States.⁵⁷

g. *Collectors*.—**Liability for Money Received**.—The collector is responsible for all moneys received by him and not accounted for, without reference to the official terms he may have served, or to any bonds he may have executed.⁵⁸

h. *Disbursing Officers*.—**Advance of Public Money Must Be under Direction of President**.—See ante, "Superintendence by President," XII, A, 4.

2. ACCOUNTS—a. *Power to Take Security*.—The secretary of the treasury and the comptroller of the treasury have the power to take security for a debt on account of the United States, according to the usual methods provided by law for that end.⁵⁹

52. United States v. Waters, 133 U. S. 208, 215, 33 L. Ed. 594.

53. Auditor.—United States v. Waters, 133 U. S. 208, 215, 33 L. Ed. 594.

54. The commissioner.—Soule v. United States, 100 U. S. 8, 12, 25 L. Ed. 536; Dugan v. United States, 3 Wheat. 172, 4 L. Ed. 362; United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199; Hamilton v. Dillin, 21 Wall. 73, 22 L. Ed. 528.

55. Inspectors of immigration.—Ekin v. United States, 142 U. S. 651, 663, 35 L. Ed. 1146.

56. Receivers and depositaries of public money.—United States v. Gilmore, 7 Wall. 491, 19 L. Ed. 282.

Where the offices of receiver and depositary are united in the same person, the expense accounts of the two offices are nevertheless required to be kept separately from each other. The claims growing out of that branch of his duties which related to his office of depositary,

and had no connection with his office of receiver, must be presented to the first auditor for examination, and afterwards to the first comptroller for his final decision. United States v. Gilmore, 7 Wall. 491, 493, 19 L. Ed. 282. See ante, "Presentation and Allowance," VIII, C, 3, c.

57. States as depositaries.—Ex parte Virginia, 111 U. S. 43, 47, 28 L. Ed. 346.

58. Liability for money received.—United States v. Eckford, 1 How. 250, 259, 11 L. Ed. 120.

59. Power to take security.—To deny, them, that power would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists as an incident to the general right of sovereignty, and may be exercised by the proper department if not prohibited by legislation, is settled by the cases of Dugan v. United States, 3 Wheat. 172.

b. *Auditing and Settlement*—(1) *Necessity*.—**Accounts Connected with Indian Affairs.**—The law requires accounts relating to and connected with Indian affairs to be passed by the commissioners of Indian affairs to the second auditor of the treasury, and by him to the second auditor for examination and certificate of the balances arising thereon.⁶⁰

(2) *Time*.—Sound policy requires that the accounts of disbursing officers should be adjusted at the proper department, with as much dispatch as is practicable; this is alike due to the public and to the persons who are held responsible as sureties; to the individual who has received advances of money, no lapse of time nor change of circumstances can weaken the claim of government for reimbursement; but there may be some cases of hardship where, after a great lapse of time, and the insolvency of the principal, the amount of the defalcation is sought to be recovered from the sureties. The law on this subject is founded upon consideration of public policy; while various acts of limitation apply to the concerns of individuals, none of them operate against the government; on this point, there is no difference of opinion among the federal or state courts.⁶¹

(3) *Notice to Settle—Return of Vouchers for Expenditures.*—Under the present mode of proceeding against defaulters, the notice from the comptroller of the treasury to return vouchers for the expenditure of moneys received, authorized by the act of 1795, is unnecessary.⁶²

c. *Payment and Extinguishment*—(1) *Credits*.—The United States possesses the general right to apply all sums due to an officer in the service of the United States for pay and emoluments, to the extinguishment of any balances due to them by such officer, on any other account; whether as a private individual, or an officer of the United States. It is but the exercise of the common right which belongs to every creditor, to so apply the unappropriated moneys of his debtor in his hands, in the extinguishment of the debts due by him.⁶³ Should

4 L. Ed. 362; *United States v. Tingey*, 5 Pet. 115, 117, 8 L. Ed. 66; *United States v. Bradley*, 10 Pet. 343, 9 L. Ed. 448, and *United States v. Linn*, 15 Pet. 290, 10 L. Ed. 742; *Neilson v. Lagow*, 12 How. 98, 107, 13 L. Ed. 909.

60. **Accounts connected with Indian affairs.**—*United States v. Brinble*, 110 U. S. 688, 694, 28 L. Ed. 286. See the title **INDIANS**, vol. 6, p. 906.

61. **Settlement.**—*Smith v. United States*, 5 Pet. 292, 8 L. Ed. 130.

The defendant pleaded, that Alpha Kingsley was removed from office on the 1st of April, 1815, and on the 15th of September, reported himself to the treasurer of the United States as ready for the settlement of his accounts; at which time, and long afterwards, he was solvent, and able to pay the full amount of the defalcation; that no notice was given to him by the treasury to account for moneys in his hands, nor to the defendant until the commencement of the suit, and that before the commencement of the suit, K. became insolvent. The United States demurred to this plea; the district court of Missouri sustained the demurrer, and gave judgment for the United States. There was no error in the judgment. *Smith v. United States*, 5 Pet. 292, 8 L. Ed. 130.

The fiscal operations of the government are extensive and often complicated; it is extremely difficult, at all times, and

sometimes, impracticable, to settle the accounts of public officers, with as little delay as attends the private accounts of a mercantile establishment; but it is always in the power of an individual, who may be held responsible for the faithful conduct of a public agent, to see that his accounts are settled, and the payment of any balance enforced. A notice to the government, by the surety, that he is unwilling to continue his responsibility, would induce it, in most instances, to take the necessary steps for his release. *Smith v. United States*, 5 Pet. 292, 8 L. Ed. 130.

62. **Notice to settle.**—By the acts of the 3d of March, 1797, and the 3d of March, 1817, material changes are made in the accounting department of the government; and although the act of March 3, 1795, may not be expressly repealed, yet it is abrogated by new and substantive provisions. *Smith v. United States*, 5 Pet. 292, 8 L. Ed. 130.

63. **Credits.**—*Gratiot v. United States*, 15 Pet. 336, 10 L. Ed. 759.

So held as to disbursements of money for which a naval agent was entitled to credits without regard to whether the debts were for moneys received before or after the expiration of his office. *United States v. Nicholl*, 12 Wheat. 505, 511, 6 L. Ed. 709, following *United States v. Patterson*, 7 Cranch 575, 3 L. Ed. 444.

the accounting officer of the treasury refuse to allow an officer the established compensation which belongs to his station, the claim, having been rejected by the proper department, should, unquestionably, be allowed by way of set-off to the demand of the government by a court and jury.⁶⁴

Allowance of Credit for Money Transferred without Authority to Another Officer.—Where an advance of a sum of money by one federal officer to another was not made in pursuance of any authority, the treasury officers have no right to release the transferrer from liability, by crediting his account for so much money paid to the transferee.⁶⁵

(2) *Application of Payments.*—But payments into the treasury of moneys accruing and received in the second term, should not be applied to the extinguishment of a balance apparently due at the end of the first term. Payments made in the subsequent term, of moneys received on duty bonds, or otherwise, which remained charged to the collector as of the preceding official term, should be so applied.⁶⁶

d. *Suits*—(1) *Distress against Delinquent Revenue Officers.*—See the titles PUBLIC OFFICERS, vol. 10, p. 363; REVENUE LAWS, vol. 10, p. 838.

(2) *Set-Off.*—See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1127, note 77.

(3) *Treasury Transcripts as Evidence.*—See the title DOCUMENTARY EVIDENCE, vol. 5, pp. 438, 441, 445, 447. In every treasury account on which suit is brought, the law requires the credits to be stated as well as the debits; these credits the officers of the government cannot properly either suppress or withhold; they are made evidence in the case, and were designed by the law for the benefit of the defendant. The defendant is entitled to a certified statement of his credits, as allowed by the accounting officers, and he has a right to claim the full benefit of them, in a suit by the government; and under no circumstances has the government a right to withdraw credits which have been fairly allowed.⁶⁷

64. *United States v. Ripley*, 7 Pet. 18, 8 L. Ed. 593. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, pp. 1124, 1128.

The statute allowing such set-offs, act of March 3, 1797, prevents delinquent officers from delaying the United States, by frivolous pretenses, from obtaining judgment at the return term; gives to the defendant the full benefit of having every credit to which he may suppose himself equitably entitled, and which has been disallowed, passed upon by a jury; and guards the district attorney from surprises, by informing him, through the treasury department, before the time of trial, of the credits which have been claimed, and the reasons for the rejection of them. *United States v. Hawkins*, 10 Pet. 125, 9 L. Ed. 369.

Before a depository of public money can, in a suit against him by the United States for a balance, offer proof of credits for clerk hire, he must show by evidence from the books of the treasury—a transcript of the proceedings of the officers being a proper form of such evidence—that a claim for such credits had been presented to the proper officers of the treasury (that is to say, to the first auditor, and afterwards to the first comptroller for his final decision), and by them had been, in whole or in part, dis-

allowed. *United States v. Gilmore*, 7 Wall. 491, 19 L. Ed. 282.

And to be legally presented the claim should be presented by items, and with the proper vouchers. *Watkins v. United States*, 9 Wall. 759, 19 L. Ed. 820.

Whether testimony in support of such claims was properly in the case, was a question for the court and not for the jury. *United States v. Gilmore*, 7 Wall. 491, 19 L. Ed. 282.

65. **Allowance of credit for money transferred without authority to another officer.**—*United States v. Buford*, 3 Pet. 12, 29, 7 L. Ed. 585.

66. **Application of payments.**—*United States v. Eckford*, 1 How. 250, 11 L. Ed. 120.

67. *United States v. Jones*, 8 Pet. 375, 8 L. Ed. 979.

The law has prescribed the mode by which treasury accounts shall be made evidence, and whilst an individual may claim the benefit of this rule, the government can set up no exemption from its operation. In the performance of their official duty, the treasury officers act under the authority of law, their acts are public, and affect the rights of individuals as well as those of the government; in the adjustment of an account, they sometimes act judicially, and their acts are all recorded on the books and files of

Weight and Sufficiency.—Treasury transcripts of the accounts of public officers are prima facie evidence of the correctness of the balance certified, but not conclusive. An objection to the statement does not lie to its competency, but to its effect.⁶⁸

3. **PENALTIES.**—The penal sanctions of the third section of the act of June

the treasury department; so far as they act strictly within the rules prescribed for the exercise of their powers, their decisions are, in effect, final; for if an appeal be made, they will receive judicial sanction; accounts amounting to many millions annually, come under the action of these officers; it is, therefore, of great importance to the public, and to individuals, that the rules by which they exercise their powers, should be fixed and known. *United States v. Jones*, 8 Pet. 375, 8 L. Ed. 979.

The defendant, in an action by the United States, where a treasury transcript is produced in evidence by the plaintiffs, is entitled to the credits given to him in the account; and in claiming those credits, he does not waive any objection to the items on the debit side of the account. He is unquestionably entitled to the evidence of the decision of the treasury officers upon his vouchers, without reference to the charges made against him; and he may avail himself of that decision, without in any degree restricting his right to any improper charge. The credits were allowed the defendant on the vouchers alone, and without reference to the particular items of demand which the government might have against him; and the debits, as well as the credits, must be established on distinct and legal evidence. *United States v. Jones*, 8 Pet. 375, 8 L. Ed. 979.

68. *United States v. Dumas*, 149 U. S. 278, 285, 37 L. Ed. 734; *United States v. Stone*, 106 U. S. 525, 27 L. Ed. 163; *Soule v. United States*, 100 U. S. 8, 11, 25 L. Ed. 536; *United States v. Eckford*, 1 How. 250, 11 L. Ed. 120; *United States v. Hodge*, 13 How. 478, 14 L. Ed. 231; *Bruce v. United States*, 17 How. 437, 440, 15 L. Ed. 129, distinguishing *United States v. Buford*, 3 Pet. 12, 29, 7 L. Ed. 585, and *United States v. Jones*, 8 Pet. 375, 376, 8 L. Ed. 979; *Smith v. United States*, 5 Pet. 292, 8 L. Ed. 130; *Cox v. United States*, 6 Pet. 172, 202, 8 L. Ed. 359; *Hoyt v. United States*, 10 How. 109, 13 L. Ed. 348.

In *United States v. Eckford*, 1 How. 250, 11 L. Ed. 120, a statement of account by the officers of the treasury was held not to be conclusive, but only prima facie evidence. So in *United States v. Hodge*, 13 How. 478, 14 L. Ed. 231, a treasury transcript offered in evidence was held to be competent, but not conclusive. *United States v. Dumas*, 149 U. S. 278, 285, 37 L. Ed. 734.

In *Watkins v. United States*, 9 Wall. 759, 19 L. Ed. 820, nothing more ap-

peared in the shape of evidence than the certified transcript of accounts, and being held to be prima facie evidence, it warranted judgment for the government for the amount therein shown to be due, in the absence of any testimony explaining or contradicting it. But that case does not hold that certified transcripts of accounts are conclusive upon the officer. *United States v. Dumas*, 149 U. S. 278, 285, 37 L. Ed. 734.

In *Soule v. United States*, 100 U. S. 8, 11, 25 L. Ed. 536, it was held that "it is as competent for the accounting officers to correct mistakes and to restate the balance as it is for a judge to change his decree during the term in which it was entered. Errors of computation against the United States are no more vested rights in favor of sureties than in favor of the principal. All such mistakes in cases like the present may be corrected by a restatement of the account." *United States v. Dumas*, 149 U. S. 278, 285, 37 L. Ed. 734.

In the case of the *United States v. Buford*, 3 Pet. 12, 29, 7 L. Ed. 585 (who was a deputy commissary), the money had been placed in his hands by Morrison, who was a deputy quartermaster, without authority and contrary to his duty, and the accounting officers refused to credit it in Morrison's account. Upon application to congress, however, a law was passed authorizing the accounting officers to allow the credit, upon receiving from Morrison an assignment to the United States of all his right to the money mentioned in the receipt, which he had taken from Buford when he advanced him the money. Morrison made the assignment accordingly; and thereupon an account was stated on the books of the treasury, charging Buford as debtor to Morrison for the amount advanced to him. And a transcript from this account was offered in evidence. It is set out in the report of the case, and it is evident that this account was not within the letter or spirit of the act of congress. It certainly could not prove the receipt of Buford for the whole transaction was outside of the regular operations of the government, and the accounting officers could not be presumed to have any official knowledge of the unauthorized transactions between the parties. *Bruce v. United States*, 17 How. 437, 440, 15 L. Ed. 129.

In *United States v. Jones*, 8 Pet. 375, 376, 8 L. Ed. 979, the transcript contained charges against the contractor

14, 1866, "to regulate and secure the safe-keeping of public money," etc. (14 Stat. at Large, 65), is confined to officers of banks and banking associations.⁶⁹

Remission of Penalties for Violation of Revenue Laws.—See the title REVENUE LAWS, vol. 10, p. 988.⁷⁰

4. SALARY OR COMPENSATION OF EMPLOYEES AND CLERKS.—There is nothing to prevent the secretary of the treasury from putting an employee on furlough without pay at any time, if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is in effect a partial dismissal.⁷¹ The joint resolution approved June 23, 1874 (18 Stat., part 3, p. 289), providing for two months' pay to clerks and employees of the executive departments at Washington, applied to such only as should be discharged at the close of the fiscal year by reason of the reductions made necessary by the legislation of that session of congress.⁷³

A disbursing clerk of the treasury department is not entitled to compensation for services performed by him under the direction of the secretary of the treasury as disbursing agent for the funds appropriated for a postoffice at Washington, D. C.⁷⁴

D. Department of Interior—1. **SECRETARY OF INTERIOR.**—As to authority to license transportation between loyal and insurrectionary states, see the title WAR.

2. **TIMBER AGENTS.**—Treated elsewhere.⁷⁵

E. War Department.—See the titles ARMY AND NAVY, vol. 2, p. 494; WAR.

1. **SECRETARY OF WAR**—a. *In General.*—The secretary of war is the regular constitutional organ of the president for the administration of the military establishment of the nation; and rules and orders, publicly promulgated through him, must be received as the acts of the executive, and as such are binding upon all within the sphere of his legal and constitutional authority.⁷⁶

b. *Powers and Duties Respecting Contracts*—(1) *Duty to See to Faithful Execution.*—It is the duty of the secretary of war, as head of the war department, to see that contracts which belong to his office are properly and faithfully executed, whether he have made the contracts himself or have conferred authority on others to make them.⁷⁷

(2) *Power to Suspend Payment and Effect Settlement.*—If the secretary of war becomes satisfied that contracts which he has made himself are being fraud-

for bills of exchange, drawn by him and paid to other persons. The court regarded this operation as not within the ordinary mode of proceeding in the department, and that the accounting officers could not be presumed to have any knowledge of the drawing of those bills, or of their indorsement to others, and thereupon rejected these items. *Bruce v. United States*, 17 How. 437, 440, 15 L. Ed. 129.

69. Penalties.—*United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830.

70. The Laura, 114 U. S. 411, 414, 29 L. Ed. 147.

71. Salary or compensation of employees and clerks.—*United States v. Murray*, 100 U. S. 536, 537, 25 L. Ed. 756.

Owing to the partial exhaustion of the appropriation, A, a clerk in the treasury department, was granted leave of absence without pay for five months from February 1, 1874. He performed no service thereafter. His name was continued on the rolls to allow his transfer to some

other bureau, should an opportunity offer. He was, June 30, informed in writing by the secretary of the treasury that his services had terminated January 31. Held, that he has no claim against the United States after the last-mentioned date. *United States v. Murray*, 100 U. S. 536, 25 L. Ed. 756.

73. United States v. Murray, 100 U. S. 536, 25 L. Ed. 756.

74. Bartlett v. United States, 197 U. S. 230, 49 L. Ed. 735. See the title REVENUE LAWS, vol. 10, p. 838.

75. Timber agents.—See the title PUBLIC LANDS, vol. 10, pp. 56, 236. See, also, *In re Neagle*, 135 U. S. 1, 65, 34 L. Ed. 55.

76. Secretary of war.—*United States v. Eliason*, 16 Pet. 291, 10 L. Ed. 968.

"In the absence of the secretary the authority with which he was invested could be exercised by the officer who, under the law, became for the time acting secretary of war." *Ryan v. United States*, 136 U. S. 68, 81, 34 L. Ed. 447.

77. See cases cited to following paragraph.

ulently executed, or that those made by others were made in disregard of the rights of the government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates.⁷⁸

c. *Allowance of Additional Rations to Officers Commanding Separate Posts.*—See the title ARMY AND NAVY, vol. 2, p. 519.

2. SURGEON GENERAL AND ASSISTANT SURGEON GENERAL.—The acts of the assistant surgeon general, appointed under the act of congress and located at St. Louis, are the acts of the surgeon general, and have the same validity until countermanded or revoked.⁷⁹

F. Navy Department.—See the title ARMY AND NAVY, vol. 2, p. 494.

G. Postoffice Department.—See the title POSTAL LAWS, vol. 9, p. 550.

XIII. Legislative Department—Congress.

See the title CONSTITUTIONAL LAW, vol. 4, pp. 293, 297, et seq.

Effect of Refusal of States to Elect Senators.—If all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of performing all its functions.⁸⁰

UNITED STATES BANK.—See the title BANKS AND BANKING, vol. 3, p. 1.

UNITED STATES BONDS.—See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650.

78. *United States v. Adams*, 7 Wall. 463, 19 L. Ed. 249, followed in *United States v. Mowry*, 154 U. S., appx., 564, 19 L. Ed. 256; *United States v. Morgan*, 154 U. S., appx., 565, 13 L. Ed. 643, 19 L. Ed. 256; *United States v. Burton*, 154 U. S., appx., 566, 19 L. Ed. 256.

If there exist well-grounded suspicions, or facts unexplained, tending strongly to the conclusion that contracts have been entered into, and debts incurred, within a particular military district, in disregard of the rights of the government, the secretary has a right and is bound to issue an order to suspend the payment of all claims against it. *United States v. Adams*, 7 Wall. 463, 19 L. Ed. 249.

In such a case (especially where the military district in which the contracts were made and are to be carried into execution is one distant from Washington, where congress and the court of claims sit, and a resort to these tribunals would occasion delay and expense), the appointment of a board of commissioners, to meet at once at the place where all the transactions out of which the claims and demands of which payment is now suspended originated—the appointment being for the simple purpose of affording to such claimants as might desire a tribunal to speedily hear and decide upon their claims, without the delay and expense of resorting to those which the law had recognized or provided, and so

to relieve them from the hardship resulting from the suspension of the payment, as far as was in the power of the secretary—is a fit measure to be taken by the secretary. *United States v. Adams*, 7 Wall. 463, 19 L. Ed. 249.

If the claimant voluntarily come before a board thus appointed, and present his claim, and the board investigate it, and congress afterwards enacting that all claims allowed by such board shall be deemed to be due and payable, and be paid upon presentation of a voucher with the commissioners' certificate thereon, the petitioner do present his voucher and receive payment of the sum so allowed by the board, he cannot afterwards recover in the court of claims a balance which would remain on an assumption of the validity of his original contract. *United States v. Adams*, 7 Wall. 463, 19 L. Ed. 249.

These principles applied to contracts made in 1861 by General McKinstry, quartermaster in the Western Military Division, under General Fremont, commanding, for motor boats and tug boats, to be used by the army on the western rivers during the late Civil War. *United States v. Adams*, 7 Wall. 463, 19 L. Ed. 249.

79. *Parish v. United States*, 100 U. S. 500, 25 L. Ed. 763.

80. **Effect of refusal of states to elect senators.**—*Cohens v. Virginia*, 6 Wheat. 264, 390, 5 L. Ed. 257.

UNITED STATES COMMISSIONERS.

BY R. J. BROSSMAN.

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CROSS REFERENCES.

As to the number of fees chargeable for taking acknowledgments of defendant and sureties in a criminal case, see the title **ACKNOWLEDGMENTS**, vol. 1, p. 95. As to reference in admiralty causes to commissioners, see the titles **ADMIRALTY**, vol. 1, p. 177; **REFERENCE**, vol. 10, p. 600. As to a power of commissioner in exclusion cases, see the titles **ALIENS**, vol. 1, pp. 250, 252; **CHINESE EXCLUSION ACTS**, vol. 3, pp. 774, 780. As to sufficiency of warrant of commissioner in making arrest, see the titles **ARREST**, vol. 2, p. 541; **WARRANTS**. As to the right of clerk to compensation where the commissioner has deposited with him records of his office upon the abolition of office of commissioner, see the title **CLERKS OF COURT**, vol. 3, p. 854. As to power of one person to occupy the offices of both clerk of court and commissioner, and compensation therefor, see the title **CLERKS OF COURT**, vol. 3, pp. 850, 856. As to authority of commissioner to commit a person accused of an offense against the fugitive slave law, see the title **COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED**, vol. 3, p. 952. As to whether a preliminary examination is a proceeding in a court of the United States, see the title **COMMITMENT AND EXAMINATION OF ACCUSED**, vol. 3, p. 954. As to supreme court adopting commissioner's finding of probable cause for change of venue, see the title **CRIMINAL LAW**, vol. 5, p. 104. As to power of congress to authorize the appointment of commissioners by the courts, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 246. As to jurisdiction of court of claims in an action by commissioner for salary, see the title **COURTS**, vol. 4, p. 1030. As to validity of deposition taken before a commissioner who was not sworn, see the title **DEPOSITIONS**, vol. 5, p. 324. As to compensation of commissioner as supervisor of election, see the title **ELECTIONS**, vol. 5, p. 725.

As to jurisdiction of commissioner in extradition cases, see the title *EXTRA-DITION*, vol. 6, pp. 219, 221. As to errors by commissioner in jailing debtor for fraud as a ground for habeas corpus, see the title *HABEAS CORPUS*, vol. 6, pp. 666, 667. As to commissioners appointed under a treaty, see the title *INTER-NATIONAL LAW*, vol. 7, p. 253. As to approval of account by designated authority prerequisite to action for fees, see the title *PUBLIC OFFICERS*, vol. 10, p. 401.

I. Appointment and Removal.

A. Appointment of De Facto Commissioner.—The appointment by a district court with circuit court powers of a commissioner being valid at the time it was made, he is, if thereafter continued in office by the circuit court, a de facto officer in the discharge of his duties, even if his continuance be not evidenced by express reappointment.¹

B. Removal.—Commissioners not holding their offices for any fixed tenure fall within the settled rule that the power of removal is incident to the power of appointment.²

II. Powers and Duties.

A. In General.—A commissioner is an officer,³ or an adjunct of the court, possessing independent, though subordinate, judicial powers of his own,⁴ and his duties are prescribed by statute.⁵

Control by Court.—While no express power is given over commissioners by statute, their relations to the court are such that some power of this kind must be implied. Though not strictly officers of the court, they have always been considered in the same light as masters in chancery and registers in bankruptcy, and subject to its supervision and control.⁶

B. To Adjourn Hearing.—The power of a commissioner to adjourn a hearing is a necessary incident to his power of hearing and determining.⁷

C. To Administer Oaths and Take Depositions.—See note.⁸

III. Compensation.

A. Compensation Per Diem.—For acts which are performed by the commissioner in his judicial capacity, his fees are regulated on a basis of per diem

1. *De facto commissioner.*—Starr v. United States, 164 U. S. 627, 631, 41 L. Ed. 577.

2. *Reagan v. United States*, 182 U. S. 419, 424, 45 L. Ed. 1162; *Ex parte Hennen*, 13 Pet. 230, 258, 10 L. Ed. 138; *Parsons v. United States*, 167 U. S. 324, 42 L. Ed. 185. See the title *PUBLIC OFFICERS*, vol. 10, p. 397, et seq.

Removal of commissioner.—A statute in providing for the appointment of a certain number of commissioners for Indian Territory, including those who then held office, declared the latter shall hold office under their existing appointments subject to removal for causes prescribed by law. In an action for salary by a commissioner, appointed previously to the passage of said act and holding under it, it was held that as no cause for removal was prescribed by law, the action of the judge in removing him was not open to review. *Reagan v. United States*, 182 U. S. 419, 425, 45 L. Ed. 1162. See, also, *Todd v. United States*, 158 U. S. 278, 282, 39 L. Ed. 982. See, generally, the titles *DE FACTO OFFICERS*, vol.

5, p. 283; *PUBLIC OFFICERS*, vol. 10, p. 363.

3. *Todd v. United States*, 158 U. S. 278, 282, 39 L. Ed. 982.

4. *In re Kaine*, 14 How. 103, 14 L. Ed. 345.

As a judicial officer.—But his powers are not judicial in the sense in which judicial power is granted by the constitution to the courts of the United States. *Todd v. United States*, 158 U. S. 278, 282, 39 L. Ed. 982; *In re Kaine*, 14 How. 103, 118, 14 L. Ed. 345.

5. *United States v. Allred*, 155 U. S. 591, 39 L. Ed. 273.

6. *United States v. Allred*, 155 U. S. 591, 595, 39 L. Ed. 273.

7. *United States v. Jones*, 134 U. S. 483, 33 L. Ed. 1007; *United States v. Ewing*, 140 U. S. 142, 150, 35 L. Ed. 388.

8. See the titles *ACKNOWLEDGMENTS*, vol. 1, p. 81; *DEPOSITIONS*, vol. 5, p. 324.

A commissioner of the United States circuit court has not the authority to administer an oath and make a certificate that a deputy United States surveyor

compensation.⁹ His right to a per diem compensation "for hearing and deciding upon criminal charges" is not affected by the discharge of the defendant,¹⁰ nor by an adjournment of the hearing in the exercise of his discretionary power;¹¹ decisions upon motions for bail and the sufficiency thereof are judicial acts within the statute allowing a per diem compensation for the "hearing and deciding upon criminal charges."¹² In the absence of statute a commissioner is not entitled to compensation for the examination on oath of the complainant and other witnesses to determine whether a crime has been committed and a warrant issued therefor.¹³

B. Fees for Particular Services—1. **IN GENERAL**.—For facts done other than in his judicial capacity, specific fees are provided in some cases, and in others he has the same compensation as is allowed to clerks for like services.¹⁴ Under the statute authorizing in each state, for offenses against the United States, procedure agreeable to the usual mode of process against offenders in such state,¹⁵ it is proper to look at the law of the state in which the services are rendered in proceedings for offenses against the United States to determine for what services the commissioner is entitled to payment.¹⁶ An order of court requiring a service to be performed is sufficient authority as between the commissioner and the government for the performance of the service and the allowance of the proper fee therefor.¹⁷

As Dependent upon Arrest.—Unless there has been an arrest and examination, there is no "case" within Rev. Stat., § 1986, allowing commissioners a certain fee for each case in connection with proceedings in civil rights case.¹⁸

2. **DOCKET FEES**.—Under the former statute providing that a commissioner shall have the same compensation as allowed to clerks for like service, he was entitled to docket fees, although his docket entries differed from those of the clerk.¹⁹ The deficiency appropriation bill of August 4, 1886, after providing for fees substantially as in the former statute, declared that they shall not be entitled to any docket fees, and this was held to have taken away the right permanently to make such charges.²⁰

3. **DRAWING COMPLAINTS**.—Where the usual method of procedure is for a commissioner to draw complaints, he is entitled to a fee therefor, as for "taking and certifying depositions to file."²¹

had personally rendered the service required by his contract of employment. *United States v. Reily*, 131 U. S. 58, 59, 33 L. Ed. 75.

9. Section 847, Rev. Stat. *United States v. Patterson*, 150 U. S. 65, 66, 37 L. Ed. 999.

10. **Where defendant discharged**.—*United States v. Patterson*, 150 U. S. 65, 37 L. Ed. 999; *Southworth v. United States*, 151 U. S. 179, 185, 38 L. Ed. 119.

11. **Adjournment of hearing**.—*United States v. Ewing*, 140 U. S. 142, 150, 35 L. Ed. 388; *United States v. Jones*, 134 U. S. 483, 33 L. Ed. 1007.

12. **Motions for bail**.—*United States v. Jones*, 134 U. S. 483, 487, 33 L. Ed. 1007.

13. **Hearing complaints**.—*United States v. Patterson*, 150 U. S. 65, 67, 68, 37 L. Ed. 999.

14. *United States v. Patterson*, 150 U. S. 65, 66, 37 L. Ed. 999.

Like services.—The phrase "like services" does not necessarily mean identical with but only a substantial resemblance to the duties performed by a clerk. *United States v. Wallace*, 116 U. S. 398, 400, 29 L. Ed. 675.

15. Section 1014, Rev. Stat.

16. *United States v. Ewing*, 140 U. S. 142, 144, 35 L. Ed. 388.

17. **Order of court**.—*United States v. Allred*, 155 U. S. 591, 593, 39 L. Ed. 273.

18. **Must be an arrest and examination**.—*Southworth v. United States*, 151 U. S. 179, 38 L. Ed. 119; *Allen v. United States*, 204 U. S. 581, 51 L. Ed. 634.

19. *United States v. Wallace*, 116 U. S. 398, 400, 29 L. Ed. 675.

20. *United States v. Ewing*, 140 U. S. 142, 147, 35 L. Ed. 388; *United States v. McDermott*, 140 U. S. 151, 154, 35 L. Ed. 391; *United States v. Hall*, 147 U. S. 691, 37 L. Ed. 333.

Entries required by rule of court.—But in *United States v. Allred*, 155 U. S. 591, 39 L. Ed. 273, it was held that a commissioner was entitled to fees "for making entries on the docket in various cases, consisting of name of affiant, his official position if any, date of issuing warrant, name of defendant and witnesses, and final disposition of case, as required by rule of court." See ante. "In General," III, B, 1.

21. *United States v. Ewing*, 140 U. S.

4. **WRITING OUT TESTIMONY.**—A commissioner is entitled to fees for writing out testimony,²² and to a folio charge for depositions taken on examination.²³

5. **ISSUING WRITS.**—He is entitled to fees for issuing warrants,²⁴ subpoenas,²⁵ and temporary mittimus writs.²⁶

6. **ADMINISTERING OATHS AND TAKING ACKNOWLEDGMENTS.**—A commissioner is entitled to a fee for taking acknowledgments of the defendant and sureties in a criminal case,²⁷ and for the oaths of sureties and the jurat thereto in such case.²⁸ He is also entitled to fees for oaths administered to witnesses in support of their claim for fees,²⁹ and to deputy marshals for verifying their accounts of service, as required by the attorney general and the accounting officers of the treasury;³⁰ where a commissioner acts as supervisor of elections, he may charge for administering oaths to voters as to their qualifications and jurats thereto.³¹

7. **CERTIFICATES.**—A commissioner is not entitled to compensation for certifying complaints to himself as chief supervisor of elections;³² under the statutes allowing a commissioner fees for making certificates he is entitled to a fee for a jurat attached to a deposition taken before him.³³

8. **ENTERING RETURNS.**—A commissioner is entitled to fees for entering returns to process,³⁴ warrants and subpoenas.³⁵

9. **FILING PAPERS.**—A commissioner is entitled to a fee for filing complaints, warrants, subpoenas or other papers,³⁶ but two or more depositions embraced in a single paper or a series of sheets attached together form but a single paper within the meaning of the statute.³⁷

10. **FOLIO CHARGE FOR TRANSCRIPT AND PAYROLL.**—A folio charge for payrolls of witnesses is proper, and so is a like charge for making transcripts of proceedings under Rev. Stat., § 1014, providing that copies of process issued by the commissioner shall be returned into the clerk's office.³⁸

142, 146, 35 L. Ed. 388; *United States v. McDermott*, 140 U. S. 151, 35 L. Ed. 391; *United States v. Barber*, 140 U. S. 164, 165, 35 L. Ed. 396.

Complaint exceeding three folios in length.—Charges for an excess of three folios may be made where the complaint is not unnecessarily prolix. *United States v. Barber*, 140 U. S. 177, 178, 35 L. Ed. 398.

Complaints in civil rights cases.—He is entitled to no compensation for drawing complaints charging offenses under ch. 7, title 70, Rev. Stat., as provision is made by § 1986, Rev. Stat., for a fee to cover all his services in proceedings before him of offenses against the said act. *Allen v. United States*, 204 U. S. 581, 51 L. Ed. 634.

22. *United States v. Ewing*, 140 U. S. 142, 147, 35 L. Ed. 388.

23. *United States v. Barber*, 140 U. S. 164, 168, 35 L. Ed. 396.

24. *United States v. Barber*, 140 U. S. 164, 166, 35 L. Ed. 396.

Several warrants against same person.—Charges for issuing more than one warrant against the same person for a violation of the same section of the Revised Statutes, are proper where such charges are approved by the court. *United States v. Barber*, 140 U. S. 177, 179, 35 L. Ed. 398.

25. *United States v. Barber*, 140 U. S. 164, 166, 35 L. Ed. 396.

26. *United States v. Ewing*, 140 U. S. 142, 144, 35 L. Ed. 388.

27. **Acknowledgments.**—*United States v. Ewing*, 140 U. S. 142, 146, 35 L. Ed. 388; *United States v. Barber*, 140 U. S. 164, 35 L. Ed. 396; *United States v. Barber*, 140 U. S. 177, 35 L. Ed. 398; *United States v. Hall*, 147 U. S. 691, 692, 37 L. Ed. 333. See the title **ACKNOWLEDGMENTS**, vol. 1, p. 95.

28. **Oaths of sureties and jurats.**—*United States v. Barber*, 140 U. S. 164, 167, 35 L. Ed. 396.

29. **Oaths of witnesses.**—*United States v. Barber*, 140 U. S. 164, 35 L. Ed. 396.

30. **Oaths of deputy marshals.**—*United States v. Allred*, 155 U. S. 591, 596, 39 L. Ed. 273.

31. **Oaths of voters.**—*United States v. McDermott*, 140 U. S. 151, 159, 35 L. Ed. 281.

32. *Allen v. United States*, 204 U. S. 581, 583, 51 L. Ed. 634.

33. *United States v. Julian*, 162 U. S. 324, 325, 40 L. Ed. 984.

34. *United States v. Ewing*, 140 U. S. 142, 35 L. Ed. 388.

35. *United States v. Barber*, 140 U. S. 164, 35 L. Ed. 396.

36. Sections 847, 828, Rev. Stat. *United States v. Barber*, 140 U. S. 164, 166, 35 L. Ed. 396.

37. *United States v. Barber*, 140 U. S. 164, 168, 35 L. Ed. 396.

38. *United States v. Barber*, 140 U. S. 164, 167, 35 L. Ed. 396.

C. Recovery—1. **APPROVAL OF ACCOUNT BY COURT.**—The approval of a commissioner's account by a circuit court of the United States is conclusive evidence of its correctness³⁹ and the proper exercise of his discretion in the absence of clear and unequivocal proof of mistake on the part of the court,⁴⁰ but the refusal of the court to approve the account is no bar to an action thereon.⁴¹

2. **BAD FAITH AS DEFENSE.**—A lack of good faith on the part of a commissioner may rightfully be pleaded in bar of any claim against the United States for compensation.⁴²

3. **COUNTERCLAIM.**—The United States may, in an attempt by a commissioner to secure additional pay for alleged services, counterclaim the sums improperly paid to the claimant, although the account was approved by the United States circuit court "subject to revision by the accounting officers of the United States treasury," and in view of the broad language of the statute the counterclaim may include payments made later than the filing of the claim.⁴³

UNITED STATES COURTS.—See the title *COURTS*, vol. 4, p. 888.

39. *United States v. Jones*, 134 U. S. 483, 488, 33 L. Ed. 1007.

40. *United States v. Barber*, 140 U. S. 177, 179, 35 L. Ed. 398.

41. **Refusal to approve as bar to action.**—*United States v. Knox*, 128 U. S. 230, 32 L. Ed. 465; *United States v. Jones*, 134 U. S. 483, 33 L. Ed. 1007; *Southworth v. United States*, 151 U. S. 179, 183, 38 L. Ed. 119.

Such refusal may, however, be a matter for consideration in respect to the good faith of his transaction. *United States v. Jones*, 134 U. S. 483, 33 L. Ed. 1007; *Southworth v. United States*, 151 U. S. 179, 183, 38 L. Ed. 119.

42. **Bad faith as a defense.**—*Southworth v. United States*, 161 U. S. 639, 640, 40 L. Ed. 835. In this case a com-

missioner issued warrants in a great number of cases for alleged frauds in registration. The warrants were not signed by himself but by a number of clerks, no discretion being exercised, and no personal examination of the complainants or witnesses being made, but warrants were issued in all cases in which complaints were made. Most of the warrants were never served. The commissioner sued for fees alleged to be due him under Rev. Stat., § 1986, and the finding of the lower court that he "did not perform the services for the United States in good faith for the purpose of enforcing the criminal law" was sustained.

43. *Allen v. United States*, 204 U. S. 581, 583, 51 L. Ed. 634.

UNITED STATES MARSHALS.

BY R. J. BROSSMAN.

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See the titles ARREST, vol. 2, p. 541; EXECUTIONS, vol. 6, p. 84; JUDICIAL SALES, vol. 7, p. 703; REPLEVIN, vol. 10, p. 717; SHERIFFS', CONSTABLES' AND MARSHALS' SALES, vol. 10, p. 1134; SUMMONS AND PROCESS, ante, p. 299.

As to survival of action against the personal representatives of a deceased marshal for misfeasance, see the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 23. As to whether a writ of error lies to supreme court where a marshal has been prosecuted in state court for wrongful attachment, see the title APPEAL AND ERROR, vol. 1, p. 658. As to jurisdiction of supreme court in respect to

taxation of marshal's fees, see the title *APPEAL AND ERROR*, vol. 2, p. 24. As to restitution of United States money by marshal, see the title *APPEAL AND ERROR*, vol. 2, p. 390. As to objection in supreme court to the allowance of excessive fees where record does not show the services rendered, see the title *APPEAL AND ERROR*, vol. 2, p. 205. As to validity of seizure of property in control of sheriff, see the title *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 667. As to the liability of marshal for erroneously following directions of attorney to the harm of client, see the title *ATTORNEY AND CLIENT*, vol. 2, p. 715. As to duty to seize bankrupt's property and liability for wrongful seizure, see the title *BANKRUPTCY*, vol. 2, pp. 849, 850. As to proof of authority to deputy marshal, see the title *BEST AND SECONDARY EVIDENCE*, vol. 3, p. 219. As to taxation of marshal's fees, see the title *COSTS*, vol. 4, p. 820. As to jurisdiction of actions for act done in his official capacity, see the title *COURTS*, vol. 4, pp. 933, 1173. As to liability for slaying a man in the course of his duty, see the titles *CRIMINAL LAW*, vol. 5, p. 68; *HOMICIDE*, vol. 6, p. 700. As to duty of district attorney to provide marshal with necessary process, see the title *DISTRICT AND PROSECUTING ATTORNEYS*, vol. 5, p. 399. As to regulation of compensation of deputy marshal assisting at elections, see the title *ELECTIONS*, vol. 5, p. 726. As to constitutionality of an act authorizing deputy marshals to keep the peace at elections, see the title *ELECTIONS*, vol. 5, p. 727. As to plea of justification by marshal for failure to levy an execution, see the title *EMBARGO AND NONINTERCOURSE LAWS*, vol. 5, p. 739. As to liability for escape of prisoner who was committed to state jail under process of United States court, see the title *ESCAPE*, vol. 5, p. 895. As to power to receive bank notes in satisfaction of execution and liability therefor, see the title *EXECUTIONS*, vol. 6, pp. 115, 116. As to power to make levy after expiration of term of office, see the title *EXECUTIONS*, vol. 6, p. 110. As to jurisdiction in action on forthcoming bond by marshal, see the title *FORTHCOMING AND DELIVERY BONDS*, vol. 6, p. 390. As to jurisdiction of federal courts for offenses by Indians against marshal, see the title *INDIANS*, vol. 6, p. 951. As to duty of marshal having a prisoner in custody under United States authority when a state court issues habeas corpus proceedings, see the title *HABEAS CORPUS*, vol. 6, p. 629. As to effect of false return in serving process, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 633. As to effect of failure of deputy marshal in custody of jurors to take a special oath, see the title *JURY*, vol. 7, p. 777. As to suspension during appeal of running of statute of limitation in favor of marshal sued on official bond, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 989. As to the appointment of a marshal to levy a tax which the proper officials refused to levy, see the title *MANDAMUS*, vol. 8, p. 95. As to judgment of court martial being a defense to an action against marshal for false imprisonment, see the title *MILITARY LAW*, vol. 8, p. 355. As to authority of president to appoint a marshal to protect a supreme court justice, see the title *PRESIDENT OF THE UNITED STATES*, vol. 9, p. 613. As to power of marshal to make distribution among the captors in a prize cause, see the title *PRIZE*, vol. 9, p. 782. As to right of deputy marshal, present by virtue of his employment in territory to be homesteaded to make a settlement therein, see the title *PUBLIC LANDS*, vol. 10, p. 99. As to validity of payment made by marshal under direction of comptroller of the treasury but without submission of account to treasury, see the title *PUBLIC OFFICERS*, vol. 10, p. 386. As to liability of sureties on official bond for conversion of public money received by marshal prior to date bond takes effect, see the title *PUBLIC OFFICERS*, vol. 10, p. 387. As to liability to his clerk on implied contract for increased compensation, see the title *PUBLIC OFFICERS*, vol. 10, p. 404. As to treasury manuscript as evidence of default by marshal, see the titles *BEST AND SECONDARY EVIDENCE*, vol. 3, p. 219; *PUBLIC OFFICERS*, vol. 10, p. 393. As to procedure by motion under state statute against marshal and sureties for default, see the titles *COURTS*, vol. 4, p. 1150; *PUBLIC OFFICERS*, vol.

10, p. 391. As to removal of action against marshal when prosecuted in state court for official acts, see the title *REMOVAL OF CAUSES*, vol. 10, pp. 672, 673. As to effect of certificate of probable cause in an action against marshal for wrongful seizure, see the title *REVENUE LAWS*, vol. 10, pp. 1004, 1005. As to sufficiency of seizure of goods by marshal, see the title *SEARCHES AND SEIZURES*, vol. 10, p. 1087. As to submission of marshal's claims to accounting officers before such claims are available as a set-off against government, see the title *SET-OFF, RECOURPMENT AND COUNTERCLAIM*, vol. 10, pp. 1126, 1227.

I. Appointment, Qualification and Removal.

A. Appointment—1. *IN GENERAL*.—Marshals are ordinarily appointed by the president, with the advice and consent of the senate,¹ but congress may vest the appointment elsewhere.²

2. *TO FILL VACANCY*.—Congress has passed a law bestowing the temporary appointment of the marshal in case of vacancy upon the justice of the circuit in which the district where the vacancy occurs is situated.³

3. *DE FACTO MARSHAL*.—The appointment and service of a deputy marshal makes him a de facto officer, even though the clerk who administered the oath was not empowered to do so,⁴ and the acts of such de facto officer are valid as to collateral attack.⁵

B. Oath.—Every marshal of the United States, as well as his deputy, must take an oath or affirmation that he will faithfully execute all lawful precepts directed to him, and in all things well and truly perform the duties of his office.⁶

C. Removal.—Marshals are removable from office at the pleasure of the president.⁷

II. Powers, Duties and Liabilities.

A. In General.—Marshals are the ministers of the law,⁸ and are subjected by act of congress to the supervision and control of the department of justice, in the hands of one of the cabinet officers of the president.⁹ They and their deputies shall have, in each state, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.¹⁰

B. Particular Powers and Duties—1. *TO EXECUTE PROCESS*.—It is the duty of a marshal of a court of the United States, to execute all process which may be placed in his hands.¹¹

1. *In re Neagle*, 135 U. S. 1, 63, 34 L. Ed. 55; *Ex parte Siebold*, 100 U. S. 371, 397, 25 L. Ed. 717.

2. *Ex parte Siebold*, 100 U. S. 371, 397, 25 L. Ed. 717.

3. *In case of vacancy*.—*Ex parte Siebold*, 100 U. S. 371, 397, 25 L. Ed. 717.

4. *De facto marshal*.—*Wright v. United States*, 158 U. S. 232, 238, 39 L. Ed. 963.

5. *Hussey v. Smith*, 99 U. S. 20, 23, 25 L. Ed. 314; *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659.

6. *Rev. Stat.*, § 782. *Bock v. Perkins*, 139 U. S. 628, 630, 35 L. Ed. 314.

7. *Removal by appointing power*.—*In re Neagle*, 135 U. S. 1, 63, 34 L. Ed. 55. As to right of appointing power to remove, see the title *PUBLIC OFFICERS*, vol. 10, p. 397.

8. *Ministers of the law*.—*The Monte Alegre*, 9 Wheat. 616, 645, 6 L. Ed. 174; *In re Neagle*, 135 U. S. 1, 34 L. Ed. 55.

The marshal is properly the officer of the law rather than the agent of the

parties, and is bound to fulfill the behests of the law; and this, too, without special instruction or admonition from any person. *Griffin v. Thompson*, 2 How. 244, 257, 11 L. Ed. 253.

9. *Controlled by department of justice*.—*In re Neagle*, 135 U. S. 1, 63, 34 L. Ed. 55.

10. *Same power as sheriffs*.—Section 788, *Rev. Stat.* *In re Neagle*, 135 U. S. 1, 63, 34 L. Ed. 55.

The marshal of the District of Columbia is put on the same footing by statute, with respect to his duties and powers, as other marshals of the United States. *Levy Court v. Ringgold*, 5 Pet. 451, 454, 8 L. Ed. 188.

Indian policemen as marshals.—But Indian policeman are not marshals nor deputies of marshals within the meaning of the statute. *John Bad Elk v. United States*, 177 U. S. 529, 535, 44 L. Ed. 874.

11. *Must execute process*.—*New York Life, etc., Ins. Co. v. Adams*, 9 Pet. 573,

2. AS CUSTODIAN OF PROPERTY.—A marshal appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission.¹²

C. Civil Liability—1. IN GENERAL.¹³—A marshal must execute process of the courts at his peril,¹⁴ and is liable in an action of trespass for the wrongful seizure of property,¹⁵ or for failure to execute the process of the court without a legal excuse;¹⁶ he is liable for a refusal to surrender possession of goods to a sheriff who appears with a lawful writ from the state court, when such goods are in his possession illegally.¹⁷

2. LIABILITY FOR ACTS OF DEPUTY.—A marshal is responsible for the misconduct of his deputy.¹⁸

3. PROTECTION OF PROCESS.—The mandatory process of a court of competent jurisdiction, is a sufficient protection in all courts, to an officer who obeys such mandate where the process is valid on its face,¹⁹ although such process be voidable;²⁰ in an action against a marshal for the wrongful seizure of property he may justify the seizure by proof that the property was in fact subject to such seizure.²¹

4. MEASURE OF DAMAGES.—Exemplary damages cannot be recovered against a marshal who acts in good faith.²²

9 L. Ed. 234; *Levy Court v. Ringgold*, 5 Pet. 451, 454, 8 L. Ed. 188; *Thompson v. Allen County*, 115 U. S. 550, 559, 29 L. Ed. 472.

The marshal of the District of Columbia is bound to serve a subpoena in chancery, as soon as he reasonably can. *Kennedy v. Brent*, 6 Cranch 187, 3 L. Ed. 194.

Must serve attachment throughout his district.—An attachment against a witness, for contempt, must be served by the marshal, in any part of his district. *United States v. Montgomery*, 2 Dall. 335, 1 L. Ed. 404.

Need not apply for issue of execution.—The "act concerning the District of Columbia," passed March 3d, 1801, does not require the marshal to apply to the district attorney for executions, in cases of fines levied by the circuit court, and make him liable for neglecting to do so, if no execution issued. *Levy Court v. Ringgold*, 5 Pet. 451, 8 L. Ed. 188.

Marshal may levy execution in Kansas.—The act of January 29th, 1861, admitting Kansas into the Union and extending the federal laws over it, gave the marshal of the United States there a right to execute a writ of execution issued by the federal courts there. *Smith v. Cockrill*, 6 Wall. 756, 18 L. Ed. 973. See the title EXECUTIONS, vol. 6, p. 100.

12. *United States v. Thomas*, 15 Wall. 337, 343, 21 L. Ed. 89.

13. As to liability for public money seized by public enemy after default of marshal, see the title PUBLIC OFFICERS, vol. 10, p. 384.

14. *New York Life, etc., Ins. Co. v. Adams*, 9 Pet. 573, 9 L. Ed. 234.

15. **Liable for wrongful seizure of property.**—*Denny v. Bennett*, 128 U. S. 489, 499, 32 L. Ed. 491; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Matthews v. Densmore*, 109 U. S. 216, 218, 27 L. Ed.

912; *Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337; *Day v. Gallup*, 2 Wall. 97, 17 L. Ed. 855; *Sharpe v. Doyle*, 102 U. S. 686, 690, 26 L. Ed. 277; *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392. See the title TRESPASS, ante, p. 649.

16. **Failure to execute process.**—*New York Life, etc., Ins. Co. v. Adams*, 9 Pet. 573, 9 L. Ed. 234.

17. **Wrongful refusal to deliver goods.**—*Gumbel v. Pitkin*, 124 U. S. 131, 146, 31 L. Ed. 374.

18. **Liable for acts of deputy.**—*Rogers v. The Marshal*, 1 Wall. 644, 650, 17 L. Ed. 714; *Gwinn v. Buchanan, etc., Co.*, 4 How. 1, 3, 11 L. Ed. 849. See the title PUBLIC OFFICERS, vol. 10, p. 428.

Where deputy is instructed by plaintiff.—If a plaintiff directs a deputy marshal to receive a certain description of money in satisfaction of an execution, the deputy marshal acts as agent of the plaintiff, and not as agent of the marshal, and if his instructions are disobeyed, the marshal himself is not responsible, but the plaintiff must look to the deputy. *Gwinn v. Buchanan, etc., Co.*, 4 How. 1, 11 L. Ed. 849.

19. **Process is a protection.**—*Matthews v. Densmore*, 109 U. S. 216, 219, 27 L. Ed. 912; *Marks v. Shoup*, 181 U. S. 562, 564, 45 L. Ed. 1002; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257.

20. **Where process voidable.**—*Matthews v. Densmore*, 109 U. S. 216, 219, 27 L. Ed. 912.

21. **May prove proper seizure.**—*Sharpe v. Doyle*, 102 U. S. 686, 26 L. Ed. 277; *Feibelman v. Packard*, 109 U. S. 421, 426, 27 L. Ed. 984.

22. **Can recover only actual damages.**—*Conard v. Pacific Ins. Co.*, 6 Pet. 262, 8 L. Ed. 392. See, generally, the title DAMAGES, vol. 5, pp. 161, 175.

Interest allowed.—If a prize be sold by agreement, and the money be stopped

III. Official Bonds.

A. In General.—The official bond of the marshal is not made to any individual, but to the government, for the indemnity of all persons injured by the official misconduct of himself or his deputies; and his bond may be put in suit by and for the benefit of any such person.²³

B. Actions on Bond.²⁴—**Court Dockets as Evidence.**—The dockets and records of a court, showing that money has been received by the marshal or his deputies, under executions, are good evidence in a suit against his sureties.²⁵

IV. Compensation.

A. In General—1. **DEPENDENT UPON STATUTE.**—The compensation of marshals is provided by acts of congress.²⁶ The act of congress of May 28, 1896, provides that a salary is to be paid to marshals and all fees collected by them to be turned into the treasury.

2. **COMPENSATION PER DIEM.**—A marshal is allowed a per diem compensation for attending court and examinations before a commissioner.²⁷ He is entitled only to a single per diem compensation for attending several examinations before the same commissioner, but when he attends examinations before two different commissioners on the same day, he is entitled to a fee for attendance before each commissioner.²⁸ A marshal is entitled to a per diem compensation for attending courts only while the court is in actual session.²⁹

3. **MILEAGE**—a. *In General.*—A marshal is entitled to his mileage fees only for the distance of a route as usually taken, no matter how great the necessity for pursuing a more circuitous route.³⁰ He may, however, in all cases, elect to receive his actual traveling expenses to be proved to the satisfaction of the court.³¹

b. *For Transporting Prisoners.*—A marshal is allowed but actual traveling expenses for transporting a prisoner convicted of a crime to a prison in another district or territory,³² but for the transportation of himself and prisoners to a penitentiary located in another district of the same state, where it is within

in the hands of the marshal by a third party, increased damages will not be allowed, but interest only. *Jennings v. The Perseverance*, 3 Dall. 336, 1 L. Ed. 625. As to liability for interest for expenditures made by marshal from funds in his custody, see the title **INTEREST**, vol. 7, p. 225.

23. **Who may sue.**—*Lammon v. Feusier*, 111 U. S. 17, 19, 28 L. Ed. 337.

The taking by the marshal upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable. *Lammon v. Feusier*, 111 U. S. 17, 18, 28 L. Ed. 337.

24. As to jurisdiction and manner of procedure on bonds, see the titles **COURTS**, vol. 4, pp. 932, 1151; **PUBLIC OFFICERS**, vol. 10, p. 391.

25. **Dockets and records as evidence.**—*Williams v. United States*, 1 How. 290, 11 L. Ed. 135.

26. *In re Neagle*, 135 U. S. 1, 63, 34 L. Ed. 55.

27. *Rev. Stat.*, § 829.

28. *United States v. McMahon*, 164 U. S. 81, 82, 41 L. Ed. 357.

Includes service of warrants of commitment.—As the per diem of the mar-

shal for attendance before the court or commissioner includes "the bringing in, guarding and returning prisoners charged with crime," he is not entitled to a fee for serving temporary and final warrants of commitment. *United States v. McMahon*, 164 U. S. 81, 41 L. Ed. 357.

29. **While court is in session.**—*McMullen v. United States*, 146 U. S. 360, 361, 362, 36 L. Ed. 1007; *United States v. Nix*, 189 U. S. 199, 203, 47 L. Ed. 775; *United States v. Pitman*, 147 U. S. 669, 37 L. Ed. 324. As to when court is "in session," see the title **CLERKS OF COURT**, vol. 3, p. 855.

30. **Mileage for usual route.**—*United States v. Nix*, 189 U. S. 199, 202, 47 L. Ed. 775.

31. **May elect to receive expenses.**—*Rev. Stat.*, § 829; *United States v. Nix*, 189 U. S. 199, 202, 47 L. Ed. 775.

32. **Taking prisoners outside of district.**—*Rev. Stat.*, § 829.

Where prisoner escapes.—A marshal is not entitled to be reimbursed for expenses incurred in transporting a prisoner to a place of confinement, when such prisoner escaped and it was not shown that due diligence was taken on the part of the officer to prevent the escape. *United States v. Nix*, 189 U. S. 199, 206, 47 L. Ed. 775.

the discretion of the court to sentence convicts to such penitentiary, he is entitled to his full mileage.³³

c. *For Court Attendance*.—Under a statute allowing a marshal mileage for traveling from his residence to the place of holding court, to attend a term thereof, he may charge for travel on days when the court was held by adjournment over an intervening day.³⁴

d. *Service of Process*.—The clause allowing a marshal mileage for the service of process is independent of that allowing him mileage for the transportation of himself and prisoners and where an allowance has already been made for the latter, he is not entitled to mileage as for serving process in addition thereto.³⁵ A marshal may charge full travel on two or more writs in his hands at the time and served at the same place on different persons,³⁶ but where more than two writs might be served on behalf of the same party on the same person, he is entitled to compensation for travel on only two of the writs.³⁷

e. *For Making Arrest*.—It is provided by act of congress, August 18, 1894, that a marshal when making an arrest shall take the accused to the nearest judicial officer having jurisdiction and that for failure to do so he shall forfeit his mileage.³⁸ A marshal may charge for travel in making arrests in judicial districts other than his own, where he is deputized by the marshal in such other district.³⁹

4. REIMBURSEMENTS FOR EXPENDITURES.—The marshal is entitled to be reimbursed for expenses incurred while endeavoring to arrest,⁴⁰ or in transporting prisoners to and from court where they were transported in accordance with the usual practice,⁴¹ or for sums paid by him for supplies upon the requisition of the proper authority.⁴²

5. COMMISSION ON DISBURSEMENTS.—Where the statute provides for the reasonable compensation of the marshal and of his deputies for their services under certain regulations for the government of a penitentiary, he is not entitled to a commission on money expended for its support.⁴³

6. DISTRIBUTING VENIRES.—A marshal is entitled to a fee for each venire distributed to constables, although such amount was erroneously charged in the marshal's account as mileage.⁴⁴

B. Fees Accruing to Predecessor.—Where by an arrangement between a marshal and his successor, the latter was to have the fees earned upon all writs in the hands of the deputies of the former at the date the office changed hands,

33. *United States v. McMahon*, 164 U. S. 81, 84, 41 L. Ed. 357; Rev. Stat., § 829.

34. *Travel to court*.—*United States v. Harmon*, 147 U. S. 268, 270, 279, 37 L. Ed. 164.

35. *United States v. Tanner*, 147 U. S. 661, 662, 663, 37 L. Ed. 321.

Delivery of warrants not a "service."—The delivery of warrants of commitment to the warden of the penitentiary is not a "service" within the meaning of § 829. *United States v. McMahon*, 164 U. S. 81, 87, 41 L. Ed. 357; *United States v. Tanner*, 147 U. S. 661, 37 L. Ed. 321.

36. *Service of several writs at one time*.—*United States v. Harmon*, 147 U. S. 268, 280, 37 L. Ed. 164; *United States v. Fletcher*, 147 U. S. 664, 37 L. Ed. 322.

37. Rev. Stat., § 829.

38. **Act not applicable to Oklahoma marshal.**—A marshal of Oklahoma is not within the provision of the act of congress of Aug. 18, 1894, providing that a marshal shall not be allowed any mileage for failure to take the accused from the place of arrest to the nearest circuit court

commissioner, and is entitled to his mileage fees in accordance with the special statute applicable to Oklahoma authorizing the accused to be taken to the office of the commissioner nearest to the place where the crime was committed. *United States v. Nix*, 189 U. S. 199, 203, 47 L. Ed. 775.

39. *Arrest in other districts*.—*United States v. Fletcher*, 147 U. S. 664, 37 L. Ed. 322.

40. *Expenses while trying to arrest*.—*United States v. Harmon*, 147 U. S. 268, 279, 37 L. Ed. 164.

41. *Transporting prisoners in hack*.—*United States v. Harmon*, 147 U. S. 268, 281, 37 L. Ed. 164.

42. *Supplies for district attorney*.—*United States v. Harmon*, 147 U. S. 268, 277, 37 L. Ed. 164.

43. **No commission on disbursements.**—*United States v. Baird*, 150 U. S. 54, 56, 37 L. Ed. 995.

44. *United States v. Harmon*, 147 U. S. 268, 277, 37 L. Ed. 164.

the incoming marshal may charge them up in his accounts.⁴⁵

C. Liability for Compensation.—See note.⁴⁶

D. Duty to Render Account.—Marshals, like other officers, are required to render their accounts quarter-yearly to the accounting officers, with the vouchers necessary to the correct and prompt settlement thereof, within the time prescribed by law.⁴⁷ If a claim against the United States be presented for compensation by a marshal to the proper auditing department for allowance, and the department in the exercise of its discretion suspends action upon it until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken.⁴⁸

E. Approval of Account by Court.—The approval of a marshal's account by a court is *prima facie* evidence of the correctness of its item,⁴⁹ but such approval does not preclude revision of it by the proper officers, nor justify its payments when unauthorized by law.⁵⁰

V. Deputy Marshals.

A. In General.—The Revised Statutes provide that every marshal may appoint one or more deputies, removable from office by the district judge or by the circuit court; and who take the like oath as the marshal; and for the faithful performance of whose duties the marshal is responsible upon his official bond.⁵¹ A marshal of one district may depute the marshal of the district within which the crime was committed, or his deputy, to execute a warrant of removal, and relinquish to him his legal fees therefor.⁵²

B. Compensation.—The amount of the deputy's compensation depends on the contract of employment with his deputy but the allowance of no deputy shall exceed three-fourths of the fees and emoluments received or payable for the services rendered by him.⁵³

The *per diem* compensation of a special deputy, who is appointed by the marshal to aid and assist the supervisors of election, includes the attendance of the deputy before the commissioner, which is incidental to his service in arresting the fraudulent voter and taking him before the commissioner.⁵⁴

A deputy marshal may receive a reward offered by competent legislative and executive authority for the performance of a duty which he was required by law to perform.⁵⁵

45. *United States v. Fletcher*, 147 U. S. 664, 665, 37 L. Ed. 322.

46. **Liability for compensation.**—As to liability of plaintiff to marshal for poundage, see the title EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 6, p. 83.

Where the government is a party to the suit, the fees and compensation of the marshal, if chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges. *The Antelope*, 12 Wheat. 546, 6 L. Ed. 723.

47. **Rendering account at stated periods.**—*Watkins v. United States*, 9 Wall. 759, 764, 19 L. Ed. 820. See the title PUBLIC OFFICERS, vol. 10, p. 425.

48. **Suit before final action of auditors.**—*United States v. Fletcher*, 147 U. S. 664, 667, 37 L. Ed. 322.

49. **Approval as evidence of correctness.**—*United States v. Nix*, 189 U. S. 199, 205, 47 L. Ed. 775.

50. **Approval does not preclude revision.**—*McMullen v. United States*, 146

U. S. 360, 362, 36 L. Ed. 1007; *United States v. Nix*, 189 U. S. 199, 47 L. Ed. 775.

51. *In re Quarles*, 158 U. S. 532, 537, 39 L. Ed. 1080; Rev. Stat., §§ 780, 782, 783.

52. **Deputizing marshal from another district.**—*United States v. Fletcher*, 147 U. S. 664, 666, 37 L. Ed. 322.

53. *Douglas v. Wallace*, 161 U. S. 346, 349, 40 L. Ed. 727; Rev. Stat., § 841.

Where marshal of one district deputized by marshal of another.—Where a marshal of one district has deputized the marshal of the district within which the crime was committed, to execute a warrant of removal, he may relinquish to him his legal fees therefor. *United States v. Fletcher*, 147 U. S. 664, 666, 37 L. Ed. 322.

54. **Service at election.**—*United States v. McMahon*, 164 U. S. 81, 84, 41 L. Ed. 357.

55. **May receive reward.**—*United States v. Matthews*, 173 U. S. 381, 387, 43 L. Ed. 738. See the title REWARDS, vol. 10, p. 1017.

UNITED STATES NOTES.—United States notes are engagements to pay dollars; and the dollars intended are coined dollars of the United States.¹

UNITED STATES OFFICERS.—See the titles PUBLIC OFFICERS, vol. 10, p. 363; UNITED STATES, ante, p. 747; UNITED STATES COMMISSIONERS, ante, p. 817; UNITED STATES MARSHALS, ante, p. 822.

UNIVERSAL SUCCESSION.—See the title DESCENT AND DISTRIBUTION, vol. 5, p. 336.

UNIVERSITIES.—See the title COLLEGES AND UNIVERSITIES, vol. 3, p. 867.

UNLAWFUL—UNLAWFULLY.—See note 2.

UNLAWFUL COHABITATION.—See the title ADULTERY, FORNICATION AND LEWDNESS, vol. 1, p. 196.

UNLAWFUL ENTRY AND DETAINER.—See the title FORCIBLE ENTRY AND DETAINER, vol. 6, p. 303.

UNLESS.—As to the words “unless otherwise provided by law” as used in the circuit court of appeals act, see the title APPEAL AND ERROR, vol. 1, pp. 431, 814.

UNLIQUIDATED.—As to unliquidated damages, see the title DAMAGES, vol. 5, p. 168. As to set-off of, see the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1127. As to unliquidated claim against county, see the title COUNTIES, vol. 4, p. 842.

UNMANUFACTURED.—As to custom duties on various unmanufactured commodities, see the title REVENUE LAWS, vol. 10, p. 838.

UNOCCUPIED.—See the title PUBLIC LANDS, vol. 10, p. 1. As to a treaty giving Indians the right to hunt on unoccupied lands of the United States not authorizing them to hunt on such lands within a state, contrary to the laws of the state, see the title INDIANS, vol. 6, p. 942.

UNOFFERED LANDS.—See OFFERED LANDS, vol. 8, p. 956.

UNREASONABLE SEARCHES AND SEIZURES.—See the title SEARCHES AND SEIZURES, vol. 10, p. 1087.

UNSKILFULNESS.—See note 3.

UNSOUND MIND.—See the title INSANITY, vol. 6, p. 1072.

UNTIL.—The word “until,” means to the time of, or up to.⁴

1. **United States notes.**—Bank v. Supervisors, 7 Wall. 26, 19 L. Ed. 60.

2. **Unlawful arrest.**—As to unlawful arrests as used in a marine insurance policy, see the title MARINE INSURANCE, vol. 8, p. 169.

Unlawful capture.—See LAWFUL, vol. 7, p. 847. See, also, the title MARINE INSURANCE, vol. 8, p. 170.

Unlawful contracts.—As to illegal contracts, see the title ILLEGAL CONTRACTS, vol. 6, p. 737.

Ultra vires acts.—All contracts made by a corporation beyond the scope of its corporate powers are unlawful and void. See the title CORPORATIONS, vol. 4, p. 745.

Criminal law.—As to unlawfully as applied to an act or thing done, see the title CRIMINAL LAW, vol. 5, p. 63.

3. **Unskilfulness.**—In Waters v. Merchants' Louisville Insurance Co., 11 Pet. 213, 219, 9 L. Ed. 69, where the question arose whether a loss by fire, remotely caused by the negligence, carelessness or unskilfulness of the master and crew of the vessel, was a loss within the true intent and meaning of the policy, the court said: “By unskilfulness, as here stated,

we do not understand, in this instance, a general unskilfulness, such as would be a breach of the implied warranty of competent skill to navigate and conduct the vessel; but only unskilfulness in the particular circumstances, remotely connected with the loss. In this sense, it is equivalent to negligence or carelessness in the execution of duty, and not to incapacity.” See the title MARINE INSURANCE, vol. 8, p. 173.

4. **Until.**—Keppel v. Tiffin Savings Bank, 197 U. S. 356, 378, 49 L. Ed. 790, dissenting opinion of Mr. Justice Day.

Surveys.—In Croghan v. Nelson, 3 How. 187, 194, 11 L. Ed. 554, in referring to the locaters requirement that the two last lines of the survey should be so run as to include the quantity of land called for in the entry, the court said: “To these two lines he gave course, but gave no specific distance to either, that they might be run long enough to include the quantity. The first of these lines was to run from the termination of the base line at B, ‘off from the branch towards the Mississippi, on a line parallel to Mayfield creek,’ but no specific distance is given, nor is any natural object called for as

UNTRUE ANSWERS.—See TRUE, ante, p. 675.

UNUSUAL PUNISHMENT.—See the title CONSTITUTIONAL LAW, vol. 4, p. 513.

UNWROUGHT METAL.—See the title REVENUE LAWS, vol. 10, p. 886.

the termination of this line. Its termination was to be governed, therefore, by the relative positions of the objects previously called for, and the actual distance of the line, on the branch, from the river, and by the necessary course and distance that the first and second of these two lines should run to include the quantity; and therefore he continues the call by

saying, 'until a line parallel to the first (the base line) will strike Mayfield creek, to include the quantity.' The word 'until,' in grammatical construction, modifies and qualifies the words used to give course and distance, and, in legal construction, the call for course must yield to the call for quantity, the latter being the most important call in the entry."

USAGES AND CUSTOMS.

BY T. B. BENSON.

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CROSS REFERENCES.

As to custom of taking acknowledgments of married women in Pennsylvania by supreme court, see the title **ACKNOWLEDGMENTS**, vol. 1, p. 82. As to custom of grazing cattle upon public lands, see the title **ANIMALS**, vol. 1, p. 321. As to custom fixing pay of disbursing agents, see the title **ARMY AND NAVY**, vol. 2, p. 532. As to banking customs generally, see the title **BANKS AND BANKING**, vol. 3, p. 20. As to custom of banks to give notice of maturity of negotiable paper, see the title **BANKS AND BANKING**, vol. 3, p. 22. As to construction of bill of lading by usage, see the title **BILL OF LADING**, vol. 3, p. 239. As to time of maturity of negotiable paper under usage, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 284. As to usage of brokers, see the title **BROKERS**, vol. 3, p. 537. As to custom of passengers to violate rules regulating conduct of railroad, see the title **CARRIERS**, vol. 3, p. 580, note 86. As to delivery to lighterman according to usage, see the title **CARRIERS**, vol. 3, p. 592. As to usage of carriers in deviation from voyage, see the title **CARRIERS**, vol. 3, p. 596. As to custom of delivery of goods, see the title **CARRIERS**, vol. 3, pp. 598, 600. As to usage of sailing to avoid collision, see the title **COLLISION**, vol. 3, pp. 884, 887. As to custom constituting basis of common law, see the title **COMMON LAW**, vol. 3, p. 961. As to custom amounting to law of state, see the title **COURTS**, vol. 4, p. 1051. As to custom requiring notice of time when premium due, see the title **INSURANCE**, vol. 7, p. 123. As to resort to usage in construction of insurance policy, see the titles **INSURANCE**, vol. 7, p. 103; **MARINE INSURANCE**, vol. 8, p. 157. As to usage requiring certain papers on ship, see the title **MARINE INSURANCE**, vol. 8, p. 179. As to what by usage constitutes deviation, see the title **MARINE INSURANCE**, vol. 8, p. 188. As to what constitutes delay in taking on cargo, see the title **MARINE INSURANCE**, vol. 8, p. 189. As to mining customs, see the title **MINES AND MINERALS**, vol. 8, pp. 369, 370. As to usage fixing amount of compensation of agent, see the title **PRINCIPAL AND AGENT**, vol. 9,

p. 675. As to customs of former sovereign of ceded territory, see the title PUBLIC LANDS, vol. 10, pp. 315, 323. As to custom of weights and measures, see the title WEIGHTS AND MEASURES.

I. Definitions.

Use is defined to be that which has arisen from those things which a man says and does, and is of long continuance, and without interruption. Custom is the law or rule which is not written, and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it.¹

II. General Consideration.

Every country has a common law of usage and custom, both local and general, to which the people, especially those of a conquered or ceded one, cling with more tenacity than to their written laws, and all sovereigns respect them.²

III. Classification.

Customs are general or particular; the latter respects a specific thing, a particular person or place; or with respect to the whole, of certain persons or places; general, with respect to specific acts of all the inhabitants of the kingdom, and may destroy the law;³ but a particular custom in any province or seignory, has only this effect in that district or part where it hath been exercised.⁴

IV. Origin.

A usage or custom derives its authority from the consent of those affected by it.⁵ The authority of a general custom arises from the presumption of legislative enactment.⁶

V. Requisites.

A valid custom must be ancient,⁷ reasonable,⁸ certain,⁹ known,¹⁰ gen-

1. *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137.

"There is a very good description of a custom or usage in ch. 1, art. 3, of the civil code of Louisiana: 'Customs result from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.'" *United States v. Buchanan*, 8 How. 83, 102, 12 L. Ed. 997.

2. *Strother v. Lucas*, 12 Pet. 410, 437, 9 L. Ed. 1137.

3. *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137; *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

A general custom is a general law, and forms the law of a contract on the subject matter; though at variance with its terms, it enters into and controls its stipulations, as an act of parliament or state legislature. *United States v. Arredondo*, 6 Pet. 691, 715, 8 L. Ed. 547.

4. *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137.

5. A custom derives its authority from the express or tacit consent of the people affected by it. *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137.

This consent is always presumed. *United States v. Arredondo*, 6 Pet. 691, 714, 8 L. Ed. 547.

"Custom is introduced by the people, under which name we understand the union or assemblage of persons of all description, of that country where they are collected." *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137.

6. *United States v. Arredondo*, 6 Pet. 691, 714, 8 L. Ed. 547.

7. *Slidell v. Grandjean*, 111 U. S. 412, 421, 28 L. Ed. 321; *United States v. Buchanan*, 8 How. 83, 102, 12 L. Ed. 997.

It seems a usage may be comparatively of recent date, and need not be one of those to the contrary of which the memory of man runneth not. *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137.

8. *United States v. Buchanan*, 8 How. 83, 102, 12 L. Ed. 997; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817; *Fletcher v. Baltimore, etc.*, R. Co., 168 U. S. 135, 42 L. Ed. 411.

An absurd and unreasonable custom is not binding. *Tilley v. County of Cook*, 103 U. S. 155, 163, 26 L. Ed. 374.

9. *United States v. Buchanan*, 8 How. 83, 12 L. Ed. 997.

10. *Fowler v. Brantly*, 14 Pet. 318, 10 L. Ed. 473; *United States v. Buchanan*, 8 How. 83, 102, 12 L. Ed. 997; *Adams v. Otterback*, 15 How. 539, 14 L. Ed. 805; *Culbertson v. Steamer, Southern Belle*, 18 How. 584, 15 L. Ed. 493; *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539; *Bli-*

eral,¹¹ continuous,¹² and acquiesced in.¹³

VI. Application and Effect.

A. As to Contracts—1. **TO MAKE CONTRACT.**—A usage or custom cannot make a contract where there is none existing between the parties;¹⁴ but where the parties contract on a subject matter concerning which a usage or custom prevails, they by implication incorporate such usage or custom into and as a part of their agreement, unless they expressly exclude it,¹⁵ because they are pre-

ven *v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510; *Bliven v. New England Screw Co.*, 23 How. 433, 16 L. Ed. 514; *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653; *Tilley v. County of Cook*, 103 U. S. 155, 163, 26 L. Ed. 374; *Swift Co. v. United States*, 105 U. S. 691, 26 L. Ed. 1108; *Bibb v. Allen*, 149 U. S. 481, 37 L. Ed. 817; *Fletcher v. Baltimore, etc., R. Co.*, 168 U. S. 135, 42 L. Ed. 411.

"Of a custom prevailing generally there may be a presumption of knowledge." *Chateaugay, etc., Iron Co. v. Blake*, 144 U. S. 476, 486, 36 L. Ed. 510. See, also, *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374.

The parties are bound by a general banking custom of which they have no actual knowledge. *Fowler v. Brantly*, 14 Pet. 318, 10 L. Ed. 473.

A local usage cannot affect the meaning of the terms used in a contract unless known to both parties. *Chateaugay, etc., Iron Co. v. Blake*, 144 U. S. 476, 486, 36 L. Ed. 510.

The parties to whom a custom is unknown are presumed not to have dealt with reference to it. *Barnard v. Kellogg*, 10 Wall. 383, 394, 19 L. Ed. 987.

A custom of wool dealers in Boston and New York that bales sold are warranted not to be deceitfully packed is not binding upon a party to whom such custom is not known. *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987.

Factors having no power by law to make a pledge of the goods of their principals by a transfer, without indorsement in writing, of the bills of lading or warehouse receipts, a general usage of trade between banks and cotton factors at St. Louis, cannot aid the plaintiff; because the usage attempted to be set up was not shown to have been known to the defendants or to other owners of cotton. *Allen v. St. Louis Bank*, 120 U. S. 20, 39, 30 L. Ed. 573.

11. A usage, to be binding, must be general, as to place, and not confined to a particular bank. *Adams v. Otterback*, 15 How. 539, 14 L. Ed. 805.

"But to constitute a usage, it must apply to a place rather than to a particular bank. It must be the rule of all the banks of the place, or it cannot, consistently, be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly

exceed any local convenience resulting from the arrangement." *Adams v. Otterback*, 15 How. 539, 545, 14 L. Ed. 805.

A frequent and even general, but not at all universal practice in a particular port, of shipowners to allow goods brought on their vessels to be transported to the warehouse of the consignee and there inspected before freight is paid, is not such a "custom" as will displace the ordinary maritime right to demand freight on the delivery of the goods on the wharf. *The Eddy*, 5 Wall. 481, 18 L. Ed. 486.

12. A fluctuating practice in San Francisco upon the subject of the delivery of shipments of goods and the payment of freight cannot be received as a custom. *Brittan v. Barnaby*, 21 How. 527, 537, 16 L. Ed. 177.

13. *Adams v. Otterback*, 15 How. 539, 14 L. Ed. 805; *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539; *Slidell v. Grandjean*, 111 U. S. 412, 421, 28 L. Ed. 321; *Fletcher v. Baltimore, etc., R. Co.*, 168 U. S. 135, 42 L. Ed. 411.

To establish a custom, the whole, or greater part of the people, ought to concur in it. *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137.

A usage is not obligatory from the time of its adoption. To give it the force of law, it requires an acquiescence and a notoriety, from which an inference may be drawn that it is known to the public, and especially to those who do business with the bank. *Adams v. Otterback*, 15 How. 539, 545, 14 L. Ed. 805.

14. *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *Partridge v. Insurance Co.*, 15 Wall. 573, 579, 21 L. Ed. 229; *Savings Bank v. Ward*, 100 U. S. 195, 206, 25 L. Ed. 621; *National Bank v. Burkhardt*, 100 U. S. 686, 692, 25 L. Ed. 766; *Tilley v. County of Cook*, 103 U. S. 155, 162, 26 L. Ed. 374.

15. *Renner v. Bank*, 9 Wheat. 581, 588, 6 L. Ed. 166; *Bliven v. New England Screw Co.*, 23 How. 420, 431, 16 L. Ed. 510; *Bliven v. New England Screw Co.*, 23 How. 433, 16 L. Ed. 514; *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *Robinson v. United States*, 13 Wall. 363, 366, 20 L. Ed. 653; *Hostetter v. Park*, 137 U. S. 30, 40, 34 L. Ed. 568.

In *Partridge v. Insurance Co.*, 15 Wall. 573, 579, 21 L. Ed. 229, it is asserted that this tendency to incorporate usages and customs into contracts has been carried

sumed to contract with reference thereto.¹⁶ No usage can be incorporated into a contract which is inconsistent with the terms of the contract.¹⁷

2. To CONTRADICT CONTRACT.—Evidence of a usage or custom is not admissible to contradict,¹⁸ vary,¹⁹ or add to²⁰ either the express or implied²¹ terms of a contract.

3. To SUPPLY OMISSIONS.—Omissions in a contract may in some instances be supplied by evidence of a custom.²²

4. To AID CONSTRUCTION.—Evidence of a usage or custom is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom.²³ It is immaterial whether the contract is written or parol.²⁴ This extraneous evidence is admissible only in the case of ambiguity.²⁵ Mercantile contracts are subject to

as far as justified by sound policy and frequently leads to hardships.

16. *Bliven v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510.

Certain parties entered into a contract for the sale of coal in the Detroit trade. There was a custom in the coal trade at Detroit to make contracts for the sale and delivery of coal at a stipulated price, for the year next ensuing. It was held that in view of the fact that this custom was known to all the parties to the contract at the time they entered into it, it might fairly be presumed that the contract was made with reference to that custom. *Shipman v. Straitsville Cent. Min. Co.*, 158 U. S. 356, 364, 39 L. Ed. 1015.

17. *Insurance Companies v. Wright*, 1 Wall. 456, 471, 17 L. Ed. 505.

18. *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 14 L. Ed. 493; *Oelricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534; *Bliven v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510; *Insurance Companies v. Wright*, 1 Wall. 456, 470, 17 L. Ed. 505; *Thompson v. Riggs*, 5 Wall. 663, 679, 680, 18 L. Ed. 704; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Stagg v. Insurance Co.*, 10 Wall. 589, 19 L. Ed. 1038; *Robinson v. United States*, 13 Wall. 363, 365, 20 L. Ed. 653; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 22 L. Ed. 395; *Moran v. Prather*, 23 Wall. 492, 503, 23 L. Ed. 121; *Savings Bank v. Ward*, 100 U. S. 195, 206, 25 L. Ed. 621; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Tilley v. County of Cook*, 103 U. S. 155, 162, 26 L. Ed. 374; *DeWitt v. Berry*, 134 U. S. 306, 312, 33 L. Ed. 896; *Hostetter v. Park*, 137 U. S. 30, 34 L. Ed. 568; *Moore v. United States*, 196 U. S. 157, 166, 49 L. Ed. 428.

Any evidence of an understanding of the parties that a contract is made subject to a usage is inadmissible. This is merged in the written instrument. *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534.

19. *Bliven v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510; *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *Partridge v. Insurance Co.*, 15 Wall. 573,

579, 21 L. Ed. 229; *DeWitt v. Berry*, 134 U. S. 306, 312, 33 L. Ed. 896.

20. *Oelricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534; *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779.

A usage or custom cannot be resorted to to introduce a new element into a contract or to add a warranty, which the law did not raise, nor the parties intend it to contain. *Barnard v. Kellogg*, 10 Wall. 383, 394, 19 L. Ed. 987.

21. "Not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by necessary implication. For a custom can no more be set up against the clear intention of the parties, than against their express agreement." *Insurance Companies v. Wright*, 1 Wall. 456, 471, 17 L. Ed. 505.

22. *Bliven v. New England Screw Co.*, 23 How. 420, 431, 16 L. Ed. 510; *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *Savings Bank v. Ward*, 100 U. S. 195, 206, 25 L. Ed. 621.

23. *Renner v. Bank*, 9 Wheat. 581, 588, 6 L. Ed. 166; *United States Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *United States v. Boisdore*, 11 How. 63, 88, 13 L. Ed. 605; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 447, 14 L. Ed. 493; *Bliven v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653; *Tilley v. County of Cook*, 103 U. S. 155, 162, 26 L. Ed. 374.

24. *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987.

25. *Garrison v. Memphis Ins. Co.*, 19 How. 312, 15 L. Ed. 656; *Oelricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534; *Insurance Companies v. Wright*, 1 Wall. 456, 470, 17 L. Ed. 505; *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779; *Moran v. Prather*, 23 Wall. 492, 503, 23 L. Ed. 121; *Savings Bank v. Ward*, 100 U. S. 195, 206, 25 L. Ed. 621; *National Bank v. Burkhardt*, 100 U. S. 686, 692, 25 L. Ed. 766; *Moore v. United States*, 196 U. S. 157, 166, 49 L. Ed. 428.

"This general rule of evidence applies to an instrument so loose as an open or

explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties, as each is presumed to have contracted in reference to them.²⁶

B. As to Statutes—1. GENERAL CUSTOMS.—General customs and usages, equally with the written law, constitute the law of the land; and, when clearly proved, they will control the general law.²⁷ In the term "laws," is included custom and usage.²⁸

2. PARTICULAR CUSTOMS.—In case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, will control.²⁹

running policy of assurance, and even to one on which the phrases relating to the matter in contest are scattered about the document in a very disorderly way." *Insurance Companies v. Wright*, 1 Wall. 456, 17 L. Ed. 505.

26. *Schimmelpennich v. Bayard*, 1 Pet. 264, 7 L. Ed. 138; *Parsons v. Armor*, 3 Pet. 413, 430, 7 L. Ed. 724; *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985; *Rich v. Lambert*, 12 How. 347, 13 L. Ed. 1017; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446, 454, 14 L. Ed. 493; *Oelricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534; *Thompson v. Riggs*, 5 Wall. 663, 679, 18 L. Ed. 704; *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Moran v. Prather*, 23 Wall. 492, 23 L. Ed. 121.

"Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import." *The Delaware*, 14 Wall. 579, 603, 20 L. Ed. 779.

In *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653, it was held admissible to admit evidence of a usage to deliver barley in sacks and not in bulk.

In the construction of a contract with a manufacturer to furnish manufactured articles, it is admissible to show a custom to furnish such articles as manufactured on orders according to date of receipt. *Bliven v. New England Screw Co.*, 23 How. 420, 16 L. Ed. 510; *Bliven v. New England Screw Co.*, 23 How. 433, 16 L. Ed. 514.

27. *Johnson v. McIntosh*, 8 Wheat. 543, 591, 5 L. Ed. 681; *Renner v. Bank*, 9 Wheat. 581, 584, 591, 6 L. Ed. 166; *United States v. Arredondo*, 6 Pet. 691, 715, 8 L. Ed. 547; *Strother v. Lucas*, 12 Pet. 410, 446, 9 L. Ed. 1137; *Burke v. McKay*, 2 How. 66, 11 L. Ed. 181; *Slidell v. Grandjean*, 111 U. S. 412, 421, 28 L. Ed. 321.

"Usages long established and followed have to a great extent the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments." *Slidell v. Grandjean*, 111 U. S. 412, 421, 28 L. Ed. 321.

In England, and in the states of this Union which have no written constitu-

tion, usages and customs are the supreme law. *United States v. Arredondo*, 6 Pet. 691, 714, 8 L. Ed. 547.

"A custom or usage saved and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom, or usage thus saved and protected." *Mitchel v. United States*, 9 Pet. 711, 735, 9 L. Ed. 283.

A general usage may overrule the general law merchant in respect to necessity for protest. *Burke v. McKay*, 2 How. 66, 11 L. Ed. 181.

A custom in California as to the manner of making wills, if so prevailing and notorious that the tacit assent to it of the authorities may be presumed, will operate to repeal a prior law. *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

28. *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137.

"By 'the laws of Spain,' is to be understood the will of the king, expressed in his orders, or by his authority, evidenced by the acts themselves, or by such usages and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws." *Mitchel v. United States*, 9 Pet. 711, 735, 9 L. Ed. 283; *United States v. Arredondo*, 6 Pet. 691, 714, 716, 8 L. Ed. 547.

29. *United States v. Macdaniel*, 7 Pet. 1, 8 L. Ed. 587; *United States v. Buchanan*, 8 How. 83, 102, 12 L. Ed. 997; *Bliven v. New England Screw Co.*, 23 How. 433, 16 L. Ed. 514; *Thompson v. Riggs*, 5 Wall. 663, 680, 18 L. Ed. 704; *Barnard v. Kellogg*, 10 Wall. 383, 390, 19 L. Ed. 987; *Legal Tender Cases*, 12 Wall. 457, 625, 20 L. Ed. 287; *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *National Bank v. Burkhardt*, 100 U. S. 686, 692, 25 L. Ed. 766; *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906.

No usage or custom among bankers and brokers can be proved in contravention of a rule of law. They cannot in their own interest by violations of the law change it. *Vermilve & Co. v. Adams Express Co.*, 21 Wall. 138, 22 L. Ed.

C. As to Particular Transactions and Relations.—See elsewhere.³⁰

VII. Proof of Usage or Custom.

A. In General.—A usage cannot be established by indefinite and uncertain evidence.³¹ Four instances in the course of two years, are insufficient to establish a usage.³²

B. By Witnesses.—The existence of usage or custom is a question of fact to be proved by persons having a knowledge of it.³³ Officers of the postoffice may testify as to the customs of the office.³⁴ A usage may be established by a single witness.³⁵

VIII. Determination of Existence of Usage or Custom.

The determination of the existence of a usage or custom is for the jury.³⁶ Customs of miners under Revised Statutes, § 2319, are to be determined by the commissioner of the land office.³⁷

IX. Impeaching Usage or Custom.

To rebut the proof of a general usage of an allowance of five per centum for measurement, other invoices were properly introduced in which there was no such allowance. Where a witness was introduced to prove such usage, and had verified his own invoices, it was inadmissible to read a letter which had been addressed to the witness and was annexed to one of the invoices.³⁸

USE—USED.—Use is defined to be “that which has arisen from those things which a man says and does, and is of long continuance, and without interruption;” the requisites to the validity of which are prescribed.¹

609; *Thompson v. Riggs*, 5 Wall. 663, 680, 18 L. Ed. 704.

A local custom that shipowners shall be liable in certain cases of loss by fire from the negligence of their agents, is not a good custom; being directly opposed to the act of congress of March 3, 1851, entitled “An act to limit the liability of shipowners and for other purposes.” *Walker v. The Transportation Co.*, 3 Wall. 150, 18 L. Ed. 172.

As to construction of statute by aid of customs, see the title **STATUTES**, ante, p. 149. As to custom regulating army pay in violation of statute, see the title **ARMY AND NAVY**, vol. 2, p. 532.

30. See cross references at beginning of this title.

31. Where there was a written contract for the delivery of a certain number of barrels of flour at a given price, to be delivered within a named time at the seller's option, and evidence was offered by the purchaser of an usage existing, that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish a usage. *Oelricks v. Ford*, 23 How. 49, 16 L. Ed. 534.

“The evidence of a definite, general, and uniform usage was so slight, if any at all, that a verdict based upon it would be set aside, and the circuit court committed no error in striking it out and in directing a verdict for defendant.” *Berbecker v. Robertson*, 152 U. S. 373, 377, 38 L. Ed. 484.

32. *Adams v. Otterback*, 15 How. 539, 546, 14 L. Ed. 805.

33. *Oelricks v. Ford*, 23 How. 49, 62, 16 L. Ed. 534.

34. *Dunlop v. United States*, 165 U. S. 486, 41 L. Ed. 799.

35. *Robinson v. United States*, 13 Wall. 363, 20 L. Ed. 653.

36. *Fletcher v. Baltimore, etc., R. Co.*, 168 U. S. 135, 42 L. Ed. 411. See the title **RAILROADS**, vol. 10, p. 478.

37. *Parley's Park Silver Min. Co. v. Kerr*, 130 U. S. 256, 32 L. Ed. 906.

38. *Taylor v. United States*, 3 How. 197, 11 L. Ed. 559.

1. **Use.**—*Strother v. Lucas*, 12 Pet. 410, 445, 9 L. Ed. 1137.

Actual use.—See **ACTUAL**, vol. 1, p. 115.

“In” and “out” of use.—See **OUT**, vol. 8, p. 1016; **TO**, ante, p. 602.

Devise for the use and benefit of heirs.

—In *Lane v. Vick*, 3 How. 464, 475, 11 L. Ed. 681, the court said: “The testator was not satisfied with the direction to his executors to sell lots for the payment of his debts, but he adds, ‘for the use and benefit of all my heirs.’ * * * That the lots should be sold ‘for the use and benefit of all his heirs,’ after the payment of his debts, is most reasonable; but it cannot, with the same propriety of language, be said, that the debts of the testator were to be paid ‘for the use of all his heirs.’ The word **use** imports a more direct benefit.”

Used as meaning “employed” in shipowner's liability act.—See **Moore v.**

USE AND OCCUPATION.—As to assumpsit for, see the title *ASSUMPSIT*, vol. 2, p. 651. As to implied promise to pay for use and occupation of land, see the title *VENDOR AND PURCHASER*.

USEFUL TRADE.—See *TRADE*—*TRADING*, ante, p. 616.

USES.—As to statute of uses, see the title *TRUSTS AND TRUSTEES*, ante, p. 676. As to charitable uses, see the title *CHARITIES*, vol. 3, p. 675.

USUAL—USUALLY.—See note 1.

American Transp. Co., 24 How. 1, 37, 16 L. Ed. 674.

Not known or used before the application.—See the title *PATENTS*, vol. 9, p. 198.

1. **Usual place of abode.**—Where the statute of a state provided, that, during the absence of a party and all the members of his family, notice of a suit be posted upon the front door of his "usual place of abode." held. that a notice

posted upon a house seven months after it had been vacated by the defendant and his family, and while they were residing within the Confederate lines, was not posted upon his "usual place of abode," and that a judgment founded on such defective notice was absolutely void. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398. See the title *SUMMONS AND PROCESS*, ante, p. 299.

USURY.

BY JOSEPH W. TIMBERLAKE.

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ACTION OF, vol. 5, p. 205; DISCOVERY, vol. 5, p. 350; DISTRICT OF COLUMBIA, vol. 5, p. 404; EQUITY, vol. 5, p. 803; EVIDENCE, vol. 5, p. 1004; GUARDIAN AND WARD, vol. 6, p. 599; INJUNCTIONS, vol. 6, p. 1022; INTEREST, vol. 7, p. 217; JURY, vol. 7, p. 748; LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 900; MAXIMS, vol. 8, p. 313; PENALTIES AND FORFEITURES, vol. 9, p. 357; PRINCIPAL AND AGENT, vol. 9, p. 640; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799; SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1114; TENDER, ante, p. 590; VARIANCE; WITNESSES.

As to usury in bonds issued in payment for the completion of a canal, see the title CANALS, vol. 3, p. 548. As to whether federal courts follow the construction put upon state usury laws by state courts, see the title COURTS, vol. 4, p. 1088. As to stay of execution upon judgment until the determination in another action whether or not such judgment was rendered upon a usurious contract, see the title EXECUTIONS, vol. 6, p. 107. As to the time from which the statute of limitations runs against the recovery of usurious interest, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1014. As to the right to set off usurious interest or a statutory penalty for usury, see the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1119.

I. Introductory.

Usury is merely a statutory offense.¹

II. Elements of Usury—What Constitutes.

A. In General—1. LOAN OR FORBEARANCE OF MONEY OR OTHER THING.—To constitute usury, there must either be a loan, either express or implied, and a taking of usurious interest,² or the taking of more than legal interest for the forbearance of a debt or sum of money due.³ A contract is not unlawful unless more than the lawful rate has been reserved or taken for interest. If more has

1. Missouri, etc., *Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474.

The act of usury has long since lost that deep moral stain which was formerly attached to it; and is now generally considered only as an illegal or immoral act, because it is prohibited by law. *Lloyd v. Scott*, 4 Pet. 205, 224, 7 L. Ed. 833.

But it has been said that usury is a moral taint wherever it exists. *De Wolf v. Johnson*, 10 Wheat. 367, 385, 6 L. Ed. 343.

2. **Loan or forbearance.**—*Hogg v. Ruffner*, 1 Black 115, 118, 17 L. Ed. 38; *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178; *United States Bank v. Owens*, 2 Pet. 527, 537, 7 L. Ed. 508; *Moncure v. Dermott*, 13 Pet. 345, 356, 10 L. Ed. 193; *Tiffany v. Boatman's Institution*, 18 Wall. 375, 385, 21 L. Ed. 868; *Struthers v. Drexel*, 122 U. S. 487, 495, 30 L. Ed. 1216.

It is a cardinal rule in the doctrine of usury, that to constitute usury, there must be a loan in contemplation by the parties. It is true, with regard to this rule, that there are cases which necessarily import a loan; and no disguise, no affectation of sale or barter can divest them of that character; such, for instance, as a man's selling his own bond or note, executed, say, in blank. *Nichols v. Fearson*, 7 Pet. 103, 109, 8 L. Ed. 624.

Where there is nothing upon the face of

the papers to show that a transaction was a loan of money, and the record sets out no evidence to show the transaction to have been different from what it appears to be on the face of the papers, the question of usury cannot arise. *Struthers v. Drexel*, 122 U. S. 487, 495, 30 L. Ed. 1216.

The statute of Indiana does not profess to enlarge the common-law definition of the term, while it aims to include the common devices resorted to by usurers to evade its penalties. *Hogg v. Ruffner*, 1 Black 115, 118, 17 L. Ed. 38.

Where there is no loan there can be no usury. *White Water Val. Canal Co. v. Vallette*, 21 How. 414, 422, 16 L. Ed. 154.

3. **Forbearance.**—*Hogg v. Ruffner*, 1 Black 115, 118, 17 L. Ed. 38; *Moncure v. Dermott*, 13 Pet. 345, 356, 10 L. Ed. 193.

Where a sum of money is due on a contract for the sale of land, and the vendor takes more than legal interest for the forbearance of the debt, it is usury. But where the owner of land proposes to sell it for one price in cash, and for another price, double as large, on a long credit, and a purchaser prefers to pay the larger price for the sake of the longer time, the contract cannot be called usurious. *Hogg v. Ruffner*, 1 Black 115, 17 L. Ed. 38.

been reserved or taken, not for the loan and forbearance, but for a change in the place of payment, then the contract is lawful.⁴

2. **TAKING OF GREATER RATE OF INTEREST THAN ALLOWED BY LAW.**—One of the requisites to form an usurious transaction is that a greater rate of interest than is allowed by the statute shall be paid.⁵ Where the promise to pay a sum above legal interest depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious.⁶ Where a loan is made to be returned at a fixed day, with more than the legal rate of interest, depending on a casualty, which hazards both principal and interest, the contract is not usurious; but where the interest only is hazarded, it is usury.⁷

3. **RETURN OF MONEY LOANED.**—One of the requisites to form an usurious transaction is an understanding that the money lent shall or may be returned.⁸

4. **TAKING OF INTEREST IN ADVANCE—DISCOUNTS.**—It is not usurious to exact the payment of interest in advance.⁹ So the taking of interest in advance by bankers, upon loans or discounts, in the ordinary course of business, is not usurious.¹⁰ But the discounting by a bank with knowledge of the facts, at a

4. *Buckingham v. McLean*, 13 How. 151, 172, 14 L. Ed. 91.

In determining whether the excess over the lawful rate, has been reserved for interest, or as a just compensation for changing the place of payment, the custom, or the market value of this change, is evidence of the real intent of the parties, and so evidence of the validity of the contract. *Buckingham v. McLean*, 13 How. 151, 172, 14 L. Ed. 91.

5. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178. See, also, *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474. Generally, as to the rate of interest, see the title **INTEREST**, vol. 7, p. 232, et seq. As to the rate of interest allowed for national banks, see the title **BANKS AND BANKING**, vol. 3; pp. 64, 65.

6. *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619; *Bedford v. Eastern Bldg., etc., Ass'n*, 181 U. S. 227, 242, 45 L. Ed. 834; *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

Nor will usurious interest be inferred from a paper which, while referring to payment of a sum above the legal interest, is "uncertain and so curious," that intentional bad device cannot be affirmed. *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619.

Where there is a loan, although the profits derived to the lender exceeds the legal rate, yet if that profit is contingent or uncertain, the contract, if bona fide and without any design to evade the statute, is not usurious. *White Water Val. Canal Co. v. Vallette*, 21 How. 414, 422, 16 L. Ed. 154.

If a party agree to pay a specific sum, exceeding the lawful interest, provided he do not pay the principal by a day certain, it is not usury; by a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered as a penalty. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

7. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833. See, also, *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

8. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508; *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917.

9. *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 414, 35 L. Ed. 794; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 399, 35 L. Ed. 786.

10. *Fleckner v. United States Bank*, 8 Wheat. 338, 354, 5 L. Ed. 631; *Thornton v. Bank*, 3 Pet. 36, 7 L. Ed. 594. See the title **BANKS AND BANKING**, vol. 3, p. 58, et seq.

The Bank of the United States.—See *Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631. See, also, *Thornton v. Bank*, 3 Pet. 36, 7 L. Ed. 594; *Moore v. Bank*, 13 Pet. 302, 10 L. Ed. 172.

Reserving interest as discount, is the same as taking the same; since it cannot be permitted by law, to stipulate for the receipt or reservation of that which it is not permitted to receive. In those instances in which courts are called upon to inflict penalties upon the lender, whether in a civil or criminal form of action, it is necessarily otherwise; for there the actual receipt is generally necessary to consummate the offense; but where the restrictive policy of a law alone is in contemplation, the courts hold it to be a universal rule, that it is unlawful to contract to do that which it is unlawful to do. *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508.

Where there was an application to a bank for a discount upon a note, to be secured collaterally, and the party applying drew checks upon the bank which were paid before the note was actually discounted; and the bank treated the note, when discounted, as having been so on the day of its date instead of a subsequent day on which its proceeds were carried to the credit of the party, it was held not to be usury. The court below

higher rate of interest than the law allows of accommodation paper, made and given to the holder for the purpose of raising money upon it, in its origin only a nominal contract, on which no action could be maintained by any of the parties to it if it had not been discounted, is usurious, and not defensible as a purchase.¹¹ The taking of interest by a bank for the period of grace in addition to the time specified in the note, is not usury.¹² Where a statute fixes the rate of interest per annum, a contract for the payment of that rate, before the principal comes due, at periods shorter than a year, is not usury.¹³

5. PURCHASE OF SECURITIES.—A prohibition against lending money at a higher rate of interest than the law allows will not prevent the purchase of securities at any price which the parties may agree upon.¹⁴ Whether a negotiation of securities is a purchase or a loan, is ordinarily a question of fact; and does not become a question of law until some fact be proven irreconcilable with one or the other conclusion.¹⁵

6. AGREEMENT TO ADD INTEREST TO PRINCIPAL.—It is the settled doctrine in Illinois that an agreement made after interest is due to make it a principal sum does not render the transaction usurious.¹⁶

was right in refusing an instruction to the jury that, upon such evidence, they might presume usury as a fact. *Walker v. Bank*, 3 How. 62, 11 L. Ed. 494.

The branch bank of the United States, at Lexington, Kentucky, discounted a promissory note reserving interest thereon, at the rate of six per cent per annum; it being agreed that the owner of the note should receive the proceeds of the discount, in notes of the Bank of Kentucky, at their nominal value, although the same were at the time of no greater current value than 54 per cent of the said nominal value. Held, that the contract was usurious, and void; and that the bank could not recover of any of the parties to the discounted note. *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508.

Although the plea neither avers an intention to evade the statute, nor a knowledge in the plaintiffs of the depreciation of the Kentucky money, the averments are sufficient to make out usury as a defense. *United States Bank v. Owens*, 2 Pet. 527, 536, 7 L. Ed. 508.

11. *Tiffany v. Boatman's Institution*, 18 Wall. 375, 386, 21 L. Ed. 868. See, also, *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 624.

There are cases which hold that the purchaser of such paper is protected, if he took it in good faith of the holder, without knowledge of its origin, and in the belief that it was created in the regular course of business. Whether this limitation of the rule be correct or not, it is not important to inquire, as the decision of the question under consideration does not rest upon it. *Tiffany v. Boatman's Institution*, 18 Wall. 375, 386, 21 L. Ed. 868.

12. *Renner v. Bank*, 9 Wheat. 581, 6 L. Ed. 166; *Thornton v. Bank*, 3 Pet. 36, 7 L. Ed. 594.

Where it was the practice of the party who had a sixty-day note discounted at the Bank of Washington, to

renew the note, by the discount of another note, on the sixty-third day, the maker not being in fact bound to pay the note, according to the custom prevailing in the District of Columbia, such a transaction on the part of the banker is not usurious, although on each note the discount for sixty-four days was deducted. *Thornton v. Bank*, 3 Pet. 36, 7 L. Ed. 594.

13. *Meyer v. Muscatine*, 1 Wall. 384, 17 L. Ed. 564.

14. *Junction R. Co. v. Bank*, 12 Wall. 226, 20 L. Ed. 385; *Moncure v. Dermott*, 13 Pet. 345, 356, 10 L. Ed. 193; *Wycoff v. Longhead*, 2 Dall. 92, 1 L. Ed. 303.

R., through the mediation of S., borrowed \$800 of the defendant, and gave his note for \$840, payable in one month. There was no talk about premium, at the time of the loan; but it was understood by the witnesses, that the borrower was to pay at the rate of five per cent per month for the money. At the end of the month, R. paid £168 on account of his note, and gave a new note, drawn in favor of, and indorsed by S., for the balance. He discharged the amount of his last note at different times; but it was never given up by the defendant. Held, that this was an illegal loaning of money, not the purchase of a note, so as to avoid the penalties of the act; and that the usury was completed on taking and receiving the £168; as a proportion of that sum went towards payment of the illegal interest included in the original note. *Musgrove v. Gibbs*, 1 Dall. 216, 1 L. Ed. 107.

15. *Junction R. Co. v. Bank*, 12 Wall. 226, 20 L. Ed. 385; *Musgrove v. Gibbs*, 1 Dall. 216, 217, 1 L. Ed. 107.

The requiring and giving of collateral security for the payment of a bond when negotiated, is not inconsistent with the transaction being a sale. *Junction R. Co. v. Bank*, 12 Wall. 226, 20 L. Ed. 385.

16. *United States Mortg. Co. v. Sperry*, 138 U. S. 313, 350, 34 L. Ed. 969.

7. **CONTRACT VALID IN INCEPTION.**—It is a cardinal rule in the doctrine of usury that a contract which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction.¹⁷

B. Intention.—In determining whether a transaction is usurious or not, the intent with which the act is done, must be considered as an important and essential ingredient to constitute the offense. In fact it is a question of intent.¹⁸ In construing the usury laws, the uniform construction in England has been, and it is equally applicable here, that to constitute usury, within the prohibitions of the law, there must be an intention, knowingly to contract for, and to take, usurious interest; for if neither party intend it, and act bona fide and innocently, the law will not infer a corrupt agreement. There must be an intent to take illegal interest.¹⁹ Where the contract, upon its very face, imports usury, as by an express reservation of more than legal interest, there is no room for

17. *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 624; *Gaither v. Farmers', etc., Bank*, 1 Pet. 37, 7 L. Ed. 43.

So if a bond be free from usury in its inception, no subsequent transaction between other parties can invalidate it. *Moncure v. Dermott*, 13 Pet. 345, 356, 10 L. Ed. 193, citing *Nichols v. Fearson*, 7 Pet. 103, 106, 8 L. Ed. 624.

A promissory note, payable at a future day, given for a bona fide business transaction, and which note was not made for the purpose of raising money in the market, was sold by the payee and indorser, for a sum so much less on its face, as exhibited a discount beyond the legal rate of interest, no stipulation having been made against the liability of the indorser, is not per se a usurious contract between the indorser and indorsee, and an action can be maintained upon the note against the indorser who sold the same, by the purchaser. *Nichols v. Fearson*, 7 Pet. 103, 110, 8 L. Ed. 624.

If a note be free from usury in its origin, no subsequent usurious transaction respecting it can effect it with the taint of usury, although an indorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain suit upon it. *Gaither v. Farmers', etc., Bank*, 1 Pet. 37, 7 L. Ed. 43.

18. **Intention.**—*Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163; *Andrews v. Pond*, 13 Pet. 65, 76, 10 L. Ed. 61; *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917.

19. **Construction of usury laws.**—*United States Bank v. Waggener*, 9 Pet. 378, 399, 9 L. Ed. 163; *Hotel Co. v. Wade*, 97 U. S. 13, 24 L. Ed. 917; *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Call v. Palmer*, 116 U. S. 98, 101, 29 L. Ed. 559; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474; *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 117, 30 L. Ed. 905; *Moncure v. Dermott*, 13 Pet. 345, 10 L. Ed. 193; *Russell v. Post*, 138 U. S. 425, 430, 34 L. Ed. 1009; *United States Bank v. Owens*, 2 Pet. 527.

7 L. Ed. 508; *Andrews v. Pond*, 13 Pet. 65, 79, 80, 10 L. Ed. 61.

Much depends upon the intent of the parties in the transaction. Consequently, where a certificate of deposit was given, payable at a future day, it was held not to be usury, it appearing that it was given at the request of the depositor, and for his accommodation, without any intent to secure usury. *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917.

Where the directors of a corporation who took its bonds and advanced its money were owners of stock in the bank where the money, when paid to the use of the company, was deposited, the fact that interest was not paid on the deposits does not render the transaction usurious, there being no evidence that any agreement was ever made that the money should be deposited in that bank. *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917.

When an agent who is authorized by his principal to lend money for lawful interest exacts for his own benefit more than the lawful rate, without authority or knowledge of his principal, the loan is not thereby rendered usurious. *Call v. Palmer*, 116 U. S. 98, 102, 29 L. Ed. 559.

If an agent, who has, by permission of his principal, sold eight per cent stock, applies the money to his own use, and being pressed for payment, gives a mortgage to secure the repayment of the amount of the stock with eight per cent interest thereon, it is usury, and the defense may be set up in a bill to foreclose the mortgage. *De Butts v. Bacon*, 6 Cranch 252, 3 L. Ed. 215.

If A. lend money to B., who puts it out at usurious interest, and agrees to pay to A. the same rate of interest which he is receiving upon A.'s money, this is usury between A. and B. *Levy v. Gadsby*, 3 Cranch 180, 2 L. Ed. 404.

A bond of indemnity by which the covenantor agreed to pay a certain bond loaned to him is not invalidated by usury between him and the purchaser of the bond of which the obligee had no

presumption, for the intent is apparent; *res ipsa loquitur*.²⁰ But, while usury is not to be favored, the rule is well settled that in order to sustain the defense of usury when a contract is, on its face, for legal interest only, there must be proof that there was some corrupt agreement, device, or shift to cover usury, and that it was in full contemplation of the parties. There must be an intent to take illegal interest.²¹ Mere ignorance of the law will not protect a party from the penalties of usury.²² Decided cases establish the rule that the withholding a part of a loan for a time in violation of the agreement of the parties does not constitute usury, as the retention of the money was no part of the contract or loan.²³ If a larger sum than allowed by law be not expressly reserved, the instrument will not of itself expose the usury, but the real corruptness of the contract must be shown by extrinsic circumstances which prove its character.²⁴ Whether a transaction is usurious or not, being a question of intention, is a question exclusively for the jury to determine.²⁵

C. Shifts and Devices to Evade Usury Laws—1. IN GENERAL.—The laws against usury will not tolerate any shifts, devices or pretenses to evade their provisions.²⁶ A fraud upon a statute against usury is a violation of the

knowledge. *Moncure v. Dermott*, 13 Pet. 345, 10 L. Ed. 193.

20. *United States Bank v. Waggener*, 9 Pet. 378, 399, 9 L. Ed. 163. See post, "Evidence," VI, A, 4.

21. **Contract legal on its face.**—*Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917; *United States Bank v. Waggener*, 9 Pet. 378, 399, 9 L. Ed. 163; *Call v. Palmer*, 116 U. S. 98, 101, 29 L. Ed. 559; *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474; *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508. See post, "Shifts and Devices to Evade Usury Laws," II, C; "Evidence," VI, A, 4.

This rule is not at all inconsistent with what has been previously decided by the court. Profit made or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon the loan and to be a violation of those laws which limit the lender to a specified rate of interest. *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917, citing *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508.

22. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474.

While ignorance of the law will not protect a party from the penalties of usury, where it is committed, yet where there was no intention to evade the law, and the facts which amount to usury, whether they appear upon the face of the contract, or by other proof, can be shown to have been the result of mistake or accident, no penalty attaches. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

23. *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917.

So where checks were drawn before the discount was made and deposited,

and the bank treated the note as discounted at the date of the checks, the court held that it was not usury, as the circumstances negatived any unlawful intent. *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917, citing *Walker v. Bank*, 3 How. 62, 11 L. Ed. 494.

24. **Extrinsic evidence.**—*Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

25. *Andrews v. Pond*, 13 Pet. 65, 76, 10 L. Ed. 61; *Russell v. Post*, 138 U. S. 425, 430, 34 L. Ed. 1009; *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163.

26. *Fowler v. Equitable Trust Co.*, 141 U. S. 411, 414, 35 L. Ed. 794; *De Wolf v. Johnson*, 10 Wheat. 367, 385, 6 L. Ed. 343; *United States Bank v. Owens*, 2 Pet. 527, 536, 7 L. Ed. 508; *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 403, 35 L. Ed. 786; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474; *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178; *Moncure v. Dermott*, 13 Pet. 345, 10 L. Ed. 193; *Russell v. Post*, 138 U. S. 425, 430, 34 L. Ed. 1009; *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 322, 38 L. Ed. 729.

The books contain many cases where artful contrivances have been resorted to, whereby the lender is to receive some other advantage or thing of value beyond the repayment of the loan with legal interest. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 43 L. Ed. 474; *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343. See, also, *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

Because an article is depreciated in the market, it does not follow that the owner is not entitled to demand or require a higher price for it, before he consents to part with it; he may possess bank notes which to him are of par value, in the payment of his own debts, or in payment of public taxes; and yet their marketable value may be far less;

statute.²⁷ A profit made, or loss imposed on the necessities of the borrower, whatever form, shape or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specific rate of interest.²⁸ Where the promisor in a usurious contract makes it the consideration of a new contract with a third person not a party to the original contract, or to the usury paid or reserved upon it, and the new contract is not a contrivance to evade the statutes against usury, the latter is not illegal or usurious.²⁹ Whether a transaction was intended as a cover for usury or not, is a question exclusively for the jury.³⁰

2. PURCHASE OF ANNUITY.—Sometimes an agreement intended as a cover for usury has taken the form of the purchase of an annuity, but the purchase of an annuity, or any other device, used to cover a usurious transaction, will be unavailing; if the contract be infected with usury, it cannot be enforced.³¹

3. ATTORNEY'S FEE.—Where a promise to pay an attorney's fee directly or indirectly has the effect of giving the lender, or of requiring the borrower to pay, a greater compensation for the loan, use or forbearance of the money than is allowed by law, the contract is unquestionably usurious.³²

if he uses no disguise, if he seeks not to recover a loan of money, under the pretense of a sale or exchange of them, but the transaction is bona fide what it purports to be, the law will not set aside the contract, for it is no violation of any public policy against usury. *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163.

27. *United States Bank v. Owens*, 2 Pet. 527, 536, 7 L. Ed. 508.

The branch bank of the United States, at Lexington, Kentucky, discounted a promissory note reserving interest thereon, at the rate of six per cent per annum; it being agreed, that the owner of the note should receive the proceeds of the discount, in notes of the Bank of Kentucky, at their nominal value, although the same were, at the time, of no greater current value than 54 per cent of the said nominal value. Held, that the contract was usurious, and void; and that the bank could not recover of any of the parties to the discounted note. *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508.

C. & Co. discounted their notes with the F. & M. Bank of Georgetown, at thirty days; and in lieu of money, they stipulated to take the post-notes of the bank, payable at a future day, without interest, while post-notes were at a discount of one and one-half per cent in the market, at the time of the transaction; such a contract is usurious. *Gaither v. Farmers' etc., Bank*, 1 Pet. 37, 7 L. Ed. 43.

28. *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508; *Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. Ed. 917.

According to this principle the lender in this case has taken 46 per cent for three years, or at the rate of about fifteen per cent per annum above the prescribed interest; this is contrary to the

provisions of the charter of the Bank of the United States, and against law. *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508.

29. Usurious contract consideration for new contract.—*Call v. Palmer*, 116 U. S. 98, 103, 29 L. Ed. 559.

30. *Andrews v. Pond*, 13 Pet. 65, 76, 10 L. Ed. 61; *Cockle v. Flack*, 93 U. S. 344, 23 L. Ed. 949.

There has been no taking of usury, and no reservation of usury, on the face of this transaction. The case, then, resolves itself into this inquiry, whether upon the evidence, there was any such corrupt agreement, or device or shift, to reserve or take usury; and none of these appear in the case. *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163.

31. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. Ed. 474; *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

The purchase of an annuity or rent charge, if a bona fide sale, has never been considered as usurious, though more than six per cent profit be secured. Yet it is apparent that if giving this form to the contract will afford a cover which conceals it from judicial investigation, the statutee would become a dead letter; courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction; if that be in fact a loan, no shift or device will protect it. *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

32. Attorney's fee.—*Fowler v. Equitable Trust Co.*, 141 U. S. 411, 414, 35 L. Ed. 794.

But a loan is not necessarily infected with usury, because of a provision in the trust deed providing for the payment by the borrower, in addition to ordinary costs, of a reasonable solicitor's fee.

4. COMMISSIONS TO AGENTS AND BROKERS.—Brokers negotiating loans of other people's money may charge the borrower commissions, without thereby making a loan at the full rate of legal interest usurious.³³

5. EXCHANGE.—If the rate of exchange taken upon a bill of exchange is a fair one, testing it by the market price of good bills of the same description, and is not intended to cover usurious interest, the transaction is not thereby rendered usurious.³⁴ Therefore it is not usury in a bank which has power by its charter to deal in exchange, to charge the market rates of exchange upon time bills.³⁵ The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent.³⁶ There is no rule of law fixing the rate which may be charged for exchange; it does not depend on the cost of transporting specie from one place to another; although the price of exchange is, no doubt, influenced by it.³⁷

6. PURCHASE OF PROPERTY AT MORE THAN TRUE VALUE.—As a shift or device for the cover of usury, there is frequently a collateral agreement whereby the borrower is to purchase an article of property and pay therefor more than its extrinsic value.³⁸

Fowler v. Equitable Trust Co., 141 U. S. 411, 414, 35 L. Ed. 794.

33. Fowler v. Equitable Trust Co., 141 U. S. 384, 404, 35 L. Ed. 786; Grant v. Phoenix Life Ins. Co., 121 U. S. 105, 117, 30 L. Ed. 905. See, also, Call v. Palmer, 116 U. S. 98, 29 L. Ed. 559.

It is not, however, consistent with the law of Illinois, as declared by its highest court, that the lender, when taking the highest rate of interest, shall impose upon borrowers the expense of maintaining agencies in different parts of the state through which loans may be obtained. Therefore, the exaction by the lender's agent, pursuant to his general arrangement with it, of commissions over and above the highest legal rate of interest stipulated to be paid by the borrower, renders the loan usurious. Fowler v. Equitable Trust Co., 141 U. S. 384, 405, 35 L. Ed. 786.

The receiving of a bonus from the borrower, by the agent of the lender in New Mexico, representing his principal, renders the contract usurious, where the bonus and the aggregate amount of the notes given for interest exceeded the highest rate of interest that could be charged, collected, or received, under the laws of New Mexico, on the sum loaned to the borrower. McBroom v. Scottish, etc., Inv. Co., 153 U. S. 318, 322, 38 L. Ed. 729.

34. Exchange.—Andrews v. Pond, 13 Pet. 65, 79, 10 L. Ed. 61; Buckingham v. McLean, 13 How. 151, 171, 14 L. Ed. 91.

If, in consideration of further forbearance, a creditor receives a new security from his debtor, for an existing debt, he cannot enlarge the amount due, by exacting anything, either by way of interest or exchange, for the additional risk, which he may suppose he runs by this extension of credit; nor, on the opinion he may entertain as to the

punctuality of payment, or the ultimate safety of the debt. Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61.

Determination of question whether exchange was usurious.—Although the transaction, as exhibited, appears, on its face to be free from the taint of usury, yet if the rate charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usury; and if the fact be established, it must be dealt with in the same manner as if the usury had been expressly mentioned in the bill itself. But whether the charge for exchange was intended as a cover for usury or not, is a question exclusively for the jury; it is a question of intention. In order to enable the jury to decide whether the usury was concealed under the name of exchange, evidence on both sides ought to have been admitted, which tended to show the usual rate of exchange between New York and Mobile, when the bill was negotiated. Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61.

35. Power of bank to charge market rates of exchange.—Buckingham v. McLean, 13 How. 151, 14 L. Ed. 91.

36. Reason for rule.—Buckingham v. McLean, 13 How. 151, 172, 14 L. Ed. 91.

And this reason exists when the lender discounts the drawer's bill as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and customary compensation for the loss in value by change of place of payment. Buckingham v. McLean, 13 How. 151, 172, 14 L. Ed. 91.

37. Fixing of rate of exchange.—Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61.

38. Purchase of property at more than true value.—Missouri, etc., Trust Co. v. Krumseig, 172 U. S. 351, 355, 43 L. Ed.

7. NOTES BEARING INTEREST ANTERIOR TO THEIR DATE.—Promissory notes given for purchase of goods, chattels or lands, though bearing interest anterior to their date, are neither usurious nor illegal, unless the day described in the contract from which to compute the interest is anterior to the actual date of the transaction and the transfer of the subject matter of the purchase and sale, and it is quite clear that promissory notes in such a case, as between the original parties, are open to explanation.³⁹

III. Effect of Usury.

A. In General.—There is a growing inclination to construe statutes against usury so as not to destroy the contract.⁴⁰

B. Upon Validity of Contract and Amount of Recovery.⁴¹—The statutes of usury of England, and of some of the states of the Union, expressly provide that usurious contracts shall be utterly void.⁴² However, without such a provision, they are not void, as against parties who are strangers to the usury.⁴³ By statute in some states, a usurious contract is valid for the principal sum lent with lawful interest thereon and void only as to the illegal interest,⁴⁴ while

474. See, also, *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

33. Notes bearing interest anterior to date.—*Ewing v. Howard*, 7 Wall. 499, 504, 19 L. Ed. 293.

Bills or notes promising the payment of interest from a time anterior to their date, if the bills or notes so written are to be considered as conclusive evidence that they were given for money lent on the day of their date, would properly be regarded as usurious, but it is well known that bills and notes are often given subsequent to the transaction which constitutes their consideration and for property sold, and upon other transactions as well as for money lent. *Ewing v. Howard*, 7 Wall. 499, 505, 19 L. Ed. 293.

Usury being a defense that must be strictly proved, a court will not presume that a note dated on one day for a sum payable with interest from a day previous was for money first lent on the day of the date only. *Ewing v. Howard*, 7 Wall. 499, 19 L. Ed. 293.

40. Validity of contracts favored.—*Tiffany v. Boatman's Institution*, 18 Wall. 375, 384, 21 L. Ed. 868.

41. Effect upon validity of contract and amount of recovery.—See post, "Penalties and Forfeitures," VII.

42. Statutes making contracts void.—*Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *United States Bank v. Owens*, 2 Pet. 527, 538, 7 L. Ed. 508; *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 325, 38 L. Ed. 729.

Usurious transactions are declared void by the statutes of Maryland, *Gaither v. Farmers', etc., Bank*, 1 Pet. 37, 7 L. Ed. 43; *Oates v. National Bank*, 100 U. S. 239, 249, 25 L. Ed. 580; *Virginia, Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Kentucky, De Wolf v. Johnson*, 10 Wheat. 367, 382, 6 L. Ed. 343; *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163; *Minnesota, Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L.

Ed. 474; *Georgia, New England Mortg., etc., Co. v. Gay*, 145 U. S. 123, 128, 36 L. Ed. 646; and *New York*, see *Farmer's, etc., Bank v. Dearing*, 91 U. S. 29, 33, 23 L. Ed. 196.

It is the law in New York that the transfer by the payee of a valid available note, upon which when due he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not an usurious transaction, although the payee on such transfer indorses the note; and on nonpayment by the maker the indorsee may maintain an action against the indorser; but the sum which the indorsee in such case is entitled to recover of the indorser is the amount of the advance made by him, together with the interest thereon at the legal rate; while in an action against the maker the indorsee is entitled to the whole amount of the note. *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742.

43. Rule in absence of statute.—*Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 325, 38 L. Ed. 729.

44. Contract valid as to principal and lawful interest.—*Buckingham v. McLean*, 13 How. 151, 171, 14 L. Ed. 91.

Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766.

Ohio statute.—See *Buckingham v. McLean*, 13 How. 151, 171, 14 L. Ed. 91.

In Pennsylvania, a usurious bond and mortgage is void only as to the illegal interest. *Burnhisel v. Firman*, 22 Wall. 170, 177, 22 L. Ed. 766. See, also,

in others the plaintiff may recover only his principal without interest.⁴⁵ The statute incorporating the Bank of the United States, did not avoid securities on which usurious interest may have been taken, and the usury could not be set up as a defense to a note on which it was taken; it was merely a violation of the charter, for which a remedy might be applied by the government.⁴⁶ But where a bank was by its charter authorized to lend money on interest, but was forbidden to exact more than a certain per cent for the loan, and no penalty was prescribed for transgressing the law, nor did the charter declare what effect should be given to the usurious contract, it was held that if the bank took more than the rate prescribed, the contract was void in law upon general principles.⁴⁷ Under a usury law which does not avoid the securities, but only forbids the tak-

Farmers,' etc., *Bank v. Dearing*, 91 U. S. 29, 33, 23 L. Ed. 196.

Under the statute of New Mexico a contract of loan providing for usurious interest cannot be held void, except as to interest in excess of what the statute allowed to be charged, collected, or received. *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 328, 38 L. Ed. 729; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. Ed. 766.

45. Contract valid only as to principal.—*Hogg v. Ruffner*, 1 Black 115, 118, 17 L. Ed. 38.

The plaintiff can recover only the principal sum under the statute of Indiana, *Hogg v. Ruffner*, 1 Black 115, 118, 17 L. Ed. 38; Rhode Island, *De Wolf v. Johnson*, 10 Wheat. 367, 382, 6 L. Ed. 343; and Illinois, *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 397, 405, 35 L. Ed. 786. See post, "Penalties and Forfeitures," VII.

By the statute of Texas on the subject of usury, a contract of loan at a stipulated rate of interest greater than twelve per cent per annum, is declared to "be void and of no effect for whole premium or rate of interest only;" but the principal sum may be received and recovered. The constitution of Texas subsequently repealed this and all existing usury laws. *Ewell v. Daggs*, 108 U. S. 143, 148, 27 L. Ed. 682.

In the Texas usury statute declaring the contract of loan, so far as the whole interest is concerned to be "void and of no effect," these words are used in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. *Ewell v. Daggs*, 108 U. S. 143, 148, 27 L. Ed. 682.

The effect of the usury statute of Texas was to enable a party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction

placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense in the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. *Ewell v. Daggs*, 108 U. S. 143, 150, 27 L. Ed. 682.

"The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designated to protect, *Cooley Constitutional Limitations*, 378, and cases cited. * * * It is our opinion, therefore, that the defense of usury cannot avail the appellant, by reason of the constitutional repeal of the statute, on the continued existence of which alone his defense rested." *Ewell v. Daggs*, 108 U. S. 143, 151, 27 L. Ed. 682.

Tennessee statute.—See *Ewing v. Howard*, 7 Wall. 499, 503, 19 L. Ed. 293.

46. Statute incorporating United States Bank.—*Fleckner v. United States Bank*, 8 Wheat. 338, 5 L. Ed. 631; *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 325, 38 L. Ed. 729. See the title BANKS AND BANKING, vol. 3, p. 64.

In an action on a note given by a borrower to the Bank of the United States, the defense was set up, that the transaction was usurious, contrary to the charter of the bank, and void. Held, that there was no usury in the transaction. *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163.

47. Tiffany v. Boatman's Institution, 18 Wall. 375, 384, 21 L. Ed. 868; *United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508. See, also, *United States Bank v. Waggener*, 9 Pet. 378, 9 L. Ed. 163.

Construction of charter of bank of United States.—*United States Bank v. Owens*, 2 Pet. 527, 7 L. Ed. 508; *Tiffany v. Boatman's Institution*, 18 Wall. 375, 384, 21 L. Ed. 868.

ing a greater interest than a certain per centum per annum, a court of equity will not refuse its aid to recover the principal.⁴⁸

IV. Purging Transaction of Usury.

Although a contract be usurious in its inception, a subsequent agreement to free it from the taint of usury, will render it valid.⁴⁹ It is well settled that if a security founded upon a prior one be fatally tainted with usury, and the prior one were free from it but given up and canceled, and the latter one thereafter be adjudged void, the prior one will be revived, and may be enforced as if the latter one had not been given.⁵⁰ But no subsequent confirmation of a usurious contract, nor any new contract, stipulating to pay the debt, with the usurious interest, will make it valid.⁵¹ The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void.⁵²

V. Conflict of Laws.

See the title *CONFLICT OF LAWS*, vol. 3, pp. 1052, 1057, 1058, et seq.

VI. Rights and Remedies against Usury.

A. Usury as a Defense⁵³—1. **WHO MAY PLEAD.**—**Plea Personal.**—The plea of usury, at least so far as to landed security, is personal and peculiar; and however a third person, having an interest in the land, may be affected incidentally by a usurious contract, he cannot take advantage of the usury.⁵⁴

48. Equitable relief.—*De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343.

49. Doctrine that subsequent agreement will validate contract.—*De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343.

"There have been cases in which usurious contracts have been canceled, the usury refunded, and new contracts substituted, free from the taint of usury; and the law gives to the offender this locus pœnitentiæ. But there is no analogy between such a transaction and that here presented, in which the money loaned has been paid by the borrower, and only passed into the vaults of the bank, to be deposited with the usurious interest previously taken. We have not heard of the refunding of this usury; and this, at least, would have been indispensable to removing the taint." *Gaither v. Farmers', etc., Bank*, 1 Pet. 37, 44, 7 L. Ed. 43.

50. Revival of prior security free from usury.—*Burnhisel v. Firman*, 22 Wall. 170, 179, 22 L. Ed. 766.

51. Subsequent confirmation of contract.—*Moncure v. Dermott*, 13 Pet. 345, 10 L. Ed. 193.

A bare promise to pay an usurious debt, or a partial payment of it, will not take the contract out of the statute against usury. Notwithstanding, therefore, the defendant may have declared his determination to pay the debt, and did actually pay a part of it, he had, nevertheless, a perfect right, afterwards, to avail himself of the plea of usury. *Moncure v. Dermott*, 13 Pet. 345, 355, 10 L. Ed. 193.

52. Change of securities.—*Walker v. Bank*, 3 How. 62, 71, 11 L. Ed. 494.

The indorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the indorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note; for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. *Gaither v. Farmers', etc., Bank*, 1 Pet. 37, 7 L. Ed. 43.

53. Usury as a defense.—If an agent, who has, by permission of his principal, sold eight per cent stock, applies the money to his own use, and being pressed for payment, gives a mortgage to secure the repayment of the amount of the stock with eight per cent interest thereon, it is usury, and the defense may be set up in a bill to foreclose the mortgage. *De Butts v. Bacon*, 6 Cranch 252, 3 L. Ed. 215.

54. Plea personal.—*De Wolf v. Johnson*, 10 Wheat. 367, 393, 6 L. Ed. 343.

The grantee of mortgaged property who in consideration of the purchase agrees to pay off the mortgage, cannot raise the question of usury, that being a personal right of the original debtor. *First Nat. Bank v. Lasater*, 196 U. S. 115, 118, 49 L. Ed. 408.

The purchaser of an equity of redemption cannot set up usury, as a defense to a bill brought by the mortgagee for

Some exceptions may exist to this rule under bankrupt systems, but they are statutory and peculiar.⁵⁵

Corporations.—The prohibition against usury of the New York laws cannot be interposed by corporations as a defense,⁵⁶ nor can the indorsers of their paper plead the statute.⁵⁷

2. **AGAINST WHOM DEFENSE MAY BE MADE.**—The principle seems to be settled that usurious securities are not only void, as between the original parties,⁵⁸ but the illegality of their inception affects them even in the hands of third persons, who are entire strangers to the transaction.⁵⁹

3. **PLEA OF USURY.**—Usury, as a defense, must be specially pleaded or set up in the answer to entitle it to consideration.⁶⁰ If the usury be specially pleaded, and the court reject the evidence offered upon such special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea.⁶¹ The right of the defendant to offer in evidence, under the plea of non assumpsit, that the instrument was given upon an usurious contract, is well settled.⁶²

4. **EVIDENCE.**⁶³—**Presumptions and Burden of Proof.**—Usury is a defense that must be strictly proved, and the court will not presume a state of facts to sustain that defense where the instrument is consistent with correct dealing.⁶⁴ It is incumbent on the party who charges usury to prove it.⁶⁵

a foreclosure, especially, if the mortgagor has himself waived the defense. *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343.

In the case of *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343, the first mortgage being executed in Rhode Island, in 1815, was not usurious by the laws of that state; and the second mortgage, executed in Kentucky, in 1817, being a new contract, was not tainted with usury; the question, therefore, whether the purchaser of an equity of redemption can show usury in the mortgage, to defeat a foreclosure, was not involved in that case. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

If A. lend money to B., who puts it out at usurious interest, and agrees to pay to A. the same rate of interest which he is receiving upon A.'s money, this is usury between A. and B., and an indorser of B.'s note to A. may avail himself of the plea of usury. *Levy v. Gadsby*, 3 Cranch 180, 2 L. Ed. 404.

55. **Exceptions to rule.**—*De Wolf v. Johnson*, 10 Wheat. 367, 393, 6 L. Ed. 343.

56. **Defense prohibited to corporations.**—*Hubbard v. Tod*, 171 U. S. 474, 501, 43 L. Ed. 246; *Junction R. Co. v. Bank*, 12 Wall. 226, 229, 20 L. Ed. 385.

57. **Indorsers of corporate paper.**—*Hubbard v. Tod*, 171 U. S. 474, 501, 43 L. Ed. 246.

58. **Party to original contract.**—*Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

59. **Third persons.**—*Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833.

Indorser of a bill originally made upon a usurious contract.—*Lloyd v. Scott*, 4 Pet. 205, 229, 7 L. Ed. 833.

If a bill of exchange be drawn, in consequence of an usurious agreement for discounting it, although the drawee to

whose order it was payable was not privy to this agreement, still it is void in the hands of a bona fide indorsee. *Lloyd v. Scott*, 4 Pet. 205, 229, 7 L. Ed. 833.

If usury may be shown in the inception of a bill, to defeat a recovery by an indorsee, who paid for it a valuable consideration, without notice of the usury, the same defense may be set up, where the party to the usurious contract claims, by virtue of its provisions, a summary mode of redress. *Lloyd v. Scott*, 4 Pet. 205, 230, 7 L. Ed. 833.

60. **Must be specially pleaded.**—*The Confederate Note Case*, 19 Wall. 548, 22 L. Ed. 196.

In *Comyn on Usury* 201, it is laid down, that in an action on a specialty, though it appear on the face of the declaration that the bond, etc., is usurious, still no advantage can be taken of this, unless the statute be specially pleaded. 3 Salk. 291; 5 Co. 119; *Chitty on Cont.* 240; 1 Sid. 285; 1 Saund. 295a. *Lloyd v. Scott*, 4 Pet. 205, 224, 7 L. Ed. 833.

In Virginia, a party cannot avail himself of the defense of usury, without averring and proving it, and he is required to pay the principal of his debt. *Kesner v. Trigg*, 98 U. S. 50, 52, 25 L. Ed. 83.

61. **Rejection of evidence upon special plea.**—*Levy v. Gadsby*, 3 Cranch 180, 2 L. Ed. 404.

62. **Usury may be shown under non assumpsit.**—*Andrews v. Pond*, 13 Pet. 65, 80, 10 L. Ed. 61.

63. **Evidence.**—See ante, "Plea of Usury," VI, A, 3.

64. **Strict proof required.**—*Ewing v. Howard*, 7 Wall. 499, 505, 19 L. Ed. 293. See ante, "Intention," II, B.

65. **Burden of proof.**—*Buckingham v.*

Admissibility.—As to the admissibility of extrinsic evidence to prove the corruptness of an alleged usurious contract, see ante, "Intention," II, B.

5. **WITNESSES.**—See the title **WITNESSES**.

6. **PROVINCE OF COURT AND JURY.**—**Question for Court.**—Questions of law are referred to the court and in cases of a written contract, the question of usury is exclusively for the decision of the court.⁶⁶

Question for Jury.—Questions of fact are referred to the jury, and it is their province to decide on the sufficiency of the testimony.⁶⁷ As to the question of intent in the case of an alleged usurious transaction, being a question for the jury, see ante, "Intention," II, B. As to the province of the jury to determine whether or not a transaction was a mere cover for usury or a shift or device to avoid the usury laws, see ante, "In General," II, C, 1.

7. **SETTING UP DEFENSE IN TRIAL COURT.**—As to the necessity for setting up the defense of usury in the trial court, see the title **APPEAL AND ERROR**, vol. 2, p. 90.

B. Relief in Equity.—**In General.**—The general rule is that courts of equity have a discretion on the subject of usury, and have prescribed the terms on which their powers can be brought into activity.⁶⁸ It is an established principle of equity jurisprudence that he who seeks the aid of equity to be delivered from usury, must do equity by paying or offering to pay the principal and lawful interest upon the money borrowed as a condition of granting the relief asked.⁶⁹ By the statutes of some states a borrower of money upon usurious

McLean, 13 How. 151, 171, 14 L. Ed. 91; *Ewing v. Howard*, 7 Wall. 499, 506, 19 L. Ed. 293.

Where usury is alleged to consist in taking excessive rates of exchange, or in resorting to the form of a bill of exchange in order to keep out of sight a usurious compensation for the simple loan of money, these facts must be proved. *Buckingham v. McLean*, 13 How. 151, 171, 14 L. Ed. 91, citing *Andrews v. Pond*, 13 Pet. 65, 10 L. Ed. 61.

66. **Question for court.**—*Walker v. Bank*, 3 How. 62, 11 L. Ed. 494; *Levy v. Gadsby*, 3 Cranch 180, 2 L. Ed. 404; *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178. See the title **EVIDENCE**, vol. 5, p. 1055, et seq.

67. **Province of jury.**—*Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178. See the title **EVIDENCE**, vol. 5, p. 1055, et seq.

Thus it was improper to request the court to say to the jury, that the facts given in evidence on the trial of the case, did not import such a lending as would support the defense of usury, as by so doing the court would usurp the province of the jury. *Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

68. **Relief in equity.**—*Tiffany v. Boatman's Institution*, 18 Wall. 375, 385, 21 L. Ed. 868; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 357, 43 L. Ed. 474.

Under a usury law which does not avoid the securities, but only forbids the taking a greater interest than six per centum per annum, a court of equity will not refuse its aid to recover the principal. *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343.

69. **Payment of principal and lawful interest condition precedent.**—*Brown v.*

Swann, 10 Pet. 497, 9 L. Ed. 508; *Veazie v. Williams*, 8 How. 134, 161, 12 L. Ed. 1018; *Stanley v. Gadsby*, 10 Pet. 521, 9 L. Ed. 518; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 358, 43 L. Ed. 474; *Hubbard v. Tod*, 171 U. S. 474, 501, 43 L. Ed. 246; *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 406, 35 L. Ed. 786. See, also, *Kesner v. Trigg*, 98 U. S. 50, 52, 25 L. Ed. 83.

A. filed a bill in the circuit court, for an injunction, to prevent the sale of property by a trustee, to whom it had been conveyed to secure the payment of a sum of money borrowed by him at usurious interest; the money borrowed had not been repaid, and the bill sought no discovery of the usury from the defendant, but averred that the complainant would be able to prove it by competent testimony; the circuit court dismissed the bill. Held, that the decree of the circuit court was correct. This is substantially an application for relief from usury; and the consequence of granting the injunction would be relief upon terms at variance with the rule of equity, that he who seeks the aid of equity to be delivered from usury, must do equity, by paying the principal and legal interest upon the money borrowed. The complainant does not offer to do so in this bill; this is essential to every such application in a court of equity; first, to give the court jurisdiction; and to enable the chancellor, if he thinks proper to do so, to require the payment of principal and interest before the hearing of the cause. The relief sought in such cases is an exemption from the illegal usury; the whole inquiry on the hearing, is to establish that fact, and to give relief to that extent;

interest may seek the aid of a court of equity without making an offer to repay the loan with lawful interest.⁷⁰

Executory and Executed Contracts.—Courts of equity will give no relief to the borrower if the contract be executory, except on the condition that he pay to the lender the money lent with legal interest.⁷¹ Nor, if the contract be executed, will they enable him to recover more than the excess he has paid over the legal interest.⁷²

Discovery.—See the title *DISCOVERY*, vol. 5, pp. 350, 353.

C. Recovery of Payments.—See ante, "Relief in Equity," VI, B; post, "Penalties and Forfeitures," VII.

D. Application of Payments.—See post, "Penalties and Forfeitures," VII.

E. Set-Off.—See post, "Penalties and Forfeitures," VII. See, also, the title *SET-OFF, RECOUPMENT AND COUNTERCLAIM*, vol. 10, p. 1119.

whenever a complainant does not comply with the rule, by averring in his bill his readiness or willingness to pay principal and interest, he can have no standing in a court of equity. *Stanley v. Gadsby*, 10 Pet. 521, 9 L. Ed. 518. See, also, *Brown v. Swann*, 10 Pet. 497, 9 L. Ed. 508.

70. Rule changed by statute.—*Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 357, 43 L. Ed. 474.

By the law of Minnesota, a borrower of money upon usurious interest can successfully seek the aid of a court of equity in canceling the debt without making an offer to repay the loan with lawful interest. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 357, 43 L. Ed. 474.

With the policy of such state legislation the federal courts have nothing to do. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 358, 43 L. Ed. 474.

By a statute of New York, it is provided that whenever a borrower files a bill for relief in respect of violation of the usury law, he need not pay or offer to pay "any interest or principal on the sum or thing loaned;" but this act has been rigidly confined to the borrower himself and, moreover, is not applicable to suits brought in courts not within the state of New York. *Hubbard v. Tod*, 171 U. S. 474, 501, 43 L. Ed. 246.

Under statutes providing that in cases of usury, the borrower is entitled to relief without being required to pay any part of the usurious debt or interest as a condition thereof, it has been held by the courts of New York and of Arkansas that courts of equity are constrained by the statutes and must grant the relief provided for therein without applying the general rule that a bill or other proceeding in equity, to set aside or affect a usurious contract, cannot be maintained without paying or offering to pay the amount actually owed. *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 358, 43 L. Ed. 474.

71. Contract executory.—*Tiffany v. Boatman's Institution*, 18 Wall. 375, 385, 21 L. Ed. 868; *Missouri, etc., Trust Co.*

v. Krumseig, 172 U. S. 351, 357, 43 L. Ed. 474.

72. Contract executed.—*Tiffany v. Boatman's Institution*, 18 Wall. 375, 385, 21 L. Ed. 868; *Missouri, etc., Trust Co. v. Krumseig*, 172 U. S. 351, 357, 43 L. Ed. 474; *Spain v. Hamilton*, 1 Wall. 604, 624, 17 L. Ed. 619.

In cases of usury, if the contract be executed, a court of chancery, on application of the debtor, will not assist him to recover back both principal and interest. To do this would be to aid one party to an illegal transaction and to deny redress to the other. *Tiffany v. Boatman's Institution*, 18 Wall. 375, 385, 21 L. Ed. 868.

Although a loan of money may be usurious and the contract to return it void, yet, in the absence of statutory enactment, it does not follow that the borrower, after he has once repaid the money, nor even that his assignee in bankruptcy, whose rights are in some respects greater than his own, can recover the principal and illegal interest paid. Equity, however, in its discretion may enable either to get back whatever money the borrower has paid in excess of lawful interest; and in the present suit it did enable an assignee in bankruptcy to do so; both in a case where before his bankruptcy the money was lent directly to the bankrupt, and in a case where the money had been given to brokers, upon indorsed notes, which, the evidence made sufficiently plain, were accommodation notes, drawn to enable the bankrupt to raise money on them and were understood by the lender of the money so to be. *Tiffany v. Boatman's Institution*, 18 Wall. 375, 21 L. Ed. 868.

The general doctrine of equity, that a party complaining of usury can have relief only for the excess above lawful interest applies to the case of a person standing in the position of a claimant through bill in equity of priority on a fund, another claimant upon which, as defendant, is the alleged usurer. The fact that the suit is a mere contest between different parties for a fund, and a con-

VII. Penalties and Forfeitures.⁷³

A. Under National Banking Act.—The Revised Statutes of the United States relating to national banking associations, after prescribing the rate of interest to be taken by national banks,⁷⁴ provide that the taking, receiving, reserving or charging a rate of interest, greater than prescribed, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon.⁷⁵ In case the greater rate of interest has been paid, the person by

test, therefore, in which each claimant may, in some senses, be considered an actor, does not force the alleged usurer into the position of a complainant or plaintiff, and so expose him to the penalty incurred by a person seeking as plaintiff to recover an usurious debt; that is to say, to the loss of the entire claim. *Spain v. Hamilton*, 1 Wall. 604, 17 L. Ed. 619.

73. Penalties and forfeitures.—See ante, "Upon Validity of Contract and Amount of Recovery," III, B. See, also, the title PENALTIES AND FORFEITURES, vol. 9, p. 537.

74. Rate of interest allowed national banks.—For language of this statute, see the title BANKS AND BANKING, vol. 3, p. 64.

The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed or fixed by the laws of the state or territory in which it is located or in which it is doing business; and equality is carefully secured with local banks. *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 553, 44 L. Ed. 882; *Talbot v. Sioux City, etc., Bank*, 185 U. S. 172, 180, 46 L. Ed. 857; *Tiffany v. National Bank*, 18 Wall. 409, 21 L. Ed. 862; *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 373, 49 L. Ed. 238.

The clear meaning and purpose of these provisions remove the ambiguity of those which follow, if there is any ambiguity. "Where no rate is fixed by the laws of the state or territory or district, the bank may take, secure, reserve or charge a rate not exceeding seven per centum." "Fixed by the laws" must be construed to mean "allowed by the laws," not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it. *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 555, 44 L. Ed. 882, limiting *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742. See, also, *Tiffany v. National Bank*, 18 Wall. 409, 21 L. Ed. 862.

National banks may take the rate of interest allowed by the state to natural persons generally, and a higher rate, if state banks of issue are authorized by the laws of the state to take it. *Tiffany v. National Bank*, 18 Wall. 409, 21 L. Ed. 862.

The contention, that under § 5197, Rev. Stat., whatever by the law of the state is lawful to natural persons in acquiring title to negotiable paper by discount is lawful for national banks, cannot be sustained, and derives no countenance, as is argued, from the decision in *Tiffany v. National Bank of Missouri*, 18 Wall. 409, 21 L. Ed. 862. All that was said in that case related to loans and to the rate of interest that was allowed thereon; and it was held that where by the laws of a state in which a national bank was located one-rate rate of interest was lawful for natural persons and a different one to state banks, the national bank was authorized to charge on its loans the higher of the two. The sole particular in which national banks are placed on an equality with natural persons is as to the rate of interest, and not as to the character of contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there be any difference between them. It is not intimated or implied that if, in any state, a natural person may discount paper, without regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some rate of interest, allowed to natural persons, which is fixed by the state law. *National Bank v. Johnson*, 104 U. S. 271, 277, 26 L. Ed. 742.

75. Forfeiture of interest.—Rev. Stat., § 5198; Act of June 3, 1864, 13 Stat. 99, § 30. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 417, 42 L. Ed. 801; *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 153, 46 L. Ed. 475; *Barnet v. National Bank*, 98 U. S. 555, 557, 25 L. Ed. 212; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 30, 23 L. Ed. 196; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 134, 46 L. Ed. 118; *Talbot v. Sioux City, etc., Bank*, 185 U. S. 172, 180, 46 L. Ed. 857; *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 554, 44 L. Ed. 882; *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 373, 49 L. Ed. 238.

See succeeding note for further discussion of this clause of the statute, as the court has frequently discussed the two clauses of the statute together, showing their relation each to the other.

But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than

whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same,⁷⁶ provided such action

the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. Act of June 3, 1864, 13 Stat. 99, § 30. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 30, 23 L. Ed. 196; *National Bank v. Johnson*, 104 U. S. 271, 278, 26 L. Ed. 742.

In reference to § 5198 of the national banking act, the federal supreme court has said that "where a statute prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might lawfully be taken." *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 324, 38 L. Ed. 729.

Where the interest charged and received by a national bank was compounded more than once a year it was at a rate greater than was allowed by U. S. Rev. Stat., § 5197, and it was forfeited where a state statute prohibited the compounding of interest oftener than once in a year. The prohibition of the Missouri statute against compounding interest oftener than once a year affects the "rate of interest" within the meaning of those words in U. S. Rev. Stat., § 5198, and although the total sums received from compounding oftener than allowed by the statute, would not amount to more than eight per cent on the debt, a national bank has no right to charge them under U. S. Rev. Stat., § 5197, coupled with Missouri Rev. Stat., § 3706. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 373, 374, 49 L. Ed. 238.

National banking act governs.—Where a note was given to a national bank, the definition of usury and the penalties affixed thereto must be determined by the national banking act and not by the laws of the state. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196. In that case it was held that a law of New York forfeiting the entire debt for usury was superseded by the national banking law, and that such law was only to be regarded in determining the penalty for usury. *Haseltine v. Central Bank, No. 2*, 183 U. S. 132, 134, 46 L. Ed. 118.

Extent of forfeiture.—The statute provides for the forfeiture, not of the amount by which the usurious has exceeded the lawful rate, but of the entire interest. *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 154, 46 L. Ed. 475.

But no loss of the entire debt is incurred by such bank, as a penalty or otherwise, by reason of the provisions of the usury law of a state. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Carter v. Carusi*, 112 U. S. 478, 483, 28 L. Ed. 820.

Allowance of credit for interest agreed

to be paid.—If a bank, which violates the statute, sues upon the note, bill or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 418, 42 L. Ed. 801; *Haseltine v. Central Bank, No. 2*, 183 U. S. 132, 135, 46 L. Ed. 118.

Waiver or avoidance of forfeiture.—A national bank when it brings an action upon a note and is met by the plea of usury, may not avoid the forfeiture imposed by Rev. Stat., § 5198, in absolute terms, by then declaring an election to remit the excessive interest. *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 374, 49 L. Ed. 238.

The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the note carries or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest, which the note, bill or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 418, 42 L. Ed. 801; *Haseltine v. Central Bank, No. 2*, 183 U. S. 132, 135, 46 L. Ed. 118.

It is the interest charged, not the interest to which a forfeiture might be enforced, that the statute (Rev. Stat., § 5198), regards as illegal. And a forfeiture may or may not occur. Interest greater than the legal rate may be charged, but it may be relinquished and recovery be had of the legal rate. *Talbot v. Sioux City, etc., Bank*, 185 U. S. 172, 181, 46 L. Ed. 857; *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 38 L. Ed. 729; *Savings, etc., Society v. Multnomah County*, 169 U. S. 421, 42 L. Ed. 803; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 419, 42 L. Ed. 801.

76. Action to recover twice amount of interest.—Rev. Stat., § 5198; *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 153, 46 L. Ed. 475; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 417, 42 L. Ed.

is commenced within two years from the time the usurious transaction oc-

801; *Barnet v. National Bank*, 98 U. S. 555, 557, 25 L. Ed. 212; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 30, 23 L. Ed. 196; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 134, 46 L. Ed. 118; *Talbot v. Sioux City, etc., Bank*, 185 U. S. 172, 180, 46 L. Ed. 857.

Two categories are thus defined, and the consequences denounced: 1. Where illegal interest has been knowingly stipulated for, but not paid, there only the sum lent without interest can be recovered. 2. Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt or suit in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives. *Barnet v. National Bank*, 98 U. S. 555, 557, 25 L. Ed. 212; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 135, 46 L. Ed. 118; *Talbot v. Sioux City, etc., Bank*, 185 U. S. 172, 180, 46 L. Ed. 857; *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 155, 46 L. Ed. 475.

In *Oates v. National Bank*, 100 U. S. 239, 249, 25 L. Ed. 580, where one of the questions was whether a bank could be deemed a bona fide holder of a negotiable note, having received it under a contract which, in its execution, involved a violation of the usury laws of the state, the federal supreme court said: "The statute under which the bank was organized, known as the national banking act, does not declare the contract under which the usurious interest is paid to be void. It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and, consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself." *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 325, 38 L. Ed. 729. See, also, *De Wolf v. Johnson*, 10 Wheat. 367, 6 L. Ed. 343; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212.

National banks have been held entitled to recover upon securities taken in the course of business, but in violation of the act of congress. In *National Bank v. Matthews*, 98 U. S. 621, 627, 25 L. Ed. 188, the court said: "The statute does not declare such a security void. It is silent upon the subject. If congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision.

Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined." *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 326, 38 L. Ed. 729, citing *National Bank v. Whitney*, 103 U. S. 99, 103, 26 L. Ed. 443; *Smith v. Sheeley*, 12 Wall. 358, 361, 20 L. Ed. 430.

The statute is remedial as well as penal, and is to be liberally construed to effect the object which congress had in view in enacting it. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196.

Actual payment contemplated.—The payment contemplated by § 5198, Rev. Stat., is an actual payment, and not a further promise to pay, and is not made until the bank receives its money. *First Nat. Bank v. Lasater*, 196 U. S. 115, 118, 49 L. Ed. 408. The mere discharge of the maker of a note by giving his own note in renewal thereof will not uphold a recovery from the bank on account of usurious interest in the former note. *First Nat. Bank v. Lasater*, 196 U. S. 115, 118, 49 L. Ed. 408; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. Ed. 801.

Within the meaning of the statutes, interest is not "paid" when included in a renewal note. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 419, 42 L. Ed. 801; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 135, 46 L. Ed. 118; *Driesbach v. National Bank*, 104 U. S. 52, 26 L. Ed. 658.

If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at ten per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower—each renewal note including past interest, legal and usurious—the sum included in the last note, in excess of the sum originally loaned, would be interest which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 419, 42 L. Ed. 801.

Remedy exclusive.—Section 5198, Rev. Stats., having prescribed that where usurious interest has been paid to a national bank, the person paying such unlawful interest, may, in an action of debt, against the bank, recover back twice the amount so paid, the remedy thereby afforded is a penal suit and is exclusive. He can resort to no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties. *Barnet v. National Bank*, 98 U. S. 555, 558, 559, 25 L. Ed. 212; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196; *Carter v. Carusi*, 112 U. S. 478, 483, 28 L. Ed. 820; *Schuyler Nat. Bank v.*

Gadsden, 191 U. S. 451, 456, 48 L. Ed. 258; Haseltine v. Central Bank, No. 2, 183 U. S. 132, 46 L. Ed. 118; Driesbach v. National Bank, 104 U. S. 52, 26 L. Ed. 658; Stephens v. Monongahela Bank, 111 U. S. 197, 198, 28 L. Ed. 399; Tucker v. Alexandroff, 183 U. S. 424, 436, 46 L. Ed. 264; McBroom v. Scottish, etc., Inv. Co., 153 U. S. 318, 324, 38 L. Ed. 729. In the absence of such a remedy the defense might be made by way of set-off or credit upon the original demand. Tucker v. Alexandroff, 183 U. S. 424, 436, 46 L. Ed. 264.

In a suit by a national bank against all the parties to a bill of exchange discounted by it, to recover the amount thereof, the assignees of the acceptor—the latter having made an assignment for the benefit of his creditors—cannot, having intervened as parties, set up by way of counterclaim or set-off that the bank, in discounting a series of bills of their assignor, the proceeds of which it used to pay other bills, knowingly took and was paid a greater rate of interest than that allowed by law. The act of June 3, 1864 (13 Stat. 99, § 30), having prescribed that, as a penalty for such taking, the person paying such unlawful interest, or his legal representative, may, in any action of debt against the bank, recover back twice the amount so paid, he can resort to no other mode or form of procedure. *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Carter v. Carusi*, 112 U. S. 478, 483, 28 L. Ed. 820; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 136, 46 L. Ed. 118.

A controversy concerning usurious interest paid to a national bank on a note held by the bank and secured by a mortgage on real estate given to an individual for the benefit of the bank, in proceedings to foreclose the mortgage, is not governed by state law but by § 5198, Rev. Stat., which provides an exclusive remedy in such case. *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. Ed. 258.

Application of payments—Set-off.—Under the provision contained in § 5198, Rev. Stat., in reference to national banks it has been held that usurious interest actually paid cannot be applied to the discharge of the principal. *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Driesbach v. National Bank*, 104 U. S. 52, 53, 26 L. Ed. 658; *Stephens v. Monongahela Bank*, 111 U. S. 197, 199, 28 L. Ed. 399. See, also, *Walsh v. Mayer*, 111 U. S. 31, 36, 28 L. Ed. 338; *Cook v. Lillo*, 103 U. S. 792, 26 L. Ed. 460.

Usurious interest paid a national bank on renewing a series of notes cannot, in a suit by the bank on the last of them, be applied in satisfaction of the principal of the debt, the claim being not for interest stipulated for and included in the notes sued on, but for the application of what has actually been paid as interest

to the discharge of principal. *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Driesbach v. National Bank*, 104 U. S. 52, 53, 26 L. Ed. 658; *Stephens v. Monongahela Bank*, 111 U. S. 197, 199, 28 L. Ed. 399; *Carter v. Carusi*, 112 U. S. 478, 483, 28 L. Ed. 820; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 136, 46 L. Ed. 118.

In an action upon a note given to a national bank, the maker cannot set-off usurious interest paid in cash upon renewals of such note, and of all others of which it was a consolidation. *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 134, 46 L. Ed. 118.

Section 5198, Rev. Stat., clearly makes a difference between interest which a note, bill or other evidence of debt held by a national bank, "carries with it or which has been agreed to be paid thereon," and interest which has been "paid." Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of § 5198 and become principal. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 418, 42 L. Ed. 801; *Haseltine v. Central Bank*, No. 2, 183 U. S. 132, 135, 46 L. Ed. 118.

Nature of suit.—A suit against a national bank to recover back twice the amount of interest illegally taken by it is a suit to recover a penalty incurred under a law of the United States. *First Nat. Bank v. Morgan*, 132 U. S. 141, 144, 33 L. Ed. 282; *Barnet v. National Bank*, 98 U. S. 555, 558, 559, 25 L. Ed. 212.

Measure of recovery.—Under the law of the United States, twice the amount of the entire interest paid and not twice the sum by which the interest received exceeded the lawful rate, is the measure of recovery against a national bank for collecting usurious interest. *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 152, 46 L. Ed. 475.

A national bank of New York discounted for the plaintiff, at the rate of twelve per cent per annum, commercial paper and promissory notes amounting to \$158,003. The amount of interest thereon which he paid, and the bank knowingly charged and received, was \$6,564.88 being an excess of \$2,735.36 beyond the rate allowed by the general laws of the state. The paper discounted was mostly business paper, that is, negotiable promissory notes, which he held and owned, and on which he could have maintained actions against the prior parties. A small portion was accommodation paper, but not known by the bank to be such, and nothing upon its face indicated that to be its character. All the paper was paid to the bank at maturity, or before the present action was brought. He indorsed all the notes at the times when they were discounted, and the proceeds were entered to his credit in his bank account. Upon

curred.⁷⁷ The statute also makes provision in regard to jurisdiction of courts over suits, actions and proceedings, against banks violating its provisions.⁷⁸

B. Under District of Columbia Statute.—The prohibition contained in the Revised Statutes of the District of Columbia providing for the case where the party contracts to receive a greater rate of interest than allowed by law, and declaring that he shall forfeit the whole interest so contracted to be received, and shall recover only his principal debt,⁷⁹ applies exclusively to cases in which illegal interest has been contracted for but not paid.⁸⁰ The only remedy in the District of Columbia for the recovery of money paid for interest in excess of the interest allowed by law is suit brought, under the Revised Statutes

these facts judgment was rendered in his favor for \$5,470.72, twice the amount of the interest paid in excess of seven per cent per annum, which judgment was affirmed by the supreme court of the United States upon the statute of the state, which established the rate of interest for the loan or forbearance of money at seven per cent. *National Bank v. Johnson*, 104 U. S. 271, 26 L. Ed. 742; *Daggs v. Phoenix Nat. Bank*, 177 U. S. 549, 555, 44 L. Ed. 882.

77. Limitation of action.—Rev. Stat., § 5198; Act of June 3, 1864, 13 Stat. 99, § 30. *Lake Benton First Nat. Bank v. Watt*, 184 U. S. 151, 153, 46 L. Ed. 475; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 417, 419, 42 L. Ed. 801; *Barnet v. National Bank*, 98 U. S. 555, 557, 25 L. Ed. 212; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 30, 23 L. Ed. 196; *Haseltine v. Central Bank, No. 2*, 183 U. S. 132, 134, 46 L. Ed. 118; *Talbot v. Sioux City, etc., Bank*, 185 U. S. 172, 180, 46 L. Ed. 857.

The limitation of the statute does not begin to run until the usurious interest is paid. In *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. Ed. 801, construing §§ 5197 and 5198 of the Revised Statutes, it was held that the "usurious transactions," from the date of which the limitation of the statute begins to run, is the time when the usurious interest was actually paid, and not the time when it was agreed that it should be paid. The inclusion of the usurious interest as principal in the notes did not amount to payment of the interest within the meaning of the statute. *Daingerfield Nat. Bank v. Ragland*, 181 U. S. 45, 46, 45 L. Ed. 738.

The demurrer of defendant in error was sustained because the action was not "commenced within two years from the time the usurious transaction occurred." This ruling was indubitably right if any date mentioned in the petition be that of the usurious transaction or transactions relied on. The latest date mentioned in the petition is the 31st of May, 1894. The present suit was commenced October 7, 1896, hence not within two years from the 31st of May, 1894, and not within six years from the date of the judgment upon which the property was sold. The contention that the bank fraudulently concealed from the plaintiff that it had

charged him with usurious interest, and that, therefore, the period of limitation of the statute did not begin "until the discovery of the wrong," is without merit, being a disputable proposition, and, besides, it is not available to the plaintiff. The petition does not disclose when the wrong was discovered. On the face of the petition the action was barred, and against its allegations and the circumstances detailed in it, the supposition cannot be indulged that plaintiff's consciousness of the wrong was not aroused until sometime within two years before the commencement of this action. *Talbot v. Sioux Nat. Bank*, 185 U. S. 182, 188, 46 L. Ed. 862.

In *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282, the defendant pleaded in bar the limitation of two years provided by congress for actions of this character. Rev. Stat., § 5198. The jury, in response to the issue submitted to them, found that the plaintiff paid, on the usurious contracts described in certain counts of the complainant, the sum of \$554.28, during the two years next preceding the commencement of the action, and returned a verdict against the bank for twice that sum, namely \$1,108.56. Judgment was accordingly rendered for the latter sum in favor of complainant.

78. Jurisdiction.—The statute (Rev. Stat., § 5198) provides that suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 417, 42 L. Ed. 801.

As to jurisdiction of suits against national banks to recover penalties for taking usurious interest, see the title COURTS, vol. 4, pp. 898, 899.

79. District of Columbia statute.—Rev. Stats., District of Columbia, § 715; Act of April 22, 1870, 16 Stat. 91. *Carter v. Carusi*, 112 U. S. 478, 482, 28 L. Ed. 820; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 36, 23 L. Ed. 196.

80. Construction of statute.—*Carter v. Carusi*, 112 U. S. 478, 482, 28 L. Ed. 820.

of the District of Columbia, provided the person who has paid such interest brings suit to recover the same within one year after the unlawful interest shall have been paid.⁸¹

C. Under State Statutes.—Illinois Statute.—Under the Illinois statute relating to usurious contracts, the lender forfeits the whole of the interest contracted to be received and can only recover the principal sum due.⁸² Where the transaction has not been settled and the lender sues to recover a balance due on the principal sum, the borrower may have all payments made by him on account of interest applied in diminution of such part of the principal as remains unpaid.⁸³

Louisiana Statute.—The Louisiana statute which prescribes the legal rate of interest, and forbids the taking of a higher rate, under penalty of a forfeiture of the entire interest, and declares that the party paying such higher rate of interest may recover it back by suit brought within twelve months, confers no authority to apply the usurious interest actually paid to the discharge of the principal debt. A suit for its recovery, brought within twelve months, is the exclusive remedy.⁸⁴

81. Recovery of illegal interest paid.—Rev. Stats., District of Columbia, § 716; Act of April 22, 1870, 16 Stat. 91; *Carter v. Carusi*, 112 U. S. 478, 482, 28 L. Ed. 820; *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 36, 23 L. Ed. 196.

The statute provides for the recovery, by the person who has paid a greater rate of interest than is allowed by law, upon any agreement or contract, of all interest paid on such contract or agreement. *Carter v. Carusi*, 112 U. S. 478, 482, 28 L. Ed. 820.

It is declared in the statute that the act shall not affect the banking act of 1864. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29, 36, 23 L. Ed. 196.

82. Illinois statute.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 397, 405, 406, 35 L. Ed. 786.

A county court did not authorize a guardian to allow interest upon interest when making a settlement in respect to a loan. It only authorized him to borrow \$95,000 in gold, or its equivalent in currency. But, on the settlement of the loan, he received only \$87,780.73, and wrongfully permitted the creditor to retain the \$7,219.27 in payment of interest upon interest, because he, in good faith, believed that it was entitled to such interest. Held, there was no contract, within the meaning of the statute, that the creditor should receive usurious interest, for no such contract was attempted to be authorized by the county court. In fact, the allowance by the guardian of interest upon interest was under a mistaken view of the obligation of the coupons in that regard. The remedy for the wrongful retention of the \$7,219.27 out of the amount the creditor agreed to lend is to treat the loan as one for only \$87,780.73, making the calculation of interest on the principal sum on that basis, and not to forfeit the interest on the sum actually received by the guardian from the creditor. *United States Mortg. Co. v. Sperry*,

138 U. S. 313, 350, 34 L. Ed. 969.

The statutes of Illinois, as existing in January, 1857, did not invalidate a contract for a rate of interest exceeding six per cent, but authorized the party to recover of the party taking usury threefold the amount above the legal rate, at any time within two years after the right of action accrued. *Hansbrough v. Peck*, 5 Wall. 497, 507, 18 L. Ed. 520.

83. Application of payments.—*Fowler v. Equitable Trust Co.*, 141 U. S. 384, 406, 35 L. Ed. 786.

In Illinois it is settled that a party making application to a court of equity for affirmative relief against an usurious contract is entitled to such relief only upon the condition that he shall pay, or offer to pay, the principal sum with legal interest. It is equally well settled there that one who has voluntarily paid usurious interest cannot recover it back in an action at law. But it is the established doctrine of the supreme court of that state that these rules have no application where the transaction has not been settled and the lender sues to recover a balance due on the principal sum. *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 406, 35 L. Ed. 786.

84. Louisiana statute.—*Carter v. Carusi*, 112 U. S. 478, 483, 28 L. Ed. 820; *Walsh v. Mayer*, 111 U. S. 31, 28 L. Ed. 338. See, also, *Cook v. Lillo*, 103 U. S. 792, 26 L. Ed. 460.

By the statute of Louisiana, if a person pays on a contract a higher rate of interest than eight per cent, it may be sued for and recovered back within twelve months from the time of the payment. Rev. Stat. 1870, § 1855. Before this statute, which was first enacted in 1844, it had been decided by the highest court of the state in several cases that money paid for usurious interest could not be reclaimed or imputed to the capital. Since the statute it has been held that a reclamation cannot be made, or the usurious

Missouri Statute.—The general statute of Missouri concerning usury allows an individual to receive ten per cent per annum interest for the loan of money; but, if more be taken and suit is brought to enforce the contract, and the plea of usury be interposed, the whole interest is forfeited to the proper county for the use of schools.⁸⁵

New Mexico Statute.—The statute of New Mexico does not declare a contract providing for usurious interest to be absolutely void in respect to the amount loaned and legal interest thereon, but only imposes a fine upon any person or corporation charging, collecting, or receiving a higher rate of interest than twelve per centum per annum, and forfeits to the person, from whom such interest is collected or received, double the amount so collected or received,⁸⁶ the action to recover such penalty to be brought within three years after the cause of action accrues.⁸⁷

Pennsylvania Statute.—For questions of forfeiture arising under the early Pennsylvania act against usury, see note.⁸⁸

Tennessee Statute.—Under the Tennessee statute, if any greater amount of interest than allowed by law to be contracted for is paid or agreed to be paid for the use of money, the whole amount of interest so paid or agreed to be paid, is forfeited by the lender.⁸⁹

UTAH.—As to means of reviewing cases, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 22. See, also, the title BIGAMY AND POLYGAMY, vol. 3, p. 225.

UTILITY.—As to what constitutes utility within the meaning of the patent-laws, see the title PATENTS, vol. 9, p. 193.

UTTERING.—See the title FORGERY AND COUNTERFEITING, vol. 6, p. 380.

UTTER LOSS.—See TOTAL LOSS, ante, p. 610.

VACANT LANDS.—See the title PUBLIC LANDS, vol. 10, p. 1.

interest imputed to the principal, unless the suit for the recovery is begun, or plea of usury set up to the claim, within twelve months after the payment is made. *Cook v. Lillo*, 103 U. S. 792, 794, 26 L. Ed. 460; *Walsh v. Mayer*, 111 U. S. 31, 36, 28 L. Ed. 338. See, also, *Carter v. Carusi*, 112 U. S. 478, 483, 28 L. Ed. 820.

85. Missouri statute.—*Tiffany v. Boatman's Institution*, 18 Wall. 375, 382, 21 L. Ed. 868.

86. New Mexico statute.—*McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 322, 38 L. Ed. 729.

Construing the statute together, it does not prohibit the recovery of the amount loaned with legal interest. No such consequence as the forfeiture of the principal and legal interest is visited upon the lender. *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 322, 38 L. Ed. 729.

Under the statute, the mere charging of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received. *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 328, 38 L. Ed. 729.

But a usurious contract of loan not being void under the statute of New Mexico except as to the excess of interest stipulated to be paid, the lender is not liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid.

McBroom v. Scottish, etc., Inv. Co., 153 U. S. 318, 328, 38 L. Ed. 729.

"The questions determined in *Barnet v. National Bank*, 98 U. S. 555, 25 L. Ed. 212; *Driesbach v. National Bank*, 104 U. S. 52, 26 L. Ed. 658; *Stephens v. Monongahela Bank*, 111 U. S. 197, 28 L. Ed. 399, and *Carter v. Carusi*, 112 U. S. 478, 28 L. Ed. 820, do not arise here. No question is presented in the case before us as to whether the borrower, when sued for the principal debt and legal interest, may, of right, set off the amount of any penalty prescribed by the statute of New Mexico." *McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 331, 38 L. Ed. 729.

87. Limitation of action.—*McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 322, 38 L. Ed. 729.

When three years limitation commences to run under statutes of New Mexico.—*McBroom v. Scottish, etc., Inv. Co.*, 153 U. S. 318, 328, 38 L. Ed. 729.

88. Construction of early Pennsylvania act.—*Wycoff v. Longhead*, 2 Dall. 92, 1 L. Ed. 303; *Musgrove v. Gibbs*, 1 Dall. 216, 1 L. Ed. 107.

89. Tennessee statute.—*Ewing v. Howard*, 7 Wall. 499, 503, 19 L. Ed. 293.

Provision is also made by the statute, that any person or persons who shall violate its provisions shall be subject to indictment, as in other cases of misdemeanor, and be punished as therein provided. *Ewing v. Howard*, 7 Wall. 499, 503, 19 L. Ed. 293.

VACANT SUCCESSION.—See SUCCESSION, ante, p. 288.

VACATION.—See the titles ADJOURNMENTS, vol. 1, p. 118; CHAMBERS AND VACATION, vol. 3, p. 666; COURTS, vol. 4, p. 886. As to vacation of office, see the title PUBLIC OFFICERS, vol. 10, p. 396. As vacating judgments and decrees, see the title JUDGMENTS AND DECREES, vol. 7, p. 580. As to vacation of supersedeas, see the title SUPERSEDEAS AND STAY OF PROCEEDINGS, ante, p. 333.

VACCINATION.—See the title HEALTH, vol. 6, p. 684. As to judicial notice of, see the title JUDICIAL NOTICE, vol. 7, p. 675. Statute requiring public vaccination held to make a reasonable classification and not to deny the equal protection of the law, see the title CONSTITUTIONAL LAW, vol. 4, p. 364. As to point that such statutes do not vest arbitrary power in subordinate board or official, see the title CONSTITUTIONAL LAW, vol. 4, p. 370. As to the point that law requiring is not in derogation of the liberty guaranteed by the fourteenth amendment, see the titles DUE PROCESS OF LAW, vol. 5, p. 562; POLICE POWER, vol. 9, p. 519. That power to require is not to be arbitrarily exercised, nor go beyond what the safety of the public reasonably requires, see the title POLICE POWER, vol. 9, p. 512. Court will imply reasonable exceptions in order to sustain validity of statute, see the title POLICE POWER, vol. 9, p. 512. Proof that defendant's case is within an implied exception to the statute, see the title POLICE POWER, vol. 9, pp. 512, 519. Compulsory vaccination a valid exercise of the police power, see the title POLICE POWER, vol. 9, p. 519.

VAGRANCY.—As to power of states to exclude paupers, see the title POLICE POWER, vol. 9, p. 489.

VALIDITY.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; CONTRACTS, vol. 4, p. 552; STATUTES, ante, p. 62; TREATIES, ante, p. 628. As to the phrase "validity of statute" or "authority exercised under the United States," as used in the twenty-fifth section of the judiciary act, see the title APPEAL AND ERROR, vol. 1, p. 550, et seq.

VALUABLE CONSIDERATION.—See the title CONTRACTS, vol. 4, p. 563, et seq.

VALUATION.—As to valuation of goods under the tariff laws, see the title REVENUE LAWS, vol. 10, p. 908. As to valuation for taxation, see the title TAXATION, ante, p. 356.

VALUE.—See note 1.

VARA.—See the title PUBLIC LANDS, vol. 10, p. 295. See, also, LEAGUE, vol. 7, p. 848.

1. **Entered value.**—Entered or invoiced value.—See ENTERED VALUE, vol. 5, p. 799. See, also, the title REVENUE LAWS, vol. 10, p. 913.

Salable value, actual value, and cash value.—See ACTUAL, vol. 1, p. 115.

Value received.—As to presumption of consideration by use of the words "value received," in a negotiable instrument, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 278.

True value.—See TRUE, ante, p. 675.

Value in dispute.—As to meaning of the phrase in act conferring appellate jurisdiction on supreme court in cases from the territories and the District of Columbia, see the title APPEAL AND ERROR, vol. 1, p. 904.

As to market value, see the title REVENUE LAWS, vol. 10, p. 908.

"The value of the roadway at any given time is not the original cost, nor, a fortiori, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of

the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road." *Pittsburg, etc., R. Co. v. Backus*, 154 U. S. 421, 429, 38 L. Ed. 1031; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 479, 38 L. Ed. 483.

Value of foreign coin.—The act of March 3rd provided that, "The value of foreign

VARIANCE.

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I. Variance between Writ and Declaration, 861.

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CROSS REFERENCES.

As to variance in actions in assumpsit, see the title **ASSUMPSIT**, vol. 2, p. 636. As to variance in actions on bills, notes and checks, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 362. As to variance in actions on bonds, see the title **BONDS**, vol. 3, p. 438. As to variance between declaration and written agreement in actions on contract with broker, see the title **BROKERS**, vol. 3, p. 540. As to variance in actions for suits for collision, see the title **COLLISION**, vol. 3, p. 947. As to variance between contract given in evidence and that stated in declaration or complaint, see the title **CONTRACTS**, vol. 4, p. 593. As to variance in proceedings in court of claims, see the title **COURTS**, vol. 4, p. 1047. As to variance between evidence and instrument sued on in actions of covenant, see the title **COVENANT, ACTION OF**, vol. 5, p. 4. As to variance in actions on covenants, see the title **COVENANTS**, vol. 5, p. 19. As to variance between allegations of cross bill and the evidence, see the title **CROSS BILLS**, vol. 5, p. 144. As to variance between declaration and proof in actions of debt, see the title **DEBT, THE ACTION OF**, vol. 5, p. 210. As to necessity for conformity between writ and judgment in action of debt, see the title **DEBT, THE ACTION OF**, vol. 5, p. 211. As to variance between notice and commission to take depositions, see the title **DEPOSITIONS**, vol. 5, p. 324. As to variance in suits in equity, see the title **EQUITY**, vol. 5, p. 883. As to the general rule that evidence must tend to support the issues, see the title **EVIDENCE**, vol. 5, p. 1011. As to variance between execution and judgment, see the title **EXECUTIONS**, vol. 6, p. 106. As to variance in suits for relief on ground of fraud or deceit, see the title **FRAUD AND DECEIT**, vol. 6, pp. 448, 449. As to variance between accusation and proof in criminal prosecutions, see the title **INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 1009, et seq., and see the specific titles relating to prosecutions for particular offenses. As to variance between accusation and evidence in prosecution of bank officer under national banking act, see the title **BANKS AND BANKING**, vol. 3, p. 108. As to variance between summons and judgment, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 570. As to necessity for judgment or decree to conform to pleadings and proof, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 569. As to necessity for judgments to conform to verdict or findings, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 570. As to variance between judgment sued on and that shown on trial, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 613. As to variance between averment and proof of demise, see the title **LANDLORD AND TENANT**, vol. 7, p. 834.

coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value." The meaning of this provision is, that the **value** of foreign coins, in United States money, shall be measured by the amount of pure metal contained therein when of standard **value**; that is, when of the weight and fineness required by the laws and regulations of the country where they are produced; and the true method of comparing their money of account with ours, when both are based

on actual coin, is to compare the standard coins of the two countries in a perfect state, and to ascertain the actual amount of pure metal in each. The Collector *v.* Richards, 23 Wall. 246, 257, 23 L. Ed. 95; United States *v.* Klingenberg, 153 U. S. 93, 96, 38 L. Ed. 647. See, also, the title **REVENUE LAWS**, vol. 10, p. 903. As to evidence of value, see the titles **EVIDENCE**, vol. 5, p. 1026; **EXPERT AND OPINION EVIDENCE**, vol. 6, p. 204.

As to variance between interest proved and that alleged in actions on policies of marine insurance, see the title *MARINE INSURANCE*, vol. 8, p. 164. As to variance in actions for negligence, see the title *NEGLIGENCE*, vol. 8, p. 888. As to variance in actions by and against partnerships, see the title *PARTNERSHIP*, vol. 9, p. 126. As to variance in suits for infringement of patents, see the title *PATENTS*, vol. 9, p. 301. Generally as to necessity for correspondence of pleadings and proof, see the title *PLEADING*, vol. 9, p. 456. As to variance in actions on bonds of public officers, see the title *PUBLIC OFFICERS*, vol. 10, p. 394, and cross references there found. As to variance in suits for rescission, see the title *RESCISSION, CANCELLATION AND REFORMATION*, vol. 10, p. 818. As to variance between libel and proof in seizure and condemnation proceedings, see the title *REVENUE LAWS*, vol. 10, p. 991. As to variance between issues and verdict, see the title *VERDICT*.

I. Variance between Writ and Declaration.

How Taken Advantage of.—Variance between a writ and declaration is matter pleadable in abatement only. It cannot be taken advantage of by general demurrer to the declaration, or by motion in arrest of judgment, nor can it be assigned for error.¹

Waiver of Objection by Pleading in Bar.—To allow a defendant after the general issue has been pleaded, to avail himself of any defect or mistake in the writ, or variance or repugnancy between the count and the writ, would be, not to try the cause at issue, but would have the effect to take it from the jury and to place it before the court, upon a point of pleading which has not been pleaded, and which is unconnected with the merits of the cause.²

II. Variance between Pleadings and Proof.

General Rule as to Necessity for Correspondence of Allegata and Probata.—It is a principle of universal application, both in proceedings at law and in chancery, that the proofs must correspond with the allegations.³

No Technical Rules of Variance in Courts of Admiralty.—In the courts of admiralty of the United States, although the proofs of each party must substantially correspond to his allegations, so far as to prevent surprise, yet there are no technical rules of variance, or of departure in pleading, as at common law; and if a libellant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief (even if there is some inaccuracy in his statement of subordinate

1. **Pleadable in abatement.**—See the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 32.

2. **Objection waived by pleading in bar.**—See the title *ABATEMENT, REVIVAL AND SURVIVAL*, vol. 1, p. 40.

3. **Necessity for correspondence of allegata and probata.**—*Jones v. Morehead*, 1 Wall. 155, 17 L. Ed. 662; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527. And see the titles *EQUITY*, vol. 5, p. 883; *PLEADING*, vol. 9, p. 445.

"Pleadings, in informations for seizures upon land, or for confiscation of property, as well as in causes of admiralty or maritime jurisdiction, or in actions at law, or suits in equity, are governed by certain well-established rules of practice, which require that the allegations shall correspond with the facts as proved." *Lyon v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457.

It is a rule of evidence that when words

used in a declaration are descriptive of the instrument declared on, it must, when offered in evidence, conform strictly to that description. *United States v. Le Baron*, 4 Wall. 642, 18 L. Ed. 309.

Purpose of rule.—"Allegations of fact in the pleadings, affirmed on one side and denied on the other, must in general be tried by a jury, and the purpose of the rule which requires that the allegations and the proofs must correspond, is that the opposite party may be fairly apprised of the specific nature of the questions involved in the issue. Formerly, the rule in that respect was applied with great strictness, but the modern decisions are more liberal and reasonable. Decided cases may be found, unquestionably, where it has been held that very slight differences were sufficient to constitute a fatal variance. Just demands were often defeated by such rulings until the parliament interfered, in the parent country, to prevent such flagrant injustice." *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

facts, or of the legal effect of the facts propounded), the court may award any relief which the law applicable to the case warrants.⁴

Proof of Allegations of Time, Place, Quantity, Value, etc.—It is well settled that allegations of time, quantity or value need not be proved with precision, but a very large departure from the same is allowable.⁵ The same rule also applies to allegations of place.⁶

Test as to Materiality of Variance.—It has been held by the supreme court of the United States that no variance ought ever to be regarded as material where the allegations and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.⁷ In the codes of many of the states express provision is now made to the effect that no variance between allegations in the pleadings and the proof shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense on its merits.⁸ Such codes usually contain the further provision that whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court in what respect he has been misled, and thereupon the court may in its discretion order the pleading to be amended upon such terms as may be just.⁹

Variance Distinguished from Failure of Proof.—While undoubtedly, under the system of code pleading, a technical variance between the allegations and the proof is not deemed material, unless the adverse party is prejudiced thereby, still, where a cause of action or defense is not proven, not merely in some particular, but in its entire scope and meaning, it is treated by the authorities of those states, not as a case of variance merely, but as an entire failure of proof.¹⁰

Time and Manner of Raising Objection.—An objection for variance between allegation and proof must be taken when the evidence is offered. It cannot be taken advantage of after it is closed.¹¹ While a variance pleadable only in abatement cannot be taken advantage of upon general demurrer to the

4. No technical rules of variance in courts of admiralty.—The *Gazelle*, 128 U. S. 474, 32 L. Ed. 496. See, also, *Dupont, etc., Co. v. Vance*, 19 How. 162, 15 L. Ed. 584. The *Steamer Syracuse*, 12 Wall. 167, 20 L. Ed. 382.

5. Proof of allegations of time, quantity, value, etc.—United States *v. Le Baron*, 4 Wall. 642, 18 L. Ed. 309; *Grayson v. Lynch*, 163 U. S. 468, 41 L. Ed. 230.

6. Proof of allegations of place.—*Grayson v. Lynch*, 163 U. S. 468, 41 L. Ed. 230. See, also, *Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393, in which case proof of the delivery of iron at a different place from that alleged in the complaint was held to have been properly admitted, defendants having failed to prove that they were misled by the variance between the averment and the proof.

7. When variance deemed immaterial.—*Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Washington, etc., R. Co. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101. See, also, *Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393.

A variance is immaterial which does not change the nature of the contract relied on. *Ferguson v. Harwood*, 7 Cranch 408, 3 L. Ed. 386. See the title *CONTRACTS*, vol. 4, p. 593.

8. Code provision as to variance.—*Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393; *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. Ed. 575. And see *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527.

9. Procedure where party alleged to have been misled.—*Pope v. Allis*, 115 U. S. 363, 365, 29 L. Ed. 393; *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. Ed. 575.

Section 540 of the New York code of civil procedure declares that "when the variance is not material, as prescribed in the last section the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113, 29 L. Ed. 575.

As to amendments to conform the pleadings to the facts proved, see the title *AMENDMENTS*, vol. 1, pp. 295, 300, 301.

As to the effect of statutes of jeofails as curing defects of form, see the title *AMENDMENTS*, vol. 1, p. 308; *APPEAL AND ERROR*, vol. 2, p. 378.

10. *Wilson v. Haley Live Stock Co.*, 153 U. S. 39, 38 L. Ed. 627.

11. Time and manner of raising objection.—*Roberts v. Graham*, 6 Wall. 578, 18

declaration, yet a variance which constitutes matter of substance is fatal on demurrer.¹²

III. Variance between Proclamation of Outlawry and Proof.

Where a proclamation under the attainder law required a person therein named "now or late of the township of East Bradford," to surrender himself for trial for certain treasons in the proclamation mentioned, but on the trial all the witnesses agreed that the person named had never lived in East Bradford, but always in West Bradford, it was held that the variance was fatal.¹³

VEGETABLES.—See the title *REVENUE LAWS*, vol. 10, p. 889.

VEILS.—See the title *REVENUE LAWS*, vol. 10, p. 876.

VEIN.—See the title *MINES AND MINERALS*, vol. 8, p. 368.

VELOURS.—See the title *REVENUE LAWS*, vol. 10, p. 869.

VENDITIONI EXPONAS.

CROSS REFERENCES.

As to where executor debtor dies before issuance of venditioni exponas, see the title *SCIRE FACIAS*, vol. 10, p. 1078. As to sale of land by marshal on venditioni exponas, after removal from office, see the title *SHERIFFS', CONSTABLES' AND MARSHALS' SALES*, vol. 10, p. 1138.

Nature of Writ.—The venditioni exponas continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal. The writ is, indeed, merely for the continuation and completion of the original execution. And if its mandate is for the sale of land on which there has been a previous levy, it not only compels a sale, but confers the authority to sell, and the title of the purchaser has relation to the date of the lien of execution.¹

Election of Alias Execution or Venditioni Exponas.—It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of venditioni exponas. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a venditioni exponas is the proper writ.²

Title of Land Not Authorized by Writ.—A marshal's deed which includes, with certain lands legally sold under the confiscation act of July 17, 1862 (42 Stat. 589), a parcel not authorized by the venditioni exponas, under which the sale was made, passes no title to such parcel.³

L. Ed. 791; *Nashua Sav. Bank v. Anglo-American Land, etc., Co.*, 189 U. S. 221, 47 L. Ed. 782. See the title *APPEAL AND ERROR*, vol. 2, p. 114.

As to power of appellate court to examine evidence in order to see whether there was error in not directing the verdict, on the question of variance, see the title *APPEAL AND ERROR*, vol. 1, p. 1018.

12. Variance in matter of substance

fatal on demurrer.—See the title *DEMURRERS*, vol. 5, p. 305.

13. Fatal variance between proclamation and proof.—*Respublica v. Buffington*, 1 Dall. 60, 1 L. Ed. 37.

1. *Beebe v. United States*, 161 U. S. 104, 112, 40 L. Ed. 632.

2. *Beebe v. United States*, 161 U. S. 104, 112, 40 L. Ed. 632.

3. *Burbank v. Semmes*, 99 U. S. 138, 25 L. Ed. 315.

VENDOR AND PURCHASER.

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ADVERSE POSSESSION, vol. 7, p. 900; LIS PENDENS, vol. 7, p. 1051; MARSHALING ASSETS AND SECURITIES, vol. 8, p. 261; MINES AND MINERALS, vol. 8, p. 364; MISTAKE AND ACCIDENT, vol. 8, p. 417; MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 452; NOTICE, vol. 8, p. 928; PAROL EVIDENCE, vol. 9, p. 12; PARTIES, vol. 9, p. 34; PAYMENT, vol. 9, p. 319; POWERS, vol. 9, p. 588; PRINCIPAL AND AGENT, vol. 9, p. 640; PUBLIC LANDS, vol. 10, p. 1; RECORDING ACTS, vol. 10, p. 587; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799; SHERIFFS', CONSTABLES' AND MARSHALS' SALES, vol. 10, p. 1134; SPECIFIC PERFORMANCE, ante, p. 14; TRUSTS AND TRUSTEES, ante, p. 676; VENDORS' LIENS.

As to grantor or his subsequent grantee questioning capacity of corporation to take title, see the title CORPORATIONS, vol. 4, p. 730. As to proper party to bill filed by vendee for discovery and relief, see the title DISCOVERY, vol. 5, p. 354. As to sufficiency of vendor's title to bring ejectment, see the title EJECTMENT, vol. 5, p. 704. As to necessity for demand and notice in ejectment between vendor and vendee, see the title EJECTMENT, vol. 5, pp. 706, 707, note 40. As to estoppel of vendor and vendee, see the title ESTOPPEL, vol. 5, pp. 966, 970. As to principal being estopped to deny recitals of attorney in deed as against bona fide purchasers, see the title ESTOPPEL, vol. 5, p. 925. As to the necessity for damages from fraudulent misrepresentation as ground for rescission of contract of sale, see the title FRAUD AND DECEIT, vol. 6, pp. 403, 404. As to fraudulent purchaser of property on deprivation of possession recovering for repairs and improvements, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES, vol. 6, p. 511, note 6. As to sale of land by Indians, see the title INDIANS, vol. 6, pp. 922, 942. As to unrecorded deed of Indian being notice without recordation, see the title INDIANS, vol. 6, p. 937. As to insurable interest of vendee under executory contract, see the title INSURANCE, vol. 7, p. 110. As to sale by cotenants, see the title JOINT TENANTS AND TENANTS IN COMMON, vol. 7, p. 536. As to inadequacy of price as ground for setting aside judicial sale, see the title JUDICIAL SALES, vol. 7, p. 727, et seq. As to adverse possession between vendor and vendee, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, pp. 949, 951. As to purchaser with notice joining his adverse possession to adverse possession of his vendor, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 942. As to parol evidence to vary written contract as to mode of payment, see the title PAROL EVIDENCE, vol. 9, p. 17. As to vendor's agent with power to receive and receipt for payment of purchase price, having authority to compromise, see the title PRINCIPAL AND AGENT, vol. 9, p. 657, note 72. As to power of agent to sell and convey real estate, see the title PRINCIPAL AND AGENT, vol. 9, pp. 655, 656. As to sureties on title bond being discharged by failure of vendee to pay price at stated time, see the title PRINCIPAL AND SURETY, vol. 9, p. 725. As to vendor conveying land subject to incumbrance becoming surety instead of principal, see the title PRINCIPAL AND SURETY, vol. 9, p. 717. As to purchaser of legal title in bad faith yielding to prior equitable title, see the title PUBLIC LANDS, vol. 10, pp. 259, 260, note 30. As to bona fide purchaser of public lands, see the title PUBLIC LANDS, vol. 10, pp. 141, 142. As to compelling purchaser to accept public land, where vendor has not paid costs of survey, etc., see the title PUBLIC LANDS, vol. 10, p. 163, note 85. As to vendee of public lands being chargeable with notice that certain land was not subject to pre-emption or homestead, see the title PUBLIC LANDS, vol. 10, p. 142. As to rescission, cancellation and reformation of contracts for sale of lands, see the title RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799. As to sales of personalty, see the title SALES, vol. 10, p. 1022. As to vendee recouping damages from false and fraudulent representations as to land, see the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, pp. 1122, 1123.

I. Form, Requisites and Validity of Contract.

A. In General.—An equitable title distinct from the legal title can be the subject of a bona fide sale, and transfer by deed, in like manner that a mortgagor's equity may be sold and conveyed.¹ But the right of a vendor to avoid a sale or deed on the ground of fraud practised by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; it is a mere personal right, incapable of sale or transfer.² An intent to sell property is necessary to a sale and where no purchase price is agreed upon, no time fixed for payment, and a reservation is made that the agreement might be terminated the day after it was made, as well as that it might indefinitely continue, the theory of a sale is negatived.³

B. Form—**1. IN GENERAL.**—No particular form is necessary, nor is the place of signature regarded, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement.⁴ Courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of the contract was created. Written evidence is only required.⁵ An account stated,⁶ an invalid deed,⁷ a note, or a

1. Equitable title subject of sale.—*Smith v. Orton*, 21 How. 241, 244, 16 L. Ed. 104.

2. Right to avoid deed for vendor's fraud incapable of sale.—*Graham v. Railroad Co.*, 102 U. S. 148, 156, 26 L. Ed. 106.

3. Intent necessary to sale.—*Arnold v. Hatch*, 177 U. S. 276, 44 L. Ed. 769. See, generally, the title SALES, vol. 10, p. 1022.

A made a contract with his son, under which it was agreed that the latter should undertake the management of his farm, farm implements and live stock, make all repairs, pay all taxes and other expenses, replace all implements as they were worn out, keep up all live stock, and have as his own the net profits. It was further stipulated that each party should be at liberty to terminate the arrangement at any time, and that the son should turn back to his father the farm with its implements, stock and other personalty, of the same kind and amount as was on the farm when the father retired, and in as good condition as when he took them. Held, the ownership of the farm remained in the father and was not subject to the debts of the son, and the fact that the son was not obliged to return the specific articles of property on the farm, but could substitute property of a similar kind does not change the character of the transaction. *Arnold v. Hatch*, 177 U. S. 276, 278, 44 L. Ed. 769.

4. No particular form necessary.—*Barry v. Coombe*, 1 Pet. 640, 649, 7 L. Ed. 295. See, generally, the title FRAUDS, STATUTE OF, vol. 6, p. 451.

5. Written evidence necessary.—*Barry v. Coombe*, 1 Pet. 640, 651, 7 L. Ed. 295. But see *Halsell v. Renfrow*, 202 U. S. 287, 292, 50 L. Ed. 1032. See, generally, the title FRAUDS, STATUTE OF, vol. 6, p. 451.

Oklahoma—Intention to draw contract necessary.—Under the Oklahoma statute in force at the time no contract relating to real estate, other than for a lease for not over one year, "shall be valid until reduced to writing and subscribed by the parties thereto;" Laws of 1897, c. 8, § 4, and that the statute had not been satisfied, or the case taken out of it by part performance. This statute, if taken literally and naturally, goes further than its English prototype. It is not satisfied by a memorandum made with a different intent, but requires an instrument drawn for the purpose of embodying the contract, and, in the case of an agreement to buy and sell, the subscription of both the buyer and seller, not merely that of "the party to be charged therewith." *Halsell v. Renfrow*, 202 U. S. 287, 292, 50 L. Ed. 1032.

6. Account states as contract.—*Barry v. Coombe*, 1 Pet. 640, 649, 7 L. Ed. 295.

Where, in an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in a bill for a specific performance, and there was the following credit, "by my purchase of your one-half E. B. wharf and premises, this day, as agreed upon between us, \$7,578.63," it was held to be a sufficient memorandum in writing, under the statutes of frauds of Maryland, upon which the court decreed a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admission of the defendant in his answer, to show the particular property designated by "your ½ E. B. wharf and premises." *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295.

7. Invalid deed as contract.—A deed executed to a purchaser by an agent authorized to contract for the sale only,

letter, and even a letter, the object of which was to annul the contract, on a ground not unreasonable, has been held a sufficient memorandum.⁸

2. **NECESSITY FOR WRITING.**—Under the statute of frauds a contract for the sale of lands is unenforceable unless in writing.⁹

3. **TITLE BOND**—a. *Nature of.*—In Arkansas, “the legal effect of a title bond is like a deed executed by the vendor and a mortgage back by the vendee.”¹⁰ By the strict rules of the common law it does not convey a legal title,¹¹ yet it shows an equity on the part of the vendee which clearly authorizes the vendee to call for the legal title from the vendor.¹²

b. *Rule of Construction.*—Title bonds should not be judged of by the strict rules of the common law, nor by the general principles applicable to uses and trusts in the conveyance of legal titles, but should be interpreted according to the local policy of the community which calls them into existence, and which has defined both their objects and effects. Whatever these bonds were designed to be, whatever purposes they were, by the local policy and laws, intended to accomplish in respect to the makers thereof, or the beneficiaries therein named, the court should endeavor to effectuate.¹³

c. *Evidence.*—See note.¹⁴

C. Certainty and Definiteness.—This subject is treated elsewhere.¹⁵

D. Consideration.—See note.¹⁶

E. Execution and Delivery.—Recognition and part performance of a contract of sale sufficiently shows the execution and delivery of it.¹⁷

though invalid as a conveyance, may be good as a contract for the sale of the property described therein. *Lyon v. Pollock*, 99 U. S. 668, 25 L. Ed. 265. See the title **PRINCIPAL AND AGENT**, vol. 9, p. 653, note 64.

8. **Note or letter as contract.**—*Barry v. Coombe*, 1 Pet. 640, 651, 7 L. Ed. 295.

Contract gathered from telegrams and writings.—A complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract. *Ryan v. United States*, 136 U. S. 68, 83, 34 L. Ed. 447.

9. **Necessity for writing.**—*Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62. See the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

A promise to pay a sum of money, as a compensation to the plaintiff, for the injury done him by the misconduct of the defendant, in obtaining a patent in his own name, for land which he ought to have patented in the name of the plaintiff, and in preventing the plaintiff from obtaining a patent in his own name, and in consideration of the defendant's having procured the patent to be issued to himself, is a contract for the sale of land, within the statute of frauds, and must be in writing. *Hughes v. Moore*, 7 Cranch 176, 3 L. Ed. 307.

10. **Arkansas—Legal effect of title bond.**—*Hardin v. Boyd*, 113 U. S. 756, 765, 28 L. Ed. 1141.

11. **Title bond conveys no title.**—*Sargeant v. State Bank*, 12 How. 371, 382,

13 L. Ed. 1028; *Agricultural Bank v. Rice*, 4 How. 225, 241, 11 L. Ed. 949.

A bond for the conveyance of land does not transfer the legal title, so as to serve as a defense in an action of ejectment, and such a bond, when signed by a married woman, neither confers a legal nor equitable right upon the obligees. *Agricultural Bank v. Rice*, 4 How. 225, 11 L. Ed. 949.

12. **Title bond shows an equity.**—*Sargeant v. State Bank*, 12 How. 371, 382, 13 L. Ed. 1028.

13. **Construction of title bonds.**—*Sargeant v. State Bank*, 12 How. 371, 380, 13 L. Ed. 1028.

14. See the titles **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 8, p. 956, note 88; **DOCUMENTARY EVIDENCE**, vol. 5, p. 454.

15. **Certainty and definiteness.**—See the title **FRAUDS, STATUTE OF**, vol. 6, pp. 464, 465.

16. **Consideration.**—As to necessity for statement of consideration in memorandum of sale, see the title **FRAUDS, STATUTE OF**, vol. 6, p. 465.

As to advantage enuring to city for establishment of military headquarters being a valuable consideration, see the title **DEEDS**, vol. 5, p. 256.

Entering into possession of property and spending large sums in its improvement, on the faith of an agreement to convey the property to such person, constitutes a valuable consideration. *King v. Thompson*, 9 Pet. 204, 218, 9 L. Ed. 102. See the title **FRAUDS, STATUTE OF**, vol. 6, p. 461.

17. **Execution and delivery.**—*Dent v. Ferguson*, 132 U. S. 50, 57, 33 L. Ed. 242.

F. Parties.—Treated elsewhere.¹⁸

G. Delivery of Property.—An actual delivery of immovables in Louisiana is not essential to the validity of a sale of them made by public act before a notary. The law of the state considers the tradition or delivery of the property as accompanying the act.¹⁹

H. Offer and Acceptance.—1. IN GENERAL.—An offer by the vendor of a less number of acres than the contract calls for is not a compliance with the contract, and need not be accepted by the vendee.²⁰ In the case of an optional sale, where the contract calls for the payment of a certain sum, there can be no acceptance without such payment or a tender and refusal.²¹

2. REVOCATION OF OFFER.—A mere offer without consideration to sell real estate upon specified terms may be withdrawn at any time before acceptance.²² But if the offer be accepted without conditions, and without varying its terms, and the acceptance be communicated to the other party without unreasonable delay, a contract arises from which neither party can withdraw at pleasure.²³ But a covenant in a lease giving a right or option to purchase the premises is in the nature of a continuing offer to sell, and, if under seal, must be regarded as made upon a sufficient consideration, and, therefore, one from which the lessor is not at liberty to recede. When accepted by the lessee by his notice to the lessor, a contract of a sale between the parties is completed.²⁴

I. Options.—1. IN GENERAL.—An option to purchase an interest in land within a certain time vests no interest or estate in the lands. It merely gives the right to purchase within the given time without creating any obligation to purchase.²⁵ And if the right is not exercised within the time limited, all rights

18. **Parties.**—See the title **FRAUDS, STATUTE OF**, vol. 6, p. 464.

19. **Delivery of property.**—**Louisiana.**—*Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. 721.

20. Where the contract between R. and T. was for R. to sell to the latter his right to purchase from the state an entire tract of eighteen hundred and thirteen sections of public lands for which he had applied, not for any particular portion of that tract, and T. had never proposed to take any less than the whole amount nor contracted to do so, an offer of any less by R. would never have been a compliance with his contract with T. *Telfener v. Russ*, 162 U. S. 170, 175, 40 L. Ed. 930. See, generally, the title **CONTRACTS**, vol. 4, pp. 556-558.

21. **Optional sale—Payment or tender essential to acceptance.**—*Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017.

22. **Offer without consideration may be withdrawn.**—*Ryan v. United States*, 136 U. S. 68, 85, 34 L. Ed. 447; *Waterman v. Banks*, 144 U. S. 394, 402, 36 L. Ed. 479. See the title **CONTRACTS**, vol. 4, p. 559.

23. **Acceptance without variation before notice of revocation sufficient.**—*Ryan v. United States*, 136 U. S. 68, 85, 34 L. Ed. 447. See, generally, the title **CONTRACTS**, vol. 4, p. 552.

Withdrawal while attorney general searching title.—And if a deed is given to the officers of the United States government, under a binding contract of sale for the purpose of an examination

of title, the vendor cannot withdraw the offer where the attorney general proceeds with reasonable dispatch to determine whether the title is good or not, as the vendor is bound to take notice of the acts of congress making the attorney general's approval a condition precedent to the payment of the purchase money, and upon such approval the government may record the deed. *Ryan v. United States*, 136 U. S. 68, 86, 34 L. Ed. 447.

24. **Covenant in lease to sell.**—*Willard v. Tayloe*, 8 Wall. 557, 564, 19 L. Ed. 501.

25. **Option vests no interest.**—*Richardson v. Hardwick*, 106 U. S. 252, 254, 27 L. Ed. 145.

H. entered into a contract with E. for the purchase of certain land. He also made an arrangement with R., by which R. should have a half interest in the land, if he should pay one-half of the purchase price by a certain date. H. at the same time made a contract with R. allowing R. to cut timber on the land at a stipulated price per thousand feet. R. cut and paid for a certain amount of the timber, but made no payment on the land under the agreement, and H. gave him notice that his privilege of buying the land had expired. R. claimed that half of the money he had paid for the timber should be considered as a payment on the land, and that he was therefore entitled to an interest in it. It was held that the contract did not vest him with any interest or estate in the land, as he did not agree to purchase the land

under the option are lost.²⁶ But an option in a lease renewable forever to purchase for a certain sum "at any time," may be exercised though the lease has been forfeited.²⁷

2. **OPTION TO REPURCHASE.**—Contracts for the sale of property with a reservation to the vendor, of a right to repurchase the same land, at a fixed price, and at a specified time, are not contrary to public policy.²⁸ If a contract requires the vendor "to purchase back" the land from the vendee within a certain time if desired, a notice by the vendee to the vendor before the expiration of the time that he desired the vendor "to purchase back" the land, is sufficient. The rights of the parties under the contract then become fixed, and it is not necessary for the vendee to tender a deed on the day fixed for the performance. And where both parties fail to perform on the day fixed it is equivalent to a waiver by each of the default of the other, and the vendee by offering to perform within a reasonable time can compel the other to complete the contract.²⁹

J. Construction and Operation.—1. **IN GENERAL.**—When a resort is made by individuals or the government to the mode provided by the statute of a state where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation given to the instrument of conveyance as is there designated.³⁰ Whether an instrument is an agreement to convey or a conveyance is a question of intention to be gathered from the instrument itself.³¹ The word "disposed" in a contract of sale is not synonymous with the word "sell," but is to be construed in connection with the circumstances in which they are used.³² Although the vendee has only the right of selection of city lots by squares out of those the vendor had the right of selection, the vendee may select lots out of squares out of which the vendors were to be assigned lots alternately, where a selection by squares was, in practice, complied with, when made of all those lots contained in any given square which were owned by the party bound to convey.³³

2. **DEPENDENT AND INDEPENDENT COVENANTS.**—In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the understandings of the respective parties are always dependent, unless a contrary intimation clearly appears.³⁴

but only had an option on it and made no payment under this option. *Richardson v. Hardwick*, 106 U. S. 252, 255, 27 L. Ed. 145.

26. **Option lost if not exercised within requisite time.**—*Richardson v. Hardwick*, 106 U. S. 252, 254, 27 L. Ed. 145.

27. **Option to purchase "at any time."**—Where a lease given for a term of years and renewable for successive terms forever, contained a provision for re-entry upon nonpayment of rent and a holding of the premises as if no lease had been executed, and also provided that the lessee "at any time," upon payment of a certain sum, might call for a conveyance, the heirs of the lessee may call for the conveyance under the above clause, where the lessor re-entered, as such a covenant did not depend upon the existence of the lease. *Prout v. Roby*, 15 Wall. 471, 476, 21 L. Ed. 58.

28. **Option to repurchase.**—*Conway v. Alexander*, 7 Cranch 217, 236, 3 L. Ed. 321.

29. **Contract requiring vendor to repurchase if vendee desired.**—*Brown v. Slee*, 103 U. S. 828, 837, 26 L. Ed. 618.

30. **Statutory effects as to transfer of property applicable to United States.**—*United States v. Illinois Cent. R. Co.*, 154 U. S. 225, 237, 38 L. Ed. 971.

31. **Intention of parties determines whether a paper is an agreement to convey.**—Although there are words of conveyance in present in a contract for the purchase and sale of lands, still, if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. The whole question is one of intention to be gathered from the instrument itself. *Williams v. Paine*, 169 U. S. 55, 76, 42 L. Ed. 658. See, also, *Lee v. Dodge*, 5 Wall. 813, 18 L. Ed. 472.

32. **"Disposed" and "sell" not synonymous.**—*Hill v. Sumner*, 132 U. S. 118, 123, 33 L. Ed. 284.

33. **Uniform practice as varying contract.**—*Pratt v. Law*, 9 Cranch 456, 491, 3 L. Ed. 792.

34. **Dependent and independent covenants.**—*Bank v. Hagner*, 1 Pet. 454, 7 L. Ed. 219. See, generally, the title **COVENANTS**, vol. 5, pp. 10, 11.

II. Performance, Discharge or Breach.

A. By Vendor—1. **TITLE**—a. *In General*.—Although there is no stipulation in the contract as to the character of title to be conveyed, a good and sufficient title, free from all incumbrances, is implied.³⁵

b. *What Constitutes Good Title*.—A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others.³⁶ If the title to be conveyed is not perfect but might necessitate the vendee going into equity to perfect same, the court will not compel the vendee to take title and pay the purchase money.³⁷ Speaking generally, a title is to be deemed doubtful where a court of co-ordinate jurisdiction has decided adversely to it or to the principles on which it rests.³⁸

c. *Stipulation as to Title—Make a Deed*.—If the vendor covenants that he will "make a deed" for the property, there is a covenant that the land shall be conveyed by a deed from one who has a good title and full power to convey.³⁹

d. *Defects in Title as Affecting Rights and Obligations of Parties*—(1) *Failure of Title as to Part of Land*.—Although the failure of title is only as to part of the land, the purchaser can elect to rescind as to all, where the contract is an entire one, and the purchase money is not apportioned among the several tracts.⁴⁰ And if the contract has been in part executed, by a conveyance of part of the land, and the vendor is unable to convey the residue, a court of equity will decree the repayment of a proportionate part of the purchase money, with interest.⁴¹ But any partial defect in the title or the deed is not inquirable into by a court of law, in an action on a note given for the purchase price; but the party must seek relief in chancery.⁴² And if the title of the vendor is defective, the vendee can decline to accept the imperfect title without paying off a mortgage whose payment was to constitute part of the purchase money.⁴³

(2) *Defect in Title as to One of Several Parcels*.—A defect in the title of one of several parcels sold does not invalidate the sale of the others if the purchaser makes no objection.⁴⁴

35. Good title implied where no stipulation.—*Washington v. Ogden*, 1 Black 450, 456, 17 L. Ed. 203; *Bank v. Hagner*, 1 Pet. 454, 455, 467, 7 L. Ed. 219.

36. What constitutes good title.—*Adams v. Henderson*, 168 U. S. 573, 580, 42 L. Ed. 584.

Land subject to mineral rights.—Land incumbered with the right of a railroad company for all time, to pass over and across it for the purpose of prospecting for and mining minerals other than coal, is not such a title as a court of equity would compel the vendee to take and pay for. *Adams v. Henderson*, 168 U. S. 573, 580, 42 L. Ed. 584.

37. Title subjecting purchaser to go into equity to perfect.—*Hepburn v. Auld*, 5 Cranch 262, 277, 3 L. Ed. 96.

Tender by cestui que trust, title in trustee.—Where certain property was conveyed to a bank by T. in trust to pay a debt due the bank, and power was given to the bank to sell the land and pay any balance which might remain to T., and the bank made an agreement of sale with H. and tendered a deed from T. made with the consent of the bank, held, the court would not compel H. to accept the title, as the legal title was still in the bank and that would necessitate H. going into a court of equity

to perfect his title. *Bank v. Hagner*, 1 Pet. 454, 467, 7 L. Ed. 219.

38. When title deemed doubtful.—*Wesley v. Eells*, 177 U. S. 370, 376, 44 L. Ed. 810.

39. Stipulation to make a deed.—*Washington v. Ogden*, 1 Black 450, 17 L. Ed. 203.

Stipulation to make title in four years.—A stipulation that title was to be made in four years, amounts to a representation, that he would be able to make title at that time. *Boyce v. Grundy*, 3 Pet. 210, 217, 7 L. Ed. 655.

40. Partial failure of title.—*Ankeny v. Clark*, 148 U. S. 345, 358, 37 L. Ed. 475. See post, "Defect of Title," V, A, 1, b, (1).

41. Repayment of proportion of purchase price and interest where vendor unable to convey all.—*Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 792.

42. Remedy for partial defect is in equity.—*Greenleaf v. Cook*, 2 Wheat. 13, 4 L. Ed. 172.

43. Effect of imperfect title—Assuming mortgage.—*Ankeny v. Clark*, 148 U. S. 345, 359, 37 L. Ed. 475.

44. Defect as to one of several parcels.—*Cornelius v. Kessel*, 128 U. S. 456, 460, 32 L. Ed. 482.

(3) *Effect of Vendee's Knowledge of Defect of Title.*—He who purchases unsound property, with knowledge of the unsoundness at the time, cannot maintain an action.⁴⁵ But where the vendor was under obligation to convey a good and sufficient title, with general warranty, that the vendee had knowledge of defects in title, is no defense.⁴⁶ And if a note is given, with full knowledge of the extent of an incumbrance, and the party thus consents to receive the title, its defect is no legal bar to an action on the note.⁴⁷

2. QUANTITY OF LAND—*a. Excess.*—Although parties contracting for the sale of lands and referring to the patent for a description expect that the quantity will exceed the specified number, yet where the excess is so great as to negative⁸ the presumption that it could hardly have been within the expectation of either of the parties, a court of equity will decree a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration money mentioned in the contract bore to the quantity of land named in the same.⁴⁸

b. Deficiency in Quantity.—(1) *Sale by Tract.*—The rule of equity, that where land is sold as for a certain quantity, a court of equity relieves, if the quantity be defective, is only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendor.⁴⁹ If the vendor does not make any positive representations as to the quantity of land within the boundaries described, and does not make any statements on the subject intended to deceive, and which he knows to be false or untrue, he is not under obligation to make good any deficiency in the quantity sold.⁵⁰ Where the vendee holds land for several years and sells parts of same to pay off various installments of the purchase price without making a complaint of any deficiency in the quantity, though not conclusive, where the contract still remains an executory one, it affords strong presumption that where there is a

45. Effect of vendee's knowledge of defective title.—*Clarke v. White*, 12 Pet. 177, 198, 9 L. Ed. 1046.

The law requires reasonable diligence in a purchaser to ascertain any defect of title; but when such defect is brought to his knowledge, no inconvenience will excuse him from the ultimate scrutiny; he is a voluntary purchaser, and having notice of a fact which casts doubt on the validity of his title, the rights of innocent persons are not to be prejudiced, through his negligence. *Brush v. Ware*, 15 Pet. 93, 10 L. Ed. 672.

46. Vendor under obligation to convey with general warranty.—*Pratt v. Law*, 9 Cranch 456, 489, 3 L. Ed. 792.

In Louisiana even though the purchaser has knowledge of the vice in the title of his grantors, where the grantors, make express contracts of warranty, the grantors cannot set up such knowledge, to exonerate themselves from the ordinary obligations of their contract. *New Orleans v. Gaines*, 138 U. S. 595, 608, 34 L. Ed. 1102.

47. When defective title is no bar to action for purchase price.—*Greenleaf v. Cook*, 2 Wheat. 13, 4 L. Ed. 172.

48. Excess of land.—*King v. Hamilton*, 4 Pet. 310, 320, 7 L. Ed. 869.

Loss of right to dispute title to excess.—The right to dispute plaintiff's title to

the lands in excess of the quantity specified in a contract for the sale of a tract, the area of which was incorrectly ascertained and stated therein, is not lost by an agreement of counsel which, though admitting plaintiff's title to the quantity specified, and that the consideration price was intended to cover the whole tract if the court should be of opinion that contract covered the same irrespective of the specification of its area, states in terms that, "to avoid all dispute, it is the express understanding of the parties that the whole question concerning the said surplus land is reserved for future decision." *King v. Hamilton*, 4 Pet. 310, 311, 7 L. Ed. 869.

49. Deficiency in quantity.—*Dunlap v. Dunlap*, 12 Wheat. 574, 6 L. Ed. 733.

Contract of hazard—Contract departing therefrom should be clearly proved.—A special contract, departing from a general custom, to sell an entry or a survey, taking the chance of surplus, and the hazard of losing a part of the land by other entries, ought to be in writing, or to be very clearly proved, especially, when the written evidence of the contract conforms to this general custom. *Dunlap v. Dunlap*, 12 Wheat. 574, 578, 6 L. Ed. 733.

50. Vendor, in absence of fraud, not liable for deficiency.—*Lawson v. Floyd*, 124 U. S. 108, 116, 31 L. Ed. 347.

large deficiency that the vendee had ample opportunity to discover the deficiency and that the vendor made no warranty as to quantity.⁵¹

(2) *Exchange of Lands*.—Where the governing element in a transaction is not a purchase but an exchange of lands, and some of the land is subject to judgment liens, and there is no set price per acre, the contract is not to be construed by that strict rule in regard to the quantity of land which governs its interpretation in the case of an independent purchase to be paid for in money.⁵²

3. *DEED*.—a. *Who Prepares Deed*.—The true rule, independent of any usage on the subject, would seem to be that the party who is to execute and deliver a deed should prepare it.⁵³ The general rule in the United States is that it is the duty of the vendor to prepare and tender a formal deed to the vendee.⁵⁴ Though a few states have adopted the rule that the vendee must prepare and tender the deed, but the local practice constitutes the proper guide in the interpretation of the terms of the contract.⁵⁵

b. *Tender of Deed*.—(1) *Necessity of Tender*.—A tender of a deed is not necessary where it would be a useless ceremony.⁵⁶ And where parties to a contract of sale had disagreed in relation to the payment to be made, until the disagreement ceases, no deeds are required.⁵⁷

(2) *Sufficiency of Tender*.—A tendered deed is not a legal performance of an agreement to convey lands where it contained a building stipulation, a distinct, independent contract, which ought not to have been made a part of the conveyance, and this question appears, at that time, to have been submitted to counsel, and decided in favor of the vendee. Whether correctly or not, it is too late to inquire, where it appears to have been acquiesced in, and conveyances executed for nearly the whole of the same land which was contained in the tendered deed.⁵⁸ If the purchaser of land agrees to take a general war-

Vendee making personal inspection.—The sale of lands will not be set aside for fraudulent representations as to the number of acres of cleared land in the tract conveyed, or as to the freedom of the land from liability to overflow from the river, where ample opportunity was given to inspect the land before the sale, and defendant's agent stated that he was personally unacquainted with the land but requested plaintiff to make a personal inspection of same, which he did. *Farrar v. Churchill*, 135 U. S. 609, 612, 34 L. Ed. 246.

51. **Presumption as to warranty of quantity.**—*Lawson v. Floyd*, 124 U. S. 103, 118, 31 L. Ed. 347.

52. **Exchange of land not construed strictly.**—*Lawson v. Floyd*, 124 U. S. 108, 118, 31 L. Ed. 347.

Construed in reference to surrounding circumstances.—The words, "about 1,000 acres of land," in an original contract, and a similar expression, "estimated to contain 1,000 acres," used in a compromise agreement, are to be construed in reference to the circumstances surrounding the parties, and which would probably influence them in making the contract, at the time it was entered into. *Lawson v. Floyd*, 124 U. S. 108, 117, 31 L. Ed. 347.

Exchange of "about 1,000 acres."—An agreement for the exchange of "about 1,000 acres" contains no warranty as to quantity. *Lawson v. Floyd*, 124 U. S. 108, 117, 31 L. Ed. 347.

53. **Preparation of deed.**—*Willard v. Tayloe*, 8 Wall. 557, 573, 19 L. Ed. 501.

54. **Vendee tenders deed in United States.**—*Taylor v. Longworth*, 14 Pet. 172, 175, 10 L. Ed. 405.

English rule.—The rule that the purchaser of property shall prepare and tender a deed of conveyance of the property to the vendor, to be executed by him, although prevailing in England, has not been adopted in the United States, though prevailing in a few states. *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405.

55. **Local practice constitutes guide in interpretation of contract.**—*Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405.

56. **Tender of deed useless.**—Where confessedly the title of a party claiming land as owner, and who has agreed to sell, is denied by the vendee and a dispute has taken place about title, a tender of a deed would be a useless ceremony. *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113. See post, "Necessity for Payment or Tender," II, B, 2, b; "Costs," V, A, 1, d.

57. **No tender necessary until disagreement as to payments ceases.**—*Willard v. Tayloe*, 8 Wall. 557, 572, 19 L. Ed. 501.

As to necessity for tender of deed under option to repurchase, see ante, "Option to Repurchase," I, I, 2.

58. **Sufficiency of tender.**—*Pratt v. Law*, 9 Cranch 456, 491, 3 L. Ed. 792.

ranty deed, and pays the purchase money and a general warranty deed is tendered to the purchaser, but there is a contingent liability in the form of a mortgage on the property, the vendee cannot refuse to take such deed or go into equity for idemnity for fulfillment of the contract, but must rely on the covenants of the deed.⁵⁹ But the vendee is estopped from setting up that the deed tendered was defective in not containing sufficient warranties, where the only objection made when the deed was tendered was the want of money to perform the contract.⁶⁰

(3) *Waiver and Excuse of Tender*.—If, before the period fixed for a delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule is applicable only in cases where the act which is construed into a waiver, occurs previous to the time for performance.⁶¹ If the vendee makes no complaint that the deed is not tendered in season, he waives his right to object to the irregularity.⁶² Frequent varying selections by the vendor furnishes no sufficient excuse for nonperformance, where a tender of a conveyance, conformable to any one of those selections, would have been a performance.⁶³

B. By Purchaser—1. **WHERE CONDITION PRECEDENT**.—It is well settled that when there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified.⁶⁴ If a

59. Tender of general warranty deed—Contingent liability on property.—*Refeld v. Woodfolk*, 22 How. 318, 330, 16 L. Ed. 370.

60. Estoppel to set up defective deed.—*Gregg v. Von Phul*, 1 Wall. 274, 281, 17 L. Ed. 536.

Sufficiency of tender not decided where objection was merely inability to pay.—Whether a contract to give a deed with "full covenants of seizure and warranty," is answered by a deed containing a covenant that the grantor is "lawfully seized in fee simple, and that he will warrant and defend the title conveyed against the claim or claims of every person whatsoever"—there not being a further covenant against incumbrance, and that the vendor has a right to sell—need not be decided in a case where the vendee, under such circumstances made no objection to the deed offered, on the ground of insufficient covenants, but only stated that he was not prepared to pay the money for which he had agreed to give notes; handing the deed at the same time, and without any further remark, back to the vendor's agent who had tendered it to him. *Gregg v. Von Phul*, 1 Wall. 274, 17 L. Ed. 536.

61. Effect of vendee's refusal before time of delivery of deed.—*Bank v. Hagner*, 1 Pet. 454, 455, 467, 7 L. Ed. 219.

62. Vendee not making complaint that deed is tendered in season.—*Gregg v. Von Phul*, 1 Wall. 274, 281, 17 L. Ed. 536.

Presumption as to acquiescence in delay.—Where a vendor agrees to give a deed on a day named, and the vendee to

give his notes for the purchase money at a fixed term from the day when the deed was thus meant to be given, and the vendor does not give the deed as agreed, but waits till the term the note had to run expires, and then tenders it—the purchaser being, and having always been in possession—such purchaser will be presumed, in the absence of testimony, to have acquiesced in the delay; or, at any rate, if when the deed is tendered he makes no objection to the delay, stating only that he is not prepared to pay the money for which he had agreed to give the notes, and handing back the deed offered, he will be considered, on ejectment brought by the vendor to receive his land, to have waived objections as to the vendor's noncompliance with exact time. *Gregg v. Von Phul*, 1 Wall. 274, 17 L. Ed. 536.

63. Varying selections by vendor as defense.—*Pratt v. Law*, 9 Cranch 456, 489, 3 L. Ed. 792.

64. Condition precedent.—*Waterman v. Banks*, 144 U. S. 394, 403, 36 L. Ed. 479.

Conveyance "after payment."—If the contract provides for conveyance "after payment," payment is a condition precedent to a conveyance. *Loud v. Pomona, etc., Co.*, 153 U. S. 564, 577, 38 L. Ed. 822.

Sale dependent on release of prior agreement.—Where the agreement to purchase is expressly made dependent on the "surrender and cancelment" of a former agreement of the vendor to sell the same land to another person, it is a condition precedent, that the former

purchaser of city lots stipulates to build, within a limited time, a house on every third lot purchased, or in that proportion, and receives conveyances for the greater part of the lots, he is not bound to build, in proportion to the lots conveyed, unless the whole number be conveyed.⁶⁵

2. PAYMENT OR TENDER OF PURCHASE MONEY—*a. In General.*—When no specific time for the payment of money is fixed in a contract for the purchase of land but the time is left at the option of the vendor, in judgment of law, the same is payable on demand.⁶⁶ If a life estate in land be sold, and at the time of the sale the estate has terminated by the death of the person in whom the right vested, a court of equity would relieve the purchaser from the payment of the purchase price. If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake.⁶⁷

b. Necessity for Payment or Tender.—(1) *Where Covenants Are Dependent.*—In a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or as soon as it is paid, the covenants are mutual and dependent and neither the vendor nor vendee can sue without showing a performance, or an offer to perform on his part. Performance, or an offer to perform on the one part, is a condition precedent to the right to insist upon a performance on the other part,⁶⁸ unless the other party waives the tender, or by his conduct renders it unnecessary.⁶⁹ The inability of the vendor to make a conveyance does not relieve the vendees of necessity for tender of payment on their part, where he seeks to hold the surety on the vendor's bond.⁷⁰

(2) *Where Covenants Are Independent.*—If the payment of the purchase price for the land is a condition precedent to the vendee's covenant to convey, then the vendor is entitled to enforce payment without conveyance or tender of conveyance, and an allegation of his readiness and willingness to convey,

agreement shall be canceled and surrendered. But the acquiescence of the former vendee or his assigns, or the mutual understanding of all parties interested in the former contract that it shall be regarded as at an end, is not equivalent to a surrender and cancellation of it. *Washington v. Ogden*, 1 Black 450, 17 L. Ed. 203.

65. *Obligation not binding until contract completed.*—*Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 792.

66. *Purchase price payable on demand in absence of stipulation.*—*Bank v. Hagner*, 1 Pet. 454, 463, 7 L. Ed. 219. See, generally, the title TENDER, ante, p. 590.

67. *Sale of life estate.*—*Allen v. Hammond*, 11 Pet. 63, 69, 9 L. Ed. 633.

68. *Tender where covenants are dependent.*—*Telfener v. Russ*, 162 U. S. 170, 181, 40 L. Ed. 930; *Bank v. Hagner*, 1 Pet. 454, 464, 7 L. Ed. 219; *Loud v. Pomona, etc., Co.*, 153 U. S. 564, 576, 38 L. Ed. 822. See, generally, the title TENDER, ante, p. 590.

As to when conditions are mutual or independent, see the title COVENANTS, vol. 5, pp. 10, 11.

Where the covenants are dependent the vendor is not bound to convey, unless the purchase price is paid, nor is the purchaser bound to pay unless the vendor is able to convey a good title free from all

incumbrances. *Washington v. Ogden*, 1 Black 450, 17 L. Ed. 203.

Payment of price and conveyance are correlative obligations.—A court of chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and the one failing, leaves the other without a cause. *Refeld v. Woodfolk*, 22 How. 318, 327, 16 L. Ed. 370.

69. *Waiver of tender.*—*Telfener v. Russ*, 162 U. S. 170, 181, 40 L. Ed. 930.

70. *Inability of vendor to make conveyance.*—*Coughran v. Bigelow*, 164 U. S. 301, 311, 41 L. Ed. 442, citing *Telfener v. Russ*, 162 U. S. 170, 171, 40 L. Ed. 930; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017.

Failure of vendee to pay installment releases vendor's surety.—Where the vendee failed to pay an installment of the contract when it became due, the surety on the vendor's bond is released from liability, though the vendor subsequently accepted the payment, as the vendor's subsequently acceptance merely waived his right to rescind and declare a forfeiture. *Coughran v. Bigelow*, 164 U. S. 301, 310, 41 L. Ed. 442, citing *Bank v. Hagner*, 1 Pet. 454, 455, 7 L. Ed. 219; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. Ed. 1017.

upon payment of the purchase money, is sufficient.⁷¹ And though an optional contract of sale makes it the duty of the vendor to tender the vendee an abstract of title, his failure to do so does not dispense with performance or the offer to perform on the part of the vendee.⁷²

c. *Sufficiency of Tender*.—If time is of the essence of the contract, neither party has any rights under the contract unless he made a tender of performance on the day specified for the performance.⁷³

d. *Waiver as to Time of Payment*.—Even though time is of the essence of the contract, the acceptance of the vendor of partial payments, in subsequent demands for performance by him, constitutes a waiver thereof.⁷⁴

e. *Extension of Time of Payment*.—An agreement to extend the time of payment after default, not in writing, and without any new consideration passing between the parties, is void.⁷⁵

3. **DISCHARGE OF CONTRACT**.—A voluntary relinquishment, by the vendee, of all right under a contract of sale, and a voluntary surrender of the possession accepted by the vendor, terminates the vendee's equitable interest.⁷⁶ That the contract contains no clause of re-entry or that the vendor has sought to enforce payment of the amounts which became due to him before the surrender and abandonment, does not effect the surrender or abandonment.⁷⁷ But the obligation of the contract of a railroad company to complete an exchange of property is not released or impaired by the fact that when the railroad company notified the other party that the company would not make the exchange, the other party wrote to them asking when the company would be ready to re-

71. Necessity for payment where covenants are independent.—*Loud v. Pomona, etc.*, Co., 153 U. S. 564, 576, 38 L. Ed. 822.

An understanding that the vendee should have no right or title to the land, or the right to any conveyance of the land, until the full purchase price should be paid, has relation to the security reserved, and not to the time of payment, and does not make time the essence of the contract. *Brown v. Guarantee Trust, etc.*, Co., 128 U. S. 403, 415, 32 L. Ed. 468.

Payment of money into court.—Where property in litigation between A. and B. was sold by A. to C., A. taking a mortgage payable in one year, if the suit between A. and B. to the land was determined, and if not then determined to pay the purchase money into court in the case of A. and B., but the suit not being determined in a year and the money not being paid into court, A. brought a bill to foreclose the mortgage against C., held, the contract, in that particular, required the co-operation of the parties. Hence, when, by the terms of the mortgage, the time had arrived for the payment of the money, it was the duty of C. to have signified his readiness to pay and to unite with A. in procuring the necessary order of the court. Not having so done, a right to enforce the mortgage at once arose. *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317, 322, 38 L. Ed. 177.

72. Failure of vendor to tender abstract as obviating offer of performance by

vendee.—*Kelsey v. Crowther*, 162 U. S. 404, 408, 40 L. Ed. 1017.

73. Sufficiency of tender.—*Bank v. Hagner*, 1 Pet. 454, 465, 7 L. Ed. 219. See, generally, the titles **CONTRACTS**, vol. 4, pp. 583, 584; **SPECIFIC PERFORMANCE**, ante, p. 14.

74. Acceptance of partial payments as waiver.—*Brown v. Guarantee Trust, etc.*, Co., 128 U. S. 403, 415, 32 L. Ed. 468.

Where the purchaser of land did not pay the first installment in full, but the "vendee" accepted the partial payment, and treated the contract as a subsisting one; and it was so treated by the purchaser, who took possession of the land, and exercised acts of ownership over it, he is not in a position to claim that the contract was terminated because of his own failure to pay the first installment in full. *Loud v. Pomona, etc.*, Co., 153 U. S. 564, 581, 38 L. Ed. 822.

75. Extension of time of payment.—*Hansbrough v. Peck*, 5 Wall. 497; 508, 18 L. Ed. 520.

76. Discharge of contract.—*Jennisons v. Leonard*, 21 Wall. 302, 310, 22 L. Ed. 539.

In contracts for the sale of land, where the purchase price is payable in installments, no legal title passes. The interest of the vendee is equitable merely, and whatever puts an end to the equitable interest—as notice, an agreement of the parties, a surrender, an abandonment—places the vendor where he was before the contract was made. *Jennisons v. Leonard*, 21 Wall. 302, 309, 22 L. Ed. 539.

77. Jennisons v. Leonard, 21 Wall. 302, 310, 22 L. Ed. 539.

move its track from the land and come to a settlement for its use.⁷⁸

III. Rights and Liabilities of Parties.

A. Relation of Vendor and Vendee—1. **VENDOR TRUSTEE FOR LAND AND VENDEE TRUSTEE FOR PURCHASE PRICE.**—Upon the execution of a contract for the sale of land, and the execution of notes for the purchase price and the title bond, a court of equity treats the vendor as trustee for the legal title and the vendee as a trustee for the payment of the purchase money, and the performance of the terms of the contract.⁷⁹ If the purchase price is payable in installments the title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him.⁸⁰ And when the contract price is fully paid, the entire title is equitably vested in the vendee, and he may compel a conveyance of the legal title by the vendor, his heirs, or his assigns.⁸¹ This equitable estate of the vendee is alienable, descendible, and

78. Letter asking when railroad would remove tracks from land as release.—*Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 313, 32 L. Ed. 673.

Vendee stating he would hold himself exonerated under contract if not performed.—Where the purchaser of certain land wrote the vendor requesting performance, and concluded with a declaration that if the vendor did not comply with his contract on his part, the vendee would hold himself exonerated, and would resort to his original money contract, as it stood prior to their entering into the contract for the sale of the land, held, this was not a relinquishment of the contract. To have availed himself of it, he should have adopted the alternative offered him; and it was too late, after a bill was filed, to claim the benefit of a right thus gone by; at least, without paying unto the vendee the amount which would have been due to the vendee upon a mutual relinquishment of the bargain. *Barry v. Coombe*, 1 Pet. 640, 653, 7 L. Ed. 295.

79. Vendor trustee for land.—*Lewis v. Hawkins*, 23 Wall. 119, 125, 23 L. Ed. 113; *Boone v. Chiles*, 10 Pet. 177, 225, 9 L. Ed. 383; *Jennisons v. Leonard*, 21 Wall. 302, 22 L. Ed. 539; *Gunton v. Carroll*, 101 U. S. 426, 431, 25 L. Ed. 985.

The vendor of real estate is treated as trustee of the title for the purchaser. *Chapman v. County of Douglas*, 107 U. S. 348, 357, 27 L. Ed. 378.

Vendee not trustee as to possession of land.—But a vendee is in no sense the trustee of the vendor, as to the possession of the property sold; the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract imposes; his possession is, therefore, adverse as to the property, but friendly as to the performance of the conditions of purchase. In virtue of his legal title, the vendor has a legal right of possession; but equity will not permit him to assert it, unless the vendee has violated the contract; he will be enjoined, if the vendee performs it. *Boone v.*

Chiles, 10 Pet. 177, 225, 9 L. Ed. 383.

Heirs bound by execution of title bond by ancestor.—The heirs of the vendor who executed a title bond to convey, are not bound to surrender the title except upon the performance of the conditions upon which their ancestor agreed to convey, viz, the payment of the purchase money. The heirs of the vendor hold the title in trust for the purchaser, while the purchaser is a trustee for the payment of the purchase money. *Hardin v. Boyd*, 113 U. S. 756, 765, 28 L. Ed. 1141.

Title put in third person in fraud of vendee.—Where P. put H. in possession of land under a contract of sale, but in fraud of such contract put the title to the property in the name of his niece, held, the niece was trustee for H. *Whitney v. Hay*, 181 U. S. 77, 89, 45 L. Ed. 758.

Statute of limitations not applicable to possession of vendee under executory contract.—A statute of limitations barring suits for the recovery of real estate after a certain lapse of time does not apply to a possession by a vendee under an executory contract to convey upon payment of the purchase money. The vendee, or the purchaser from him, stands in the relation of a trustee to the vendor for the unpaid purchase money (or, as the matter is looked upon in some states, stands in that of a mortgagee) against whom the statute does not run. *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

80. Equitable interest vests in vendee to extent of payment.—*Jennisons v. Leonard*, 21 Wall. 302, 309, 22 L. Ed. 539.

The execution of a contract for the sale of real estate with a partial payment thereon, is a transfer in equity of the title of the land to the vendee, leaving in the vendor simply a naked title as trustee for the vendee, to be conveyed upon performance on his part. *Bissell v. Heyward*, 96 U. S. 580, 586, 24 L. Ed. 678.

81. Upon full payment of price entire title equitably vests.—*Jennisons v. Leonard*, 21 Wall. 302, 309, 22 L. Ed. 539; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428, 432, 36 L. Ed. 762.

devisable in like manner as real estate held by a legal title. The securities for the purchase money are personality, and in the event of the death of the vendor, go to his personal representative.⁸²

2. AS LANDLORD AND TENANT.—The relation of landlord and tenant in no wise exists between vendor and vendee, and this is especially the case where a conveyance is executed.⁸³

B. Estoppel to Deny Vendor's Title—1. IN GENERAL.—See note.⁸⁴

2. PURCHASE OF OUTSTANDING TITLE.—The vendee of property has a right to fortify his title by the purchase of any other which may protect him in the quiet enjoyment of the premises.⁸⁵ But if he buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title.⁸⁶ Nor can one taking and holding possession of a lot, and making improvements in pursuance and under a contract with another to complete title, purchase an outstanding title and set up such title for himself. Such purchase enures to their joint benefit.⁸⁷

82. Equitable estate of vendee devisable and alienable.—*Lewis v. Hawkins*, 23 Wall. 119, 125, 23 L. Ed. 113.

83. Existence of relation of landlord and tenant.—*Watkins v. Holman*, 16 Pet. 23, 25, 10 L. Ed. 573.

84. Estoppel to deny vendor's title.—See the title *ESTOPPEL*, vol. 5, pp. 966-970.

As to covenant for further assurance estopping vendor from setting up an after-acquired title, see the title *ESTOPPEL*, vol. 5, p. 928. As to completion of vendor's title vesting vendee with same, see the title *ESTOPPEL*, vol. 5, p. 932.

85. Vendee may purchase outstanding title.—*Watkins v. Holman*, 16 Pet. 23, 53, 10 L. Ed. 873.

86. Vendor liable for amount paid.—*Galloway v. Finley*, 12 Pet. 264, 294, 9 L. Ed. 1079; *Bush v. Marshall*, 6 How. 284, 291, 12 L. Ed. 440.

Acts done by vendee to perfect title inure to benefit of vendor.—In reforming a contract for the sale of lands, equity treats the purchaser as a trustee for the vendor, because he holds under the vendor; and acts done to benefit the title, by the vendee, when in possession of the lands, inure to the benefit of him under whom the possession was obtained, and through whom the knowledge that a defect in the title existed, was derived. *Galloway v. Finley*, 12 Pet. 264, 9 L. Ed. 1079.

As to vendee in possession purchasing at tax sale, see the title *ESTOPPEL*, vol. 5, p. 970.

C. B., a resident in Ohio, as an officer in the Virginia line during the revolutionary war, was entitled to a quantity of military land in the state of Ohio; warrants for the land were issued to him, and were surveyed, located and patented; in 1835, the heirs of C. B. sold part of these lands to G., who went into possession thereof; he soon afterwards dis-

covered, that the patent for these lands issued after the decease of C. B., and was, consequently, void; the land had been recognized for forty years, as the property of C. B. and his heirs, and the title in them deemed valid; G., on making a discovery of the defects in the patent, entered and located the land for himself. Held, that G. could not be permitted to avail himself of this defect in the title, while standing in the relation of a purchaser to defeat the agreement to purchase, made with the heirs of C. B.; under the most favorable circumstances, he could only have it reformed; and the amount advanced to perfect the title deducted from the unpaid purchase money. *Galloway v. Finley*, 12 Pet. 264, 9 L. Ed. 1079.

Purchaser setting up another title not allowed expenses.—Where a purchaser, instead of claiming from his vendors the cost of entering and surveying the lands, the defect in the title to which had become known to him through his purchase, claims to hold the land as his own, under the title acquired by his entry or survey, and asks a court of equity to rescind the contract of purchase; the court will decline giving its aid, to obtain the expenses of the warrants and surveys taken out by him for the land, and set up against the rights of his vendors. *Galloway v. Finley*, 12 Pet. 264, 9 L. Ed. 1079.

Where the holder of a pre-emption right to lots relinquished the right to the United States in order that a sale might be made and a public sale made so as to perfect the title and at public sale, the vendee himself became the purchaser, he became a trustee for his original vendor; and if, at the public sale, the original vendor became the purchaser, the title inured to the benefit of his vendee. *Bush v. Marshall*, 6 How. 284, 12 L. Ed. 440.

87. Completing title under contract.—*Hallett v. Collins*, 10 How. 174, 183, 13 L. Ed. 376.

C. Possession of Property.—If a contract for the sale of lands is silent as to possession by the vendee, he is not entitled to it.⁸⁸ If the contract stipulates for possession by the vendee, or the vendor puts him in possession, he holds as a licensee, but the relation of landlord and tenant does not subsist between the parties.⁸⁹ At law a purchaser in possession, by a contract to sell, is a trespasser; but in equity he is the owner of the estate, having taken possession under the contract, and the vendor is in the situation of an equitable mortgagee.⁹⁰ Neither party need ever have had actual possession of premises, to compel a conveyance of the legal title by the holder of the equitable title.⁹¹

D. Interest and Rent and Profits.—The vendor at common law is not allowed interest on the purchase price before the day fixed for payment, unless specially contracted for. But where the purchaser has contracted to pay on a given day, and neglects or refuses so to do, both law and equity subject him to interest as the measure of damages for the breach of his contract.⁹² Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the amount of which is to be determined by arbitrators, the vendor must pay interest from the time the debt is liquidated, until he makes a good title, and the vendee is accountable for the rents and profits, from the time the title is perfected, until the contract is specifically performed.⁹³ But a vendee in possession under an executory contract of sale is not a tenant, and, in absence of agreement, is not liable for rent where the vendor is unable to give a good title.⁹⁴ And though the vendee enters when there was no legal contract of

88. No possession where contract silent.—*Burnett v. Caldwell*, 9 Wall. 290, 293, 19 L. Ed. 712.

89. Vendee in possession as licensee.—*Burnett v. Caldwell*, 9 Wall. 290, 293, 19 L. Ed. 712.

If there is no authority for the vendee to take possession and he enters into possession, he holds as a licensee or tenant at will. *Lewis v. Hawkins*, 23 Wall. 119, 125, 23 L. Ed. 113.

90. Purchaser in possession by contract a trespasser.—*Boone v. Chiles*, 10 Pet. 177, 223, 9 L. Ed. 383.

91. Possession unnecessary to compel conveyance of legal title.—*Smith v. Orton*, 21 How. 241, 243, 16 L. Ed. 104.

92. Interest and rent and profits.—*Curtis v. Innerarity*, 6 How. 146, 156, 12 L. Ed. 380.

Civil-law doctrine.—The doctrine of the civil law, "that the vendee is not liable for interest where he received no profits from the thing purchased," applies only to executory contracts, where the price is contracted to be paid at some future day, and the contract is silent as to the interest. In such a case, the civil law will allow interest from the date of the contract of sale, if the vendee has had possession and received profits from the thing purchased. *Curtis v. Innerarity*, 6 How. 146, 156, 12 L. Ed. 380.

Vendee assuming notes wherein principal and interest payable at maturity.—Where the vendee of real estate gave a deed of trust to the vendor and assumed therein as a part of the purchase price, the payment of eight notes of 1,000 each with interest, as appeared by a certain deed, and payable respectively in one, two, three, etc., years after date with in-

terest, the vendee was liable for the payment of each of these notes and all interest to the time of their maturity, as the interest was not payable annually and was payable only at maturity, and furthermore mutual mistake of the party as to the amount of the debt and fraudulent concealment as to the sum was negatived where the reference in the deed of trust to the deed for the description of the indebtedness, distinctly showed the amount thereof. *Sawyer v. Weaver*, 131 U. S., appx., cli, 24 L. Ed. 705.

Rescission—Interest allowed on amount paid.—In *Michoud v. Girod*, 4 How. 503, 504, 11 L. Ed. 1076, a contract was rescinded and interest allowed on amount paid, together with allowance of actual cost of permanent improvements and interest thereon, but the vendee was charged with the rents and profits of the land and interest thereon, less taxes.

As to interest on deferred installments payable on favorable termination of adverse suits as to title, see the title **INTEREST**, vol. 7, p. 230, note 69. As to interest on mortgage given on an agreement to pay purchase money into court, not providing for interest, see the title **INTEREST**, vol. 7, p. 230, note 70. As to expense and trouble in removing cloud from title being defense to payment of interest, see the title **INTEREST**, vol. 7, p. 228.

93. Conveyance in payment of debt.—*Hepburn v. Dunlop*, 1 Wheat. 178, 4 L. Ed. 65.

94. Vendee in possession under contract of sale not liable for rent.—Where the possession of land was taken and maintained under an express contract, by which the vendor, in consideration of

purchase in existence, the vendor is only entitled to interest on the purchase money from the time possession was taken until the price of sale was paid, if he demands it before the delivery of the deed.⁹⁵

E. Payment of Taxes.—The purchaser in possession under an executory contract of sale is under obligation to take care of and pay the taxes assessed, accruing after his purchase.⁹⁶

F. Assumption of Mortgage—1. **EXPRESS AGREEMENT TO ASSUME NECESSARY.**—"An agreement merely to take land, subject to a specified encumbrance, is not an agreement to assume and pay the encumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable."⁹⁷ But where the vendee gave a bond for an amount equal to a mortgage assumed, the vendee is not liable for the whole

\$8,000 to be paid therefor, agreed to convey to the vendee a certain house free and clear of all incumbrances, and the title to be perfect, and at the date of the agreement the vendee paid \$500, and was at all times ready to pay the residue of the purchase money on a deed being delivered to him according to the agreement, but the vendor was not able to execute a deed according to his contract, held, these facts show the vendee was not in possession under such circumstances as to create the relation of landlord and tenant. There was neither an express nor an implied contract to pay rent, and no action could be maintained to recover for the use and occupation of the premises. *Ankeny v. Clark*, 148 U. S. 345, 359, 37 L. Ed. 475. See the title **LANDLORD AND TENANT**, vol. 7, p. 840.

One who enters into possession of land in virtue of an agreement or understanding that he was to be a purchaser, is not liable in an action for the use and occupation of the land, if the purchase is actually concluded. *Carpenter v. United States*, 17 Wall. 489, 494, 21 L. Ed. 680.

An action for use and occupation will not lie against a bona fide purchaser, for a valuable consideration, from the heirs of a disseiser, after a descent cast, and without notice of the disseisin. *Wharton v. Fitzgerald*, 3 Dall. 501, 1 L. Ed. 697.

Church property—When parties not chargeable for use and occupation.—Parties are not in equity chargeable personally with the value of the use and occupation of church property during the time they were litigating to keep the control of the society and its affairs, where during the entire controversy the church property has been kept exclusively for church purposes, and every member of the congregation was permitted to worship there if he chose, and no person was excluded from the church building for the purposes of worship if he wanted to go. *Bouldin v. Alexander*, 103 U. S. 330, 335, 26 L. Ed. 308. See, generally, the title **RELIGIOUS SOCIETIES**, vol. 10, p. 638.

Purchaser in possession under invalid deed—Tenancy from year to year not created.—A contract executed for the purpose of conveying and acquiring an estate in fee, but wanting that legal formality which is required to pass the title, cannot be converted into a tenancy from year to year contemplated by neither party; and by this conversion, estop the purchaser, while it leaves the seller free to disregard the express stipulation. *Hughes v. Clarksville*, 6 Pet. 369, 382, 8 L. Ed. 430.

Contract providing for rent on failure to perform.—Where there was a covenant to sell land upon condition that the purchase money should be paid in installments, and other acts done by the covenantor, on failure to perform which rent was to be charged, and the covenantor failed to pay the first installment or insure as per the contract, the rent was justly chargeable. *Stinson v. Dousman*, 20 How. 461, 15 L. Ed. 966.

95. Possession taken before payment of price.—*Carpenter v. United States*, 17 Wall. 489, 495, 21 L. Ed. 680.

96. Payment of taxes.—*Bradford v. Union Bank*, 13 How. 57, 63, 14 L. Ed. 49.

If the vendee in possession allows a sale of part of the land for taxes, the vendor, on the tender of the purchase money, is bound only to convey to the vendee a good and valid title to the land at the time, subject to any outstanding title or titles that existed under tax sales, where the payment of the taxes had accrued subsequent to the purchase. For these titles they would not have been responsible, as they arose from the neglect of the vendee. *Bradford v. Union Bank*, 13 How. 57, 64, 14 L. Ed. 49.

97. Grantee's assumption of mortgage.—*Shepherd v. May*, 115 U. S. 505, 510, 29 L. Ed. 456; *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678.

Payment of interest does not impose liability.—The mere purchase of premises subject to a mortgage does not render the purchaser personally liable to the

amount of the mortgages but his liability is limited to the amount in his bond.⁹⁸

2. **LIABILITY OF MORTGAGOR'S GRANTEE.**—By the settled law as declared by the supreme court and existing in the District of Columbia, the grantee in a deed assuming a mortgage is not directly liable to the mortgagee, at law or in equity. The only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt.⁹⁹ But in some states the mortgagee may sue the mortgagor's grantee at law.¹ If the vendee's bond given to insure the payment of a mortgage on the land is assigned, the assignee has only the rights of the assignor, and the bond is subject to all set-

mortgagee, as having assumed to pay it, nor does the mere payment of interest in itself impose that liability. *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 447, 37 L. Ed. 799, citing *Elliott v. Sackett*, 108 U. S. 132, 27 L. Ed. 678; *Drury v. Hayden*, 111 U. S. 223, 28 L. Ed. 408.

Mutual mistake as to insertion of clause "assuming mortgage."—Where a clause in a deed of lands subject to a mortgage, by which the grantee is made to assume the mortgage, is conclusively proved to have been inserted in the deed by mistake of the scrivener, without the knowledge and against the intention of the parties, a court of equity, upon a bill filed by the grantor for the purpose, will decree a reformation of the deed by striking out that clause. *Elliott v. Sackett*, 108 U. S. 132, 133, 27 L. Ed. 678, cited in *Drury v. Hayden*, 111 U. S. 223, 227, 28 L. Ed. 408.

Assumption of "certain incumbrances" includes unpaid taxes.—A clause in a deed assuming "certain incumbrances now resting thereon," designates and comprehends all mortgages and unpaid taxes, as clearly as if the words used had been "the incumbrances," or "all incumbrances," or had particularly described each mortgage and each tax, and this is true notwithstanding the deed contains a covenant of special warranty against all persons claiming under the grantor, and it was contended the words "certain incumbrances" cannot include the mortgages made by the grantor, but must be limited to the unpaid taxes which, it is said, would not come within the covenant of special warranty. *Keller v. Ashford*, 133 U. S. 610, 619, 33 L. Ed. 667.

98. **Vendee giving bond liable to extent of bond only.**—*Episcopal City Mission v. Brown*, 158 U. S. 222, 228, 39 L. Ed. 960.

99. **Rule in District of Columbia.**—*Union, etc., Ins. Co. v. Hanford*, 143 U. S. 187, 190, 36 L. Ed. 118, citing *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667; *Willard v. Wood*, 135 U. S. 309, 34 L. Ed. 210.

An agreement by the purchaser to assume a mortgage does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal

and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Keller v. Ashford*, 133 U. S. 610, 625, 33 L. Ed. 667, citing *Shepherd v. May*, 115 U. S. 505, 511, 29 L. Ed. 456. See, generally, the title **PRINCIPAL AND SURETY**, vol. 9, pp. 716, 717.

1. **Illinois and New York.**—By the law of Illinois and New York the mortgagee may sue at law the grantee who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. *Union, etc., Ins. Co. v. Hansford*, 143 U. S. 187, 191, 36 L. Ed. 118; *Willard v. Wood*, 164 U. S. 502, 525, 41 L. Ed. 531.

Laches as denying relief.—Nearly sixteen years had elapsed since B. entered into a covenant with W., when, on March 10, 1890, over eight years after the issue of the first subpoena, alias process was issued against B. and service had. For seven years of this period he had resided in the District of Columbia. For seven years he had been a citizen of Illinois as he still remained. By the law of Illinois the mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. But C. the owner of the bond, did not see fit to bring a suit against B. in Illinois, nor was this bill filed during B.'s residence in the district, and when filed it was allowed to sleep for years without issue of process to B., and for five years after it had been dismissed as to W.'s representatives, W. having been made defendant, by C.'s ancillary administrator, as a necessary party. In the meantime D., the original obligor, had been discharged in bankruptcy and had died; P., to whom B. had sold the property, had also departed this life, leaving but little if any estate; W. had deceased, his estate been distributed, and any claim against him had been barred; and the mortgaged property had diminished in value one-half and had passed into the ownership of C.'s heirs. It was held, that, in view of the laches disclosed by the record, the equitable jurisdiction of the court ought not to be extended to enforce a covenant plainly not made for the benefit of C., and in re-

offs or equities existing between the parties.² Assuming that a mortgagee has acquired, by the law of a state where the contract was made, a right to enforce an agreement to assume the mortgage against the grantor of the mortgage, the form of remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the *lex fori*, where the action was brought.³

IV. Bona Fide Purchaser.

A. In General.—Nothing is clearer than that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate at the time of his purchase, is entitled to priority in equity as well as at law, according to the well-known maxim that when equities are equal the law shall prevail.⁴ But the protection of a bona fide purchase is necessary only when the plaintiff has a prior equity; which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money, and receiving the conveyance, without notice, and a clear conscience.⁵ The plea of a bona fide purchaser is one especially favored in law.⁶

B. Who Is a Bona Fide Purchaser—1. **IN GENERAL.**—The term "bona fide purchaser" has a well-settled meaning in law. It does not require settlement or occupancy. Any one is a bona fide purchaser who buys in good faith and pays value.⁷

spect of which he possessed no superior equities. The changes which the lapse of time had wrought in the value of the property and in the situation of the parties were such as to render it inequitable to decree the relief sought as against B. So that whether the barring in this jurisdiction of the remedy merely as against W. would or would not in itself defeat a decree against B., without more, it was held that relief was properly refused, and the decree affirmed. *Willard v. Wood*, 164 U. S. 502, 525, 41 L. Ed. 531.

Extending time of payment.—In these states any subsequent agreement of the mortgagee with the grantee, without the grantor's assent, extending the time of the payment of the mortgage debt, discharges the grantee from all personal liability for that debt. *Union, etc., Ins. Co. v. Hanford*, 143 U. S. 187, 191, 36 L. Ed. 118. See, generally, the title **PRINCIPAL AND SURETY**, vol. 9, p. 713.

2. Assignee of vendee's bond has right of assignor only.—*Episcopal City Mission v. Brown*, 158 U. S. 222, 227, 39 L. Ed. 960.

3. Mortgagee's remedy governed by *lex fori*.—*Willard v. Wood*, 135 U. S. 309, 313, 34 L. Ed. 210; *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667.

4. Bona fide purchaser entitled to priority.—*Townsend v. Little*, 109 U. S. 504, 511, 27 L. Ed. 1012, citing *Williams v. Jackson*, 107 U. S. 478, 27 L. Ed. 529.

As to "bona fide possessor" of land, see the title **IMPROVEMENTS**, vol. 6, p. 896, note 1.

5. Prior equity only barred by union of legal title and equity.—*Boone v. Chiles*, 10 Pet. 177, 179, 9 L. Ed. 383.

6. Plea of bona fide purchaser favored.—*United States v. California, etc., Land*

Co., 148 U. S. 31, 40, 37 L. Ed. 354; *Boone v. Chiles*, 10 Pet. 177, 179, 9 L. Ed. 383; *United States v. Dallas, etc., Road Co.*, 148 U. S. 49, 37 L. Ed. 362.

Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril, by purchasing a title, and paying a valuable consideration, without notice of any defect in it; and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief, which a court of equity imparts liberally. Such suitors are its most special favorites; it will not inquire how he may have obtained a statute, mortgage, incumbrance, or even a satisfied legal term, by which he can defend himself at law, if outstanding; equity will not aid his adversary by taking from him the *tabula in naufragio*, if acquired before a decree; relief will not be granted against him, in favor of the widow or orphan; nor shall the heir see the title papers; it is a bar to a bill to perpetuate testimony, or for discovery; and goes to the jurisdiction of the court, over him; his conscience being clear, any adversary must be left to his remedy at law. *Boone v. Chiles*, 10 Pet. 177, 179, 9 L. Ed. 383.

Every reasonable intentment indulged in to support title.—Every reasonable intentment should be made to support the titles of the bona fide purchasers of real property, and the court is not disposed to impair their safety, by insisting upon matters of form, unless they were evidently required by the legislative authority. *Van Ness v. United States Bank*, 13 Pet. 17, 20, 10 L. Ed. 38.

7. Who is bona fide purchaser.—*United States v. Des Moines, etc., R. Co.*, 142 U. S. 510, 530, 33 L. Ed. 1099; *United*

2. **MORTGAGEE.**—A mortgagee for a valuable consideration and without notice of adverse claims is entitled to the protection of a bona fide purchaser.⁸

3. **TRUSTEE AND CESTUI QUE TRUST.**—The trustee and cestui que trust in a trust deed, purchasing for value without notice of adverse claims, are entitled to the protection of a bona fide purchaser as against prior equitable rights.⁹

4. **LESSEE WITH OPTION TO PURCHASE.**—The lessee under a lease giving the lessee the option to buy at a specified time, is not a bona fide purchaser as against a party claiming the right to redeem from the lessor, who held title under a deed absolute on its face, but which was in reality a mortgage.¹⁰

5. **PURCHASER FROM DEVISEE UNDER WILL SUBSEQUENTLY SET ASIDE.**—A purchaser from the devisee under a will probated in Louisiana of a person who died domiciled in New York, while the order of the Louisiana court establishing the will remains in force, and without notice that the will has been set aside in the testator's domicile, is an innocent purchaser, and is not affected by a subsequent order setting aside the will, to which he is not a party.¹¹

6. **GRANTEE UNDER CONVEYANCE BY ORDER OF COURT.**—By the reconveyance of land to the grantor, under a decree of court setting aside a conveyance for fraud, the grantor stands in the position of a bona fide purchaser of the property for value as to third persons of whose claims he did not have actual or constructive notice.¹²

States v. California, etc., Land Co., 148 U. S. 31, 42, 37 L. Ed. 354; *United States v. Dallas, etc., Road Co.*, 148 U. S. 49, 37 L. Ed. 362.

The term "bona fide purchaser" is used in the statute of March 3, 1887, 24 Stat. 556, c. 376, but, as was pointed out in *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 480, 481, 41 L. Ed. 789, not in any technical sense, but simply as demanding good faith in the transactions between the individual and the company. It is true that the parties who, in that case, had dealt with the company had in fact purchased and paid value, and it was unnecessary to consider anything more than the effect of such transactions. But still it was distinctly held that the term "bona fide purchaser" was not intended in any technical sense, but only as one implying good faith. *Gertgens v. O'Connor*, 191 U. S. 237, 243, 48 L. Ed. 163. See, generally, the title **PUBLIC LANDS**, vol. 10, p. 1.

As to bona fide purchaser of public lands, see the title **PUBLIC LANDS**, vol. 10, pp. 141, 143.

8. **Mortgagee.**—*Kesner v. Trigg*, 98 U. S. 50, 53, 25 L. Ed. 83. See, generally, the title **MORTGAGES AND DEEDS OF TRUST**, vol. 8, p. 452.

9. **Trustee and cestui que trust.**—*Kesner v. Trigg*, 98 U. S. 50, 53, 25 L. Ed. 83. See, generally, the title **TRUSTS AND TRUSTEES**, ante, p. 676.

Where a party at the time of contracting a debt, executed, to secure the payment thereof, a deed of trust of lands to which he had a perfect record title, and a third party subsequently makes claim that he had, at the date of the deed, a title to them, the trustee and cestui que

trust must be considered as purchasers; and if they had no notice of such claim, the lands are subject to sale to satisfy the debt. If the sale yields a surplus, the rights of such third party thereto will be the same as they were to the land. *Kesner v. Trigg*, 98 U. S. 50, 25 L. Ed. 83.

10. **Lessee with option to purchase.**—*Villa v. Rodriguez*, 12 Wall. 323, 338, 20 L. Ed. 406.

11. **Purchaser from devisee under will subsequently set aside.**—*Foulke v. Zimmerman*, 14 Wall. 113, 20 L. Ed. 785. See post, "Recordation," IV, C, 4, d, (2).

12. **Grantee under conveyance by order of court.**—*Lynch v. Murphy*, 161 U. S. 247, 254, 40 L. Ed. 688.

Recordation of defective deed.—Where P. instituted and prosecuted his suit for cancellation of his conveyance against all persons known to him as claiming an interest in or incumbrance on the property, he did what the law required, in order to make his judgment binding upon all the world, and when the court divested the grantees of all interest in the property, a third person's rights, acquired through the grantee, which were not legally recorded before judgment, were divested by the decree as effectually as if such third person had been a party, and there being no actual notice, and the recording of the defective deed not operating as constructive notice, the alleged equitable lien is wholly inoperative against those holding under the decree. *Lynch v. Murphy*, 161 U. S. 247, 255, 40 L. Ed. 688.

Decree of court vesting legal title.—By the laws of Ohio, a decree in favor of certain parties directing a conveyance of land upon the payment of a certain sum and within a certain time. but if no con-

7. **PURCHASER OF EQUITABLE TITLE.**—"A bona fide purchaser of land is one who is the purchaser of the legal title, or estate; and a purchaser of a mere equity is not embraced in the definition,¹³ as the purchaser of an equitable title takes it subject to all prior equities.¹⁴ But the equitable title is good as against a purchaser of the legal title who was not a bona fide purchaser without notice.¹⁵

8. **QUITCLAIM PURCHASER.**—Although the general rule is that a vendee by deed of quitclaim is not a bona fide purchaser,¹⁶ yet that rule is not universal, and one may become a bona fide purchaser for value, although holding under a quitclaim deed,¹⁷ for a quitclaim deed is as effectual to divest and transfer a complete title as any other form of conveyance.¹⁸ The mere fact that the

conveyance was made then such parties should hold and possess same in as full and ample a manner as if a conveyance was made, vests a legal title in such parties, and such purchasers are purchasers for value without notice so that their deed will take precedence of a prior unrecorded deed. *Stelle v. Spencer*, 1 Pet. 550, 560, 7 L. Ed. 259.

13. **Purchaser of equitable title.**—*Hawley v. Diller*, 178 U. S. 476, 487, 44 L. Ed. 1157; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Villa v. Rodriguez*, 12 Wall. 323, 338, 20 L. Ed. 406; *Vattier v. Hinde*, 7 Pet. 250, 271, 8 L. Ed. 675. See post, "Must Have Complete Legal Title," IV, C, 2.

14. **Purchasers of equitable title take subject to prior equities.**—*Shirras v. Caig*, 7 Cranch 34, 46, 3 L. Ed. 260; *Vattier v. Hinde*, 7 Pet. 250, 269, 8 L. Ed. 675; *Caldwell v. Carrington*, 9 Pet. 86, 9 L. Ed. 60; *Hawley v. Diller*, 178 U. S. 476, 487, 44 L. Ed. 1157; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Hallett v. Collins*, 10 How. 174, 184, 13 L. Ed. 376; *Townsend v. Little*, 109 U. S. 504, 512, 27 L. Ed. 1012; *Fitzsimmons v. Ogden*, 7 Cranch 2, 18, 3 L. Ed. 249; *Williams v. Jackson*, 107 U. S. 478, 27 L. Ed. 529.

15. **Equitable title good as *malà fide* purchaser.**—*Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62.

Where certain land is conveyed as collateral security for debt, which debt is subsequently paid, and the equitable title is transferred to a third person, such title is good as against a purchaser of the legal title when the party is not a bona fide purchaser without notice. *Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62.

16. **Quitclaim purchaser.**—*Oliver v. Piatt*, 3 How. 333, 11 L. Ed. 622; *May v. Le Claire*, 11 Wall. 217, 20 L. Ed. 50; *Villa v. Rodriguez*, 12 Wall. 323, 338, 20 L. Ed. 406; *Baker v. Humphrey*, 101 U. S. 494, 499, 25 L. Ed. 1065; *Dickerson v. Colgrove*, 100 U. S. 578, 584, 25 L. Ed. 618.

Reason of rule.—This "is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that

there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers." *Moelle v. Sherwood*, 148 U. S. 21, 28, 37 L. Ed. 350.

17. **Quitclaim purchaser may be bona fide purchaser.**—*United States v. California, etc., Land Co.*, 148 U. S. 31, 46, 37 L. Ed. 354; *McDonald v. Belding*, 145 U. S. 429, 36 L. Ed. 788; *Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350.

When quitclaim grantee a bona fide purchaser.—If the grantee in a quitclaim deed takes the deed without notice of any outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser, upon showing that the consideration stipulated has been paid and that such consideration was a fair price for the claim or interest designated. *Moelle v. Sherwood*, 148 U. S. 21, 29, 37 L. Ed. 350.

Arkansas.—In *McDonald v. Belding*, 145 U. S. 492, 36 L. Ed. 788, it was held, in a case coming from Arkansas, and in harmony with the rulings of the supreme court of that state, that while ordinarily a person holding under a quitclaim deed may be presumed to have had knowledge of imperfections in his vendor's title, yet that the rule was not universal, and that one might become a bona fide purchaser for value although holding under a deed of that kind; where it appears the deed accepted was not drawn as a quitclaim deed pursuant to any direction given by him, and he paid full value. *United States v. California, etc., Land Co.*, 148 U. S. 31, 46, 37 L. Ed. 354.

18. **Quitclaim deed transfers complete title.**—*Moelle v. Sherwood*, 148 U. S. 21, 29, 37 L. Ed. 350.

Quitclaim deed as efficient as deed of bargain and sale.—There is in this coun-

conveyance is unaccompanied by any warranty of title, and against incumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction.¹⁹ But even in those courts in which the rule is announced, that one who takes under a quitclaim deed cannot be a bona fide purchaser, it is sometimes limited to the grantee in such a deed, and not extended to those cases in which a quitclaim was only a prior conveyance in the chain of title, and in which the immediate deed is one of bargain and sale,²⁰ and this is a reasonable limitation.²¹

9. **PURCHASER WITH NOTICE FROM BONA FIDE PURCHASER.**—A purchaser with notice may protect himself under a purchaser by deed without notice,²² unless he be the original party to the fraud.²³ But a purchaser with notice cannot protect himself under one who holds by contract only.²⁴ Of course it

try no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain and sale. If the grantor in either case at the time of the execution of his deed possesses any claim to or interest in the property, it passes to the grantee. In the one case, that of bargain and sale, he impliedly asserts the possession of a claim to or interest in the property, for it is the property itself which he sells and undertakes to convey. In the other case, that of quitclaim, the grantor affirms nothing as to the ownership, and undertakes only a release of any claim to or interest in the premises which he may possess without asserting the ownership of either. In either case if the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a bona fide purchaser. *Moelle v. Sherwood*, 148 U. S. 21, 29, 37 L. Ed. 350.

19. **Fact that conveyance has no warranty of title raises no presumption of mala fide.**—*Moelle v. Sherwood*, 148 U. S. 21, 30, 37 L. Ed. 350.

Covenants of warranty do not constitute any operative part of the instrument in transferring the title. That passes independently of them. They are separate contracts, intended only as guaranties against future contingencies. *Moelle v. Sherwood*, 148 U. S. 21, 30, 37 L. Ed. 350.

20. **Doctrine limited to grantee in quitclaim deed.**—*United States v. California, etc., Land Co.*, 148 U. S. 31, 47, 37 L. Ed. 354.

21. And this is certainly a most reasonable limitation, because the rule is obviously, at the best, arbitrary and technical; for a party who receives a quitclaim deed may act in the utmost good faith, and in fact be ignorant of any defect in the title, and this, although he has made the most complete and painstaking investigation, and only takes the quitclaim

deed because the grantor, for expressed and satisfactory reasons, declines to give a warranty. It would be unfortunate, in view of the fact, that in so many chains of title there are found quitclaim deeds, to extend a purely arbitrary rule so as to make the fact of such a deed notice of any prior defect in the title. *United States v. California, etc., Land Co.*, 148 U. S. 31, 47, 37 L. Ed. 354.

While it is held, in Texas, that a purchaser who takes a quitclaim deed of his grantor's interest only is affected with notice of all defects in the title, yet mere knowledge that the deed is in that form cannot affect the title of one claiming under a subsequent deed of warranty from the grantee. *Stanley v. Schwalby*, 162 U. S. 255, 277, 40 L. Ed. 960, citing *United States v. California, etc., Land Co.*, 148 U. S. 31, 46, 47, 37 L. Ed. 354.

22. **Purchaser with notice from bona fide purchaser.**—*Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Alexander v. Pendleton*, 8 Cranch 461, 3 L. Ed. 624; *Stanley v. Schwalby*, 162 U. S. 255, 276, 40 L. Ed. 960; *Swayze v. Burke*, 12 Pet. 11, 23, 9 L. Ed. 980; *Mills v. Smith*, 8 Wall. 27, 33, 19 L. Ed. 346.

23. **Original party to fraud not protected.**—*McAfee v. Crofford*, 13 How. 447, 14 L. Ed. 217; *Swayze v. Burke*, 12 Pet. 11, 24, 9 L. Ed. 980; *Rogers v. Lindsey*, 13 How. 441, 446, 14 L. Ed. 215. See the title **FRAUD AND DECEIT**, vol. 6, p. 423, note 95.

A purchaser with notice may protect himself by obtaining the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud. The bona fide purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust, and a mediated fraud. 1 Story, Eq. Jur., 397, 398, and cases. *McAfee v. Crofford*, 13 How. 447, 14 L. Ed. 217.

24. **Purchase from party holding by contract only.**—*Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406.

A purchaser with notice cannot pro-

is necessary that the purchaser's grantor must have been a bona fide purchaser. If his grantor had no legal title, his purchase with notice will not be protected.²⁵

10. **PURCHASER WITHOUT NOTICE FROM PURCHASER WITH NOTICE.**—A purchaser of land, for value, and without notice of a prior equity, holds and can convey an indefeasible title, and therefore the title, either of one who, without notice, purchases from one who purchased with notice, or of a purchaser with notice from a purchaser without notice, is good.²⁶ But a vendee cannot defend as a bona fide purchaser without notice, against an unrecorded mortgage, where his rights lie in an executory contract; nor where he has a right to call for no deed but that of a quitclaim.²⁷

11. **ATTORNEY PURCHASING CLIENT'S INTEREST PENDENTE LITE.**—The attorney of a party to partition proceedings, who purchases his client's interest pendente lite, is not an innocent purchaser.²⁸

C. Essential Elements—1. **IN GENERAL.**—"The essential elements which constitute a bona fide purchaser are three: a valuable consideration, the absence of notice, and presence of good faith."²⁹ Of course the purchaser must have acquired a complete legal title.³⁰

2. **MUST HAVE COMPLETE LEGAL TITLE.**—To protect a purchaser under the plea of a purchaser for a valuable consideration, without notice, he must have a complete legal title.³¹ It follows that a purchaser from the grantee in an in-

fect himself under a purchase from one who holds or claims by contract only, for he has no standing in equity, for the obvious reason that the elder equity must prevail, unless such purchaser can shelter himself under the legal title, acquired by one whose conscience was not affected with fraud or notice, and can impart his immunity to a guilty purchaser, as the representative of his legal rights, fairly acquired by deed, in such a manner as exempts him from the jurisdiction of court of equity; such a purchase affixes no stain on the conscience, and equity cannot disturb the legal title. But as it does not pass by a contract of purchase, without deed, the defendant can acquire only an equity, the transfer of which does not absolve him from the consequences of his first fraudulent purchase; his second purchase of an equity will not avail him more than the first; for the original notice of the plaintiffs' equity taints his conscience, so as to make him a mere trustee if he hold the legal title from one who is not an innocent, bona fide purchaser. *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383.

25. **Purchaser's grantor must have been bona fide purchaser.**—*Boone v. Chiles*, 10 Pet. 177, 178, 9 L. Ed. 383.

26. **Bona fide purchase from purchaser with notice.**—*Stanley v. Schwalby*, 162 U. S. 255, 276, 40 L. Ed. 960; *Mills v. Smith*, 8 Wall. 27, 33, 19 L. Ed. 346.

If either a purchaser or his grantor is a purchaser "in good faith," then the purchaser is protected. *Mills v. Smith*, 8 Wall. 27, 33, 19 L. Ed. 346.

Bona fide purchaser from fraudulent grantee.—If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties;

but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. *Fletcher v. Peck*, 6 Cranch 87, 132, 3 L. Ed. 162. See, also, *Colorado Coal, etc., Co. v. United States*, 123 U. S. 307, 314, 31 L. Ed. 182; *Swayze v. Burke*, 12 Pet. 11, 23, 9 L. Ed. 980.

27. **Contract executory or quitclaim grantee.**—*Villa v. Rodriguez*, 12 Wall. 323, 20 L. Ed. 406.

28. **Attorney purchasing client's interest pendente lite.**—*Gay v. Parpart*, 106 U. S. 679, 697, 27 L. Ed. 256.

29. **Essential elements.**—*United States v. California, etc., Land Co.*, 148 U. S. 31, 42, 37 L. Ed. 354; *United States v. Winona, etc., R. Co.*, 165 U. S. 463, 477, 41 L. Ed. 789.

30. See ante, "Purchaser of Equitable Title," IV, B, 7; post, "Must Have Complete Legal Title," IV, C, 2.

31. **Must have complete legal title.**—*Hawley v. Diller*, 178 U. S. 476, 487, 44 L. Ed. 1157; *Vattier v. Hinde*, 7 Pet. 250, 269, 8 L. Ed. 675; *Boone v. Chiles*, 10 Pet. 177, 211, 9 L. Ed. 383; *Villa v. Rodriguez*, 12 Wall. 323, 338, 20 L. Ed. 406. See ante, "Purchaser of Equitable Title," IV, B, 7. See, also, the title **PUBLIC LANDS**, vol. 10, p. 141.

valid conveyance, though he paid a valuable consideration, is not protected, as he acquires no title whatever.³²

3. *CONSIDERATION*.—a. *In General*.—To entitle a purchaser to the protection of a court of equity, as against a legal title or a prior equity, he must not only be a purchaser without notice, but he must be a purchaser for a valuable consideration; that is, for value paid.³³ Hence a person who is a mere volunteer, having acquired title by gift, inheritance, or some kindred mode, cannot come within the scope of the term "bona fide purchaser."³⁴

b. *Sufficiency of Consideration*.—To enable a party to claim protection as a bona fide purchaser he must have parted with something possessing an actual value, capable of being estimated in money,³⁵ or he must on the faith of the purchase have changed, to his detriment, some legal position that he before had occupied.³⁶

c. *Giving Security for Purchase Price*.—Mere security to pay the purchase price is not a purchase for a valuable consideration.³⁷

d. *Giving Bond*.—See post, "Before Payment of Purchase Price," IV, C, 4, e, (2).

e. *Payment in Work*.—A party doing work under a contract with the state, making a settlement and receiving a conveyance of lands in payment for that work, is a bona fide purchaser.³⁸

f. *Conveyance for Antecedent Debt*.—The doctrine established by a pre-

32. Grantee in valid conveyance is not protected.—*Williamson v. Ball*, 8 How. 566, 12 L. Ed. 1200; *Williamson v. Berry*, 8 How. 495, 549, 12 L. Ed. 1170; *Williamson v. Irish Presbyterian Congregation*, 8 How. 565, 12 L. Ed. 1200; *Sampeyreac v. United States*, 7 Pet. 222, 241, 8 L. Ed. 665; *Vattier v. Hinde*, 7 Pet. 250, 269, 8 L. Ed. 675; *Gaines v. New Orleans*, 6 Wall. 642, 713, 18 L. Ed. 950; *Polk v. Wendell*, 5 Wheat. 293, 308, 5 L. Ed. 92. See, also, the title PUBLIC LANDS, vol. 10, p. 141, note 33.

Purchase from apparent heir.—Those who purchased property bona fide, from the apparent heir or universal legatee, in possession of the estate as such heir or legatee, could not defend against the claim of the legal and actual heir, otherwise than to give him the benefit of the limitation by prescription, though the property so purchased may belong to another person. *Gaines v. New Orleans*, 6 Wall. 642, 713, 18 L. Ed. 950.

As to purchaser under forged instrument or patents to fictitious persons not being bona fide purchaser, see the title PUBLIC LANDS, vol. 10, p. 141.

33. Valuable consideration essential.—*Dresser v. Missouri, etc.*, R. Constr. Co., 93 U. S. 92, 94, 23 L. Ed. 815; *Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62; *United States v. Des Moines, etc.*, R. Co., 142 U. S. 510, 530, 35 L. Ed. 1099; *Moelle v. Sherwood*, 148 U. S. 21, 30, 37 L. Ed. 350.

Purchasers with notice and upon an inadequate consideration are in no position to invoke the assistance of a court of equity as against a prior grantee upon valuable consideration, on the ground of the inability of the vendor to make the first conveyance. *Roberts v. Northern*

Pac. R. Co., 158 U. S. 1, 14, 39 L. Ed. 873.

34. Mere volunteer not a bona fide purchaser.—*Lykins v. McGrath*, 184 U. S. 169, 173, 46 L. Ed. 485.

35. Sufficiency of consideration.—*Lykins v. McGrath*, 184 U. S. 169, 173, 46 L. Ed. 485; *Boone v. Chiles*, 10 Pet. 177, 204, 9 L. Ed. 383; *Dresser v. Missouri, etc.*, R. Constr. Co., 93 U. S. 92, 94, 23 L. Ed. 815.

Where no money paid as consideration vendee not bona fide purchaser.—A purchase of land by parol and upon which no money as a consideration has been paid, is not sufficient to constitute a vendee a bona fide purchaser. *Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62.

Advantage to city from establishment of military headquarters sufficient.—A conveyance of land by a city by deed of warranty, to the United States for military purposes, the consideration recited therein being the payment of the nominal sum of one dollar, and "divers and other good and sufficient considerations thereunto moving;" the conveyance being, in fact, for the very valuable consideration inuring to the city for the establishment of the military headquarters there, is such a consideration as to constitute the United States a bona fide purchaser for value. *Stanley v. Schwalby*, 162 U. S. 255, 275, 40 L. Ed. 960.

36. Detriment as consideration.—*Lykins v. McGrath*, 184 U. S. 169, 173, 46 L. Ed. 485.

37. Giving security for purchase price.—*Dresser v. Missouri, etc.*, R. Constr. Co., 93 U. S. 92, 94, 23 L. Ed. 815.

38. Payment in work.—*United States v. Des Moines, etc.*, R. Co., 142 U. S. 510, 530, 35 L. Ed. 1099.

ponderance of authority, whatever the rule may be in the case of negotiable instruments, is well settled that the conveyance of lands or chattels as security for an antecedent debt, where no new consideration is given, will not operate as a purchase for value, or defeat existing equities.³⁹

4. **NOTICE**—a. *In General*.—In order for a party to be a bona fide purchaser it is essential that he have no notice of adverse claims.⁴⁰ Caveat emptor is one of the best-settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a bona fide purchaser.⁴¹

b. *Constructive Notice*—(1) *In General*.—Purchasers are bound not only by actual, but also by constructive notice, which is the same in its effects as actual notice.⁴² But a bona fide purchaser without notice is not affected by the intent of his grantor.⁴³ The general rule is that knowledge of such facts and

39. Conveyance for antecedent debt.—Peoples' Sav. Bank v. Bates, 120 U. S. 556, 567, 30 L. Ed. 754.

40. Notice.—Meador v. Norton, 11 Wall. 442, 458, 20 L. Ed. 184; Clarke v. White, 12 Pet. 177, 198, 9 L. Ed. 1046; Wilson v. Wall, 6 Wall. 83, 18 L. Ed. 727; Astor v. Wells, 4 Wheat. 466, 4 L. Ed. 616; Airhart v. Massieu, 98 U. S. 491, 505, 25 L. Ed. 213; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 35 L. Ed. 1062; San Pedro, etc., Co. v. United States, 146 U. S. 120, 139, 36 L. Ed. 912; Roberts v. Northern Pac. R. Co., 158 U. S. 1, 14, 39 L. Ed. 873; United States v. Detroit, etc., Lumber Co., 200 U. S. 321, 333, 50 L. Ed. 499; Brush v. Ware, 15 Pet. 93, 10 L. Ed. 672; Stanley v. Schwalby, 162 U. S. 255, 276, 40 L. Ed. 960; Caldwell v. Carrington, 9 Pet. 86, 9 L. Ed. 60. As to notice generally, see the title **NOTICE**, vol. 8, p. 928. As to notice with reference to public lands, see the title **PUBLIC LANDS**, vol. 10, p. 141.

Executor selling without authority—Purchasers charged with notice.—The executor of an officer in the Virginia line on the continental establishment, obtained a certificate from the executive council of Virginia, as executor, for 4,000 acres of land in the Virginia reserve, in the state of Ohio, and afterwards sold and assigned the same; entries were made, and warrants issued in favor of the assignees, and a survey was made under one of the warrants, in favor of one of the assignees, a bona fide purchaser, who obtained a patent from the United States for the land. It appeared that the executor had no right, under the will, to sell the land to which the testator was entitled. The patent was granted in 1818, and the patentee had been in possession of the land from 1808. The heirs of the officer entitled to the land for military services, in 1839, some of them being minors, filed a bill to compel the patentee to convey the land held by him to them. Held, that the patentee was a purchaser with notice of the prior title of the heirs, and that he was bound to make the conveyance asked from him. Brush v. Ware, 15 Pet. 93, 10 L. Ed. 672.

41. Caveat emptor applicable to purchase only.—Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 35 L. Ed. 1062.

Purchase subject to dower.—Where the vendee of real estate had purchased it, subject to the dower of the widow, of which dower he might have been informed, if he had used proper diligence, a court of equity will not interfere, to release the purchaser; but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed. Greenleaf v. Queen, 1 Pet. 138, 147, 7 L. Ed. 85.

Timber lands.—The rule of law in respect to purchasers of land or timber is the same as that which obtains in other commercial transactions. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he purchases property, the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. Jones v. Simpson, 116 U. S. 609, 615, 29 L. Ed. 742. He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title. United States v. Detroit, etc., Lumber Co., 200 U. S. 321, 332, 50 L. Ed. 499.

Notice of conflicting claim does not preclude being a bona fide purchaser.—That a party may have notice of conflicting claims does not prevent him from being a bona fide purchaser, as he still may, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith. United States v. Southern Pac. R. Co., 184 U. S. 49, 54, 46 L. Ed. 425.

42. Constructive notice.—Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 35 L. Ed. 1062. See, generally, the title **NOTICE**, vol. 8, p. 928.

43. Bona fide purchaser not affected by intent of grantor.—Under the statute of fraudulent conveyance of Ohio, which provides, that "every gift, grant or conveyance of land, tenements, hereditaments, etc., made or obtained, with intent

circumstances as are sufficient to put a purchaser upon inquiry and to show that if he had exercised due diligence it would have led to the discovery of defects in title or equitable rights of others, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.⁴⁴ The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.⁴⁶

(2) *Application of Principles.*—Vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge.⁴⁷ The vendee has a right to rely upon the positive assurances of the vendor and is not put upon inquiry by information received from a third person which is not of such a full and decided character as to amount to the communication of knowledge.⁴⁸ Likewise a bona fide purchaser without notice is not affected by a

to defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons who shall purchase such lands, etc., shall be deemed utterly void, and of no effect;" held, that a bona fide purchaser, without notice, could not be affected by the intent of the grantor to defraud creditors. *Astor v. Wells*, 4 Wheat. 466, 4 L. Ed. 616.

44. Notice of facts putting on inquiry.—*Brush v. Ware*, 15 Pet. 93, 10 L. Ed. 672; *Fitzsimmons v. Ogden*, 7 Cranch 2, 3 L. Ed. 249; *Vattier v. Hinde*, 7 Pet. 250, 274, 8 L. Ed. 675; *Caldwell v. Carrington*, 9 Pet. 86, 9 L. Ed. 60; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1062. See the title NOTICE, vol. 8, p. 930.

Indians—Conveyance to evade restraint on alienation.—Where F., a half-breed Indian, was given a certificate of land script by which he was entitled to locate upon any unoccupied land subject to pre-emption or private sale, but it was expressly provided that "no transfer or conveyance of such script should be valid," and he executed a blank power of attorney and quitclaim deed, and these came into the possession of P., who inserted the name of R. as attorney in the power, and his own name as grantee in the quitclaim deed and a description of certain land, and this title was subsequently confirmed by act of congress, held, that P. was chargeable with notice that the blank power of attorney and quitclaim deed was resorted to for the purpose of evading the provision as to alienation, and that he acquired no title even though the title was confirmed by act of congress. *Felix v. Patrick*, 145 U. S. 317, 325, 36 L. Ed. 719.

As to purchaser of land upon which attachment has been levied being affected with notice, see the title LIS PENDENS, vol. 7, pp. 1054, 1055.

Contract signed "agent for L. and others" as notice of others' rights.—The fact that a paper given by the agent to a purchaser was signed by the former as agent for a third person and "others" is

sufficient to show that the agent was aware that the third person was not the sole owner, and was notice to the purchaser of that fact. *Smith v. McKay*, 161 U. S. 355, 359, 40 L. Ed. 731.

Knowledge or information that vendor has not paid purchase price to his vendor is constructive notice of amount unpaid and of the liability of the land to vendor's lien. *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587.

As to notice of attorney being notice to client, see the titles ATTORNEY AND CLIENT, vol. 2, p. 703; PRINCIPAL AND AGENT, vol. 9, pp. 694, 695.

As to knowledge of mortgagor's agent as to fraudulent release of prior mortgage, see the title PRINCIPAL AND AGENT, vol. 9, p. 695.

Notice to mortgagor's agent as notice to mortgagee.—Notice to an agent employed by the mortgagor to draw a mortgage is not notice to the mortgagee, where the agent was not the agent of both parties. *Astor v. Wells*, 4 Wheat. 466, 486, 4 L. Ed. 616.

Notice of a prior incumbrance to an agent, is notice to the principal. *Astor v. Wells*, 4 Wheat. 466, 4 L. Ed. 616. See the title PRINCIPAL AND AGENT, vol. 9, pp. 692-696.

Suit not prosecuted to judgment.—A suit not prosecuted to a decree or judgment is not constructive notice to a person not a pendente lite purchaser. *Alexander v. Pendleton*, 8 Cranch 461, 469, 3 L. Ed. 624.

46. Charged with constructive notice where negligence not to obtain.—*United States v. Detroit, etc., Lumber Co.*, 200 U. S. 321, 333, 50 L. Ed. 499; *Wilson v. Wall*, 6 Wall. 83, 91, 18 L. Ed. 727.

47. Vague rumor or suspicion.—*Stanley v. Schwalby*, 162 U. S. 255, 276, 40 L. Ed. 960; *Wilson v. Wall*, 6 Wall. 83, 18 L. Ed. 727.

48. Information from third person not amounting to notice.—*Boyce v. Grundy*, 3 Pet. 210, 218, 7 L. Ed. 655.

Where a city having a quitclaim deed to certain land, donated the lands to the

prior disposition of the land by articles of partnership not of record.⁴⁹

Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance.⁵⁰

c. *Possession as Notice*—(1) *In General*.—The law is perfectly well settled, both in England and this country, except perhaps in some of the New England States, that open, notorious and continued possession of land, under apparent claim of ownership, is notice to every one of whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable in its nature, and of all fact which the proposed purchaser might have learned by due inquiry.⁵¹ Such possession of the land as the land is susceptible of,

United States by general warranty deed, the city having knowledge of the claims of a third person thereto, and such knowledge being communicated to the government attorney searching the title, and the attorney searched the records, not finding such person in the chain of title, and satisfied himself that such person had never paid the purchase money, and found no deed to such person recorded and hence advised the United States the title was good, held, that the United States was a bona fide purchaser. *Stanley v. Schwalby*, 162 U. S. 255, 40 L. Ed. 960. See the title ATTORNEY AND CLIENT, vol. 2, p. 703.

A mere description of land as "known as the McMillan land" is not notice of an unrecorded deed to McMillan. *Stanley v. Schwalby*, 162 U. S. 255, 277, 40 L. Ed. 960.

A mere change in the opinions of the officers of the government, as to the validity of a railroad company's title, although made known to parties proposing to purchase from such company, is not sufficient to take away from them the protection of good faith. *United States v. Southern Pac. R. Co.*, 184 U. S. 49, 54, 46 L. Ed. 425.

49. Articles of partnership.—*Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 383; *Gilmer v. Poindexter*, 10 How. 257, 268, 13 L. Ed. 411.

On the 20th day of November, 1835, P., by a conveyance of record, conveyed his right in certain lands in question to H., and on the same day, by articles of copartnership with H., not of record, authorized H. to apply these lands for the mutual benefit of P. and H. Held, a purchaser from H. without notice is not affected by these articles. *Gilmer v. Poindexter*, 10 How. 257, 13 L. Ed. 411.

50. Notice of sale as notice of unrecorded conveyance.—*Stanley v. Schwalby*, 162 U. S. 255, 276, 40 L. Ed. 960; citing *The Distilled Spirits*, 11 Wall. 356, 367, 20 L. Ed. 167; *Wilson v. Wall*, 6 Wall. 83, 18 L. Ed. 727.

51. Possession as notice to purchasers.—*Kirby v. Tallmadge*, 160 U. S. 379, 383, 384, 40 L. Ed. 463; *McLean v. Clapp*, 141 U. S. 429, 436, 35 L. Ed. 804; *Landes v. Brant*, 10 How. 348, 375, 13 L. Ed. 449; *Boone v. Chiles*, 10 Pet. 177, 223, 9 L. Ed. 383; *Bowman v. Wathen*, 1 How.

189, 11 L. Ed. 97; *Crews v. Burcham*, 1 Black 352, 17 L. Ed. 91; *Lea v. Polk County, etc., Co.*, 21 How. 493, 498, 16 L. Ed. 203; *Hughes v. United States*, 4 Wall. 232, 236, 18 L. Ed. 303; *Noyes v. Hall*, 97 U. S. 34, 24 L. Ed. 909; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1062; *Dickerson v. Colgrove*, 100 U. S. 578, 584, 25 L. Ed. 618; *Miller v. Texas, etc., R. Co.*, 132 U. S. 662, 33 L. Ed. 487; *Long v. Thayer*, 150 U. S. 520, 523, 37 L. Ed. 1167; *Horbach v. Porter*, 154 U. S. 549, 18 L. Ed. 30.

Reason for rule.—Actual and unequivocal possession is notice, because it is incumbent on one who is about to purchase real estate to ascertain by whom and in what right it is held or occupied; and the neglect of this duty is one of the defaults which, unexplained, is equivalent to notice. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442, 35 L. Ed. 1062.

Purchaser of land in possession of railroad.—It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession. *Roberts v. Northern Pac. R. Co.*, 158 U. S. 1, 10, 39 L. Ed. 873.

Land fraudulently surveyed to contain town site.—A corporation is not a bona fide purchaser of tracts of land fraudulently surveyed so as to contain land not within the patent and also a town site not within the patent, where the president of the company, and a large stockholder, together with others interested, visited the property before the purchase and were warned of adverse claims; they examined the land and could easily have perceived the situation of some of the points named in the description, and also the presence within the limits of the patent of the town site. *San Pedro, etc., Co. v. United States*, 146 U. S. 120, 139, 36 L. Ed. 912.

Presumption arising from possession.—Generally speaking, the presumption aris-

according to its adaptation to use, if otherwise sufficient, will constitute notice.⁵²

(2) *By Husband and Wife*.—The occupancy of a husband and wife is not by law referable to the husband alone as the head of the family, so as to bind the purchaser only with notice of the occupation by the husband.⁵³ Though where land is occupied by two persons, as for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other.⁵⁴ But, where the land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, the proposed purchaser is bound to make some inquiry as to their title.⁵⁵ A polygamous wife in possession of property with her husband, who is record owner, has not such possession as to constitute notice to purchasers of claims she may have to the property by reason of a secret agreement with her husband, the record owner.⁵⁶

(3) *Requisites of Possession*—(a) *Must Be Open and Unambiguous*.—"Where possession is relied upon as giving constructive notice it must be open and unambiguous, and not liable to be misunderstood or misconstrued. It must be sufficiently distinct and unequivocal, so as to put the purchaser on his guard."⁵⁷

ing from the fact of possession of real property is that the person in possession is the owner in fee. If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title. *Bradshaw v. Ashley*, 180 U. S. 59, 63, 45 L. Ed. 423.

A land company purchasing land granted to a railroad company cannot be considered as purchasing in good faith from the railroad company, where it took its conveyance with notice, from possession, of all the rights and claims of the party in possession. *United States v. Winona, etc.*, R. Co., 165 U. S. 463, 485, 41 L. Ed. 789.

52. Possession according to adaptation sufficient.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 443, 35 L. Ed. 1062. See, also, *Ewing v. Burnet*, 11 Pet. 41, 53, 9 L. Ed. 624.

"Possession may be actual or constructive; actual, when there is an occupancy, such as the property is capable of, according to its adaptation to use; constructive, as when a person has the paramount title, which, in contemplation of law, draws to and connects it with the possession. But to be adverse it must be a *pedis possessio*, or an actual possession." *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 442, 35 L. Ed. 1062.

Extent of possession depends upon nature and locality and of property.—What acts may or may not constitute a possession are necessarily varied, and depend to some extent upon the nature, locality and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 443, 35 L. Ed. 1062.

53. Possession by husband and wife not referable to husband alone.—*Kirby v.*

Tallmadge, 160 U. S. 379, 384, 40 L. Ed. 463.

54. Title in one, possession not notice of other's claims.—*Kirby v. Tallmadge*, 160 U. S. 379, 388, 40 L. Ed. 463.

55. Neither husband nor wife having recorded title.—*Kirby v. Tallmadge*, 160 U. S. 379, 388, 40 L. Ed. 463.

56. Townsend v. Little, 109 U. S. 504, 27 L. Ed. 1012. See post, "Requisites of Possession," IV, C, 4, c, (3).

57. Possession must be open.—*Kirby v. Tallmadge*, 160 U. S. 379, 384, 40 L. Ed. 463; *Townsend v. Little*, 109 U. S. 504, 511, 27 L. Ed. 1012.

Polygamous wife—Secret agreement by husband.—In *Townsend v. Little*, 109 U. S. 504, 27 L. Ed. 1012, one James Townsend bought and took possession of a public house in Salt Lake City, and lived in it with his lawful wife and a plural or polygamous wife, the latter, who was the appellant, taking an active part in conducting the business of a hotel. He subsequently ceased to maintain relations with the appellant as his polygamous wife, but, being desirous of having the benefit of her services, both concealed this fact. He made a secret agreement with her that if she would thus remain, she should have a half interest in the property. He afterwards acquired his legal title to the property without a disclosure of the secret agreement. His interest therein having subsequently passed into the hands of innocent third parties for value without notice of appellant's claim under the secret agreement, it was held that the joint occupation of the premises by herself and Townsend, under the circumstances, was not a constructive notice of her claim, and that she had no rights in the premises as against a bona fide purchaser without notice. There was evidently two substantial reasons why appellant's possession was not notice of

(b) *Must Be Inconsistent with Record Title*.—The rule is universal that if the possession be consistent with the record title, it is no notice of any additional or different title or interest to a purchaser who has relied upon the record, but has had no actual notice beyond what is thereby disclosed.⁵⁸

(c) *Must Be Continuous Possession*.—See ante, "In General," IV, C, 1.

d. *Title Papers as Notice*—(1) *Recitals*.—No principle is better established than that a purchaser must look to every part of the title which is essential to its validity,⁵⁹ and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice.⁶⁰ Hence one who purchases of another whose deed shows the consideration is "to be paid" in installments at subsequent dates, is charged with notice that a vendor's lien is charged on the land.⁶¹ But where a trust does not appear on the title papers, but is verbal, a purchaser for a valuable consideration is not affected by it, unless he is a purchaser with notice.⁶²

(2) *Recordation*.—One who purchases land from the heir at law for a valuable consideration paid, without legal or constructive notice of a will, is a bona fide purchaser as against parties claiming under a will probated in another state, a copy of which will has been probated and admitted to record in the state in which the land lays, but which has never been proved in the state where the land lays as required by the laws of the state.⁶³

(3) *Quitclaim Deed*.—See ante, "Quitclaim Purchaser," IV, B, 8.

e. *Effect of Notice*—(1) *In General*.—A purchaser, with notice, can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights.⁶⁴ And if a purchaser acquires a legal title, having notice of a prior equity of another, he becomes a

her rights. First, James Townsend took the legal title to himself in 1873 and held it until 1878, when the purchase was made; and second, his agreement with the appellant was not one with his lawful but his polygamous wife, and was also a secret one. The case is obviously not one of a joint occupation by a husband and his lawful wife, neither of them having any title thereto. *Kirby v. Tallmadge*, 160 U. S. 379, 385, 40 L. Ed. 463.

58. Possession must be inconsistent with record title.—*Kirby v. Tallmadge*, 160 U. S. 379, 386, 40 L. Ed. 463.

59. Purchaser must look to every part of title.—*Brush v. Ware*, 15 Pet. 93, 110, 10 L. Ed. 672.

60. Purchaser charged with notice of all facts on their face.—*Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 437, 35 L. Ed. 1062; *Northwestern Bank v. Freeman*, 171 U. S. 620, 629, 43 L. Ed. 307; *Gregg v. Sayre*, 2 U. S. 244, 250, 8 L. Ed. 932; *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587; *Brush v. Ware*, 15 Pet. 93, 110, 10 L. Ed. 672; *Wormley v. Wormley*, 8 Wheat. 421, 447, 5 L. Ed. 651.

A recital in the record of another deed, made seventeen years after a first one unrecorded, between the original grantor and the heir at law of the original grantee—the grantor having already sold to a second purchaser, whose deed is recorded—"that a sale had been made to such origi-

nal grantee, but no deed given, or if given, lost," is not constructive notice to a third person purchasing of such second grantee. *Mills v. Smith*, 8 Wall. 27, 19 L. Ed. 346.

Agreement in chain of title as notice.—Where the right of the mortgagees purchasing committee to use a right of way is based solely upon an agreement, which is a link in their chain of title, they hold under it, and must hold subject to its terms and conditions, irrespectively of the question of notice. *Joy v. St. Louis*, 138 U. S. 1, 35, 34 L. Ed. 843.

61. Recital as to nonpayment of purchase price.—*Cordova v. Hood*, 17 Wall. 1, 5, 21 L. Ed. 587. See, generally, the title VENDORS' LIENS.

62. Verbal trust not binding.—*Alexander v. Pendleton*, 8 Cranch 461, 467, 3 L. Ed. 624.

63. Recordation.—*McCormick v. Sulivant*, 10 Wheat. 192, 201, 6 L. Ed. 300.

Where a purchaser in good faith, relied on the erasure, of a mortgage and dealt with the vendors as the owners of an unencumbered plantation, he must be deemed a third party entitled to the protection of the laws requiring reinscription, though the erasure was procured by fraud. *Picket v. Foster*, 149 U. S. 505, 531, 37 L. Ed. 829. See the title RECORDING ACTS, vol. 10, p. 587.

64. Effect of notice.—*Hughes v. Edwards*, 9 Wheat. 488, 497, 6 L. Ed. 142;

trustee for that other, to the extent of his equity; but if such person has no equity, then there is nothing for which the purchaser of the legal estate can be a trustee.⁶⁵

(2) *Before Payment of Purchase Price.*—It is a settled rule in equity, that a purchaser, without notice, to be entitled to protection, must not only be so, at the time of the contract or conveyance, but at the time of the payment of the purchase money.⁶⁶ As to what the purchaser pays after notice, he is not a purchaser in good faith. He then pays with knowledge of the fraud, to which he becomes a consenting party.⁶⁷ And if he pays part and gives bond for the residue, notice of an equity before payment of the money, though after giving the bond, is sufficient.⁶⁸

f. *Evidence.*—Whether a party had notice of a prior unrecorded deed is a question for the jury.⁶⁹

5. *GOOD FAITH.*—The question of good faith is largely a question of notice and is treated ante under "Notice," IV, C, 4.

D. Pleading.—In setting up a bona fide purchase, without notice, by plea or answer, it must state the deed of purchase, the date, parties and contents briefly; that the vendor was seised in fee, and in possession, the consideration must be stated, with a distinct averment that it was bona fide and truly paid, independently of the recital in the deed; notice must be denied, previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to from which notice can be inferred; and the answer or plea must show how the grantor acquired title.⁷⁰

Wilson v. Mason, 1 Cranch 44, 100, 2 L. Ed. 29; *Caldwell v. Carrington*, 9 Pet. 86, 9 L. Ed. 60.

Purchaser with notice can only protect himself by lapse of time.—A bona fide purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself, by the lapse of time, or other equity, under the same circumstances which would afford a protection to the mortgagor. *Hughes v. Edwards*, 9 Wheat. 488, 6 L. Ed. 142.

65. Claim must be valid in equity.—*Wilson v. Mason*, 1 Cranch 44, 99, 2 L. Ed. 29.

Sums paid after discovery of fraud can not be recovered.—Where real estate is sold for a sum payable in installments, and circumstances occur showing the existence of fraud, or that it would be inequitable to take the title, the purchaser can recover back the sum paid before notice of the fraud, but not that paid afterwards. *Dresser v. Missouri, etc., R. Constr. Co.*, 93 U. S. 92, 94, 23 L. Ed. 815.

66. Must be purchaser before payment of purchase price.—*Wormley v. Wormley*, 8 Wheat. 421, 447, 5 L. Ed. 651; *Boone v. Chiles*, 10 Pet. 177, 211, 9 L. Ed. 383; *Smith v. Orton*, 131 U. S., appx. lxxv, lxxviii, 18 L. Ed. 62; *Lytle v. Lansing*, 147 U. S. 59, 70, 37 L. Ed. 78; *Swayze v. Burke*, 12 Pet. 11, 9 L. Ed. 980; *Vattier v. Hinde*, 7 Pet. 250, 269, 8 L. Ed. 675; *Villa v. Rodriguez*, 12 Wall. 323, 338, 20 L. Ed. 406.

Purchaser at sheriff's sale.—It is clear that a purchaser at sheriff's sale cannot

protect himself against a prior claim of which he had no notice; or be held a bona fide purchaser, unless he shall have paid the money. *Swayze v. Burke*, 12 Pet. 11, 9 L. Ed. 980.

Arkansas—Answer must deny notice at time of payment and delivery of deed.—In Arkansas, the answer of the vendee in support of the defense of being an innocent purchaser should deny notice of any adverse claim at the time of the payment of the purchase money, and also at the time of the delivery of the deed to him. But, where it appears upon the face of the answer that the purchase for a certain price and the delivery of the deed were at the same time, and as parts of one transaction, the denial of notice until the defendant had made the purchase is equivalent to a denial of notice at the delivery of the deed. *McDonald v. Belding*, 145 U. S. 492, 498, 36 L. Ed. 788.

67. Not a purchaser in good faith as to payment after notice.—*Dresser v. Missouri, etc., R. Constr. Co.*, 93 U. S. 92, 94, 23 L. Ed. 815.

68. Notice before payment of bond sufficient.—*Dresser v. Missouri, etc., R. Constr. Co.*, 93 U. S. 92, 94, 23 L. Ed. 815.

69. Evidence.—*Carpenter v. Dexter*, 8 Wall. 513, 533, 19 L. Ed. 426.

70. Necessary averments in plea of bona fide purchaser.—*Boone v. Chiles*, 10 Pet. 177, 179, 9 L. Ed. 383.

To bring the defense within the rule which affords protection to a bona fide purchaser without notice it must be averred in the plea or answer and proved,

V. Remedies.

A. Of Vendor—1. ACTION FOR PURCHASE MONEY—a. *In General.*—Refusal to pay the money due on a contract of purchase, unaccompanied by any promise to pay the money at a future day, is equivalent to a direct notice that the vendee declines to execute the contract, and gives an immediate right to action.⁷¹ If notes given for the purchase price of property which have been assumed by a purchaser from such vendee are not paid, the vendor may apply by bill in equity against the vendee and the purchaser from him, tendering a good deed, and ask that they pay the purchase money at short date or be foreclosed from setting up any right to the land, and that it be sold and the proceeds applied to paying the purchase money.⁷² But bringing an action for the purchase price constitutes a distinct and affirmative ratification of the sale and precludes the vendor from rescinding the sale thereafter.⁷³ So where one conveys land by deed, pursuant to a parol agreement, the law implies a promise by the grantee to pay the purchase money, and it may be recovered; but the action must be in case, and not debt on the specialty.⁷⁴

b. *Defenses*—(1) *Defect of Title*—(a) *In General.*—The rule of the civil law, that the price of the sale of real property cannot be recovered by the vendor if the vendee has been disturbed in his possession by prior incumbrances or paramount titles, or has just grounds for apprehension on that account, is the rule of chancery where there has been fraud, or where the covenants of warranty are inadequate to the protection of the vendee by reason of the insolvency of the vendor.⁷⁵ But except in special cases, a vendee in posses-

that the conveyance was by deed, and that the vendee was seised of the legal title; that all the purchase money was paid, and paid before notice. There must not only be a distinct denial of notice before the purchase, but a denial of notice before payment. Even if the purchase money had been secured to be paid, yet if it be not, in fact, paid before notice, the plea of purchase for a valuable consideration will be overruled. *Smith v. Orton*, 131 U. S., appx., lxxv, lxxviii, 18 L. Ed. 62.

The title purchased must be, apparently, perfect, good at law, a vested estate in fee simple; it must be a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. Such is the case which must be stated to give the defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out. *Boone v. Chiles*, 10 Pet. 177, 179, 9 L. Ed. 383.

71. Refusal to pay gives immediate right to action.—*Gregg v. Von Phul*, 1 Wall. 274, 282, 17 L. Ed. 536.

County not authorized to pay according to contract.—Where a conveyance of land to a county was invalid because the county had no power to bind itself to pay in the manner specified, the right to a reconveyance accrued at once and the right of action was not postponed until the time for payment of the first installment of the purchase price. *Chap-*

man v. County of Douglas, 107 U. S. 348, 358, 27 L. Ed. 378.

72. Rights of vendor where purchase money notes are not void.—*Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

73. Action for price as ratification of sale.—*Stuart v. Hayden*, 169 U. S. 1, 15, 42 L. Ed. 639.

Where one of the parties to an exchange of stock for lands, i. e., the owner of the land, brings an action at law against the other to recover of him damages for his fraudulent misrepresentation of the value of his stock at the time of the trade, this was in effect an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid and its title was vested in the other, and on no other theory, and it was a distinct and affirmative ratification of the transfer of this stock and the conveyance of the real estate, after full knowledge of all the facts, and it barred plaintiff of all right to rescind the trade thereafter. *Stuart v. Hayden*, 169 U. S. 1, 15, 42 L. Ed. 639.

As to vendor, conveying tract by mistake not being restricted to action to cancel conveyance, see the title RESCIS-SION, CANCELLATION AND REFORMATION, vol. 10, p. 804.

74. Form of action.—*Carrol v. Green*, 92 U. S. 509, 514, 23 L. Ed. 738.

75. Civil-law rule of chancery in case of fraud.—*Wanzer v. Truly*, 17 How. 584, 585, 15 L. Ed. 216. See ante, "Defects in

sion cannot, at law or in equity, contest the payment of the purchase money by showing an alleged defect of title; there being no fraud or misrepresentation, he must rely on the covenants, if there are any, in his deed.⁷⁶ If there is no fraud and no covenants to secure the title, the vendee is without remedy, as the vendor selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants in the deed. And relief will not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.⁷⁷ Failure of consideration, through defect of title, must be total, in order to constitute a good defense to an action on a note given for the purchase price of land.⁷⁸

(b) *Claim Merely Nominal*.—But it is no defense to an action by the vendor that the land was subject to a claim of a third person where such person's claim was merely nominal, and his equitable title was not such that a court of equity would enforce.⁷⁹

(c) *Effect of Agreement Not to Enforce if Title Bad*.—An agreement not to enforce a bond given in payment of purchase price should title prove bad, may be pleaded as a defense, though title proves bad after maturity of bond.⁸⁰

c. *Pleading—Declaration*.—It may be laid down as a settled rule, that at law to entitle the vendor to recover the purchase money, where the covenants are dependent and concurrent, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser.⁸¹ But if the payment of the purchase price for lands is a condition precedent to the conveyance, the vendor may enforce payment without alleging a conveyance or tender of conveyance; an allegation of readiness and willingness to convey, upon payment of the purchase money, is sufficient.⁸²

Title as Affecting Rights and Obligations of Parties," II, A, 1, d.

76. Defect of title a defense.—Patton v. Taylor, 7 How. 132, 12 L. Ed. 637, citing Wanzer v. Truly, 17 How. 584, 585, 15 L. Ed. 216; Refeld v. Woodfolk, 22 How. 318, 327, 16 L. Ed. 370; Noonan v. Lee, 2 Black 499, 508, 17 L. Ed. 278; Peters v. Bowman, 98 U. S. 56, 60, 25 L. Ed. 91.

77. Vendee without covenants.—Noonan v. Lee, 2 Black 499, 508, 17 L. Ed. 278; Patton v. Taylor, 7 How. 132, 159, 12 L. Ed. 637; Peters v. Bowman, 98 U. S. 56, 60, 25 L. Ed. 91.

78. Defect of title must be total.—Greenleaf v. Cook, 2 Wheat. 13, 4 L. Ed. 172.

Louisiana—Indorsee suing on vendee's notes.—Where certain notes were originally given for the purchase of a plantation, which plantation was afterwards reclaimed by the vendor (under the laws of Louisiana and the deed), and, in the deed of conveyance made in consequence of such reclamation, the plantation remained bound for the payment of these notes, these facts do not show "a want of lawful consideration, failure of consideration, payment, discount, nor set-off," and consequently furnish no defense for the maker when sued by the indorsee. Brabston v. Gibson, 9 How. 263, 13 L. Ed. 131.

79. Claim merely nominal.—Greenleaf v. Queen, 1 Pet. 138, 147, 7 L. Ed. 85.

80. An agreement not to enforce a bond upon the failure of title to the land, is conditional in its terms and depends for its operation upon the happening of a contingent event, and becomes by the happening of that event upon the failure of title to the land absolute, and may be pleaded as a release to the action, and the agreement is not limited in its operation to the time when the bond matures, or the penalty becomes forfeited, but is a perpetual covenant not to enforce the bond in case the designated event at any time happens. Noonan v. Bradley, 9 Wall. 394, 406, 19 L. Ed. 757.

81. Performance, offer to perform or waiver must be alleged.—Bank v. Hagner, 1 Pet. 454, 466, 7 L. Ed. 219.

A plaintiff who sues upon an agreement containing a covenant must aver and prove, not merely his readiness to perform it in the words of the contract, but that he had a good title which he was ready and willing to convey by a legal deed. Washington v. Ogden, 1 Black 450, 451, 17 L. Ed. 203.

As to statute of jeofails curing omission of formal conclusions to counts in declaration, see the title AMENDMENTS, vol. 1, p. 310.

82. When allegation of readiness to convey sufficient.—Loud v. Pomona, etc., Co., 153 U. S. 564, 576, 38 L. Ed. 822.

3. *Costs*.—Where confessedly the title of a party claiming land as owner, and who has agreed to sell, is denied by the vendee and a dispute has taken place about title, a tender of a deed would be a useless ceremony, and costs on a bill filed to enforce the payment of the purchase money must abide the result of the suit.⁸³

2. FOR BREACH OF CONTRACT—*a. In General*.—Where a party has sold that which he cannot convey, he cannot execute his contract and must answer in damages.⁸⁴

b. Measure of Damages.—The measure of damages for the breach of a contract for the sale of a right to purchase land by the purchaser is the difference between the contract price and the salable value of the right when payment was to be made.⁸⁵

3. RECOVERY OF POSSESSION.—In case of a default in the payments the vendor may bring ejectment, and to recover back the possession, but in that case, the purchaser, by going into a court of equity within a reasonable time and offering payment of the purchase money, together with costs, is entitled to a performance of the contract.⁸⁶ The owners of real estate recovering judg-

83. *Costs—Tender of deed useless*.—*Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

84. *Action for breach of contract*.—*McFerran v. Taylor*, 3 Cranch 269, 281, 2 L. Ed. 436.

Tract represented to lie on one fork of river when it was on another fork.—Where M. sold T. a certain number of acres of land to be selected by T. out of a tract located by M. and M. unknowingly represented the tract to lie on one fork of a river when in reality it was on another fork of the same river where the lands proved to be less valuable, T. is entitled to damage sustained by the inability of M. to perform his contract, though the particular location was not an inducement to the contract, both parties being ignorant of the mistake. *McFerran v. Taylor*, 3 Cranch 269, 281, 2 L. Ed. 436.

85. *Measure of damages*.—*Telfener v. Russ*, 145 U. S. 522, 534, 36 L. Ed. 800.

Salable value fixed by resale after due notice.—"That is the rule laid down by the supreme court of Texas in *Kempner v. Heidenheimer*, 65 Texas 587. That court also adds that the salable value 'may be fixed by a fair resale, after notice to the party to be bound by the price as the value, within a reasonable time after the breach.' In that case it was also held that, where no sale was made, the plaintiff was only entitled to recover the difference between the market value at the date of the defendant's breach and the price he had agreed to pay, and that the duty devolved upon plaintiff to establish these factors in the measure of damages. The same rule as to the measure of damages upon a breach of a contract for the sale of lands was held to be the proper one by the supreme court of Massachusetts in *Old Colony Railroad v. Evans*, 6 Gray 25, 36, after considering numerous authorities on the subject. A similar rule prevails in Pennsylvania. *Bowser v.*

Cessna, 62 Penn. St. 148, 151. The same rule must apply where the contract is not for the land but for a right to purchase the land. The measure of damages must be the difference between the contract price and the salable value of the right when payment was to be made." *Telfener v. Russ*, 145 U. S. 522, 36 L. Ed. 800. See the title PUBLIC LANDS, vol. 10, p. 1.

86. *Recovery of possession*.—*Hansbrough v. Peck*, 5 Wall. 497, 506, 18 L. Ed. 520. See, generally, the title EJECTMENT, vol. 5, p. 695.

Notice to quit unnecessary.—Where a purchaser of real estate fails to comply with the terms of the contract under which he obtained possession, the vendor is at liberty to treat the contract as rescinded, and to regain the possession by ejectment. In such case, in the state of Georgia and in this country generally, it is not necessary to give notice to quit before bringing the action. *Burnett v. Caldwell*, 9 Wall. 290, 19 L. Ed. 712.

In ejectment brought under such circumstances an inquiry of the defendant, when examined as a witness, what he gave for the property, how much he had paid, in what manner he had paid, and whether he had paid a valuable consideration, is irrelevant. *Burnett v. Caldwell*, 9 Wall. 290, 291, 19 L. Ed. 712.

Injunction to restrain judgment in ejectment.—There were two titles to a tract of land, the senior title held by U. and the junior by B., both derived from the same person who had sold to both. B. soon afterwards sold to C., who paid B. and took possession. U. subsequently agreed to ratify the sale from the original holder to B., upon receiving an assignment of B.'s bond for the purchase money, not yet due, and other securities. The bond not being paid, U. brought an ejectment and obtained a judgment. B.'s assignees filed a bill to obtain a perpetual injunction. Held, that there was

ments for the land and rents and profits therefrom, may settle with the persons in possession so far as their personal liability is concerned without releasing the warrantors, provided it is stipulated, or shown to be the intention of the parties, that the grantee's warrantors should not be discharged.⁸⁷

B. Of Purchaser—1. **RECOVERY OF PURCHASE MONEY**—a. *In General*.—A vendee, in possession under a contract of purchase or a deed with covenants, cannot be permitted to claim the purchase money already paid, to be held as a security for the completion or protection of his title.⁸⁸ But money paid upon a sale of property may be recovered where the vendor warranted the title and it turned out that he had no title.⁸⁹

b. *Vendee in Default*.—Where in part performance of an agreement the vendee has advanced money, or done an act, and then stops short and refuses to proceed to its conclusion, the vendor being ready and willing to proceed and fulfill all his stipulations according to the contract, the vendee will not be permitted to recover back for what he has thus advanced or done.⁹⁰ Likewise if the contract provides that in default of any payments, the vendor could deem the contract at an end and all payments forfeited, the vendor's act in bringing an action to annul such contract and for possession, is not in rescission of the contract but in affirmance of the same and the vendee is not entitled to return of purchase money paid.⁹¹

c. *Grounds of Action*—(1) *Vendor Unable to Make Title*.—A vendee may recover the money paid for his portion of an internal alley, where the vendee acquires no title to such proportion of the alley.⁹² If the vendee take possession of property under an executory contract of sale, and the vendor cannot make a title, or neglect to do so, the vendee may disaffirm the contract, and restore the possession, and may sustain an action to recover back the purchase money if it has been paid.⁹³

a privity of contract between them and U., and a perpetual injunction should be granted upon their fulfilling the obligations of B., their assignor, and it was not their duty under the circumstances, to have tendered the money to U. A power in B. to resell, and a sale made under that power, prior to U.'s giving his assent to the sale from the original holder to B. himself, did not extinguish the equitable right of U. to receive the purchase money, or to proceed against the land, and U.'s right was not destroyed by lapse of time, because he had brought suit on B.'s bond and the other securities, and was not in a condition for a long time to make a valid title. *Buchanan v. Upshaw*, 1 How. 56, 11 L. Ed. 46.

87. **Owners may settle with possessors without releasing their warrantors**.—*New Orleans v. Gaines*, 138 U. S. 595, 610, 34 L. Ed. 1102.

88. **Purchase money not security for protection of title**.—*Refeld v. Woodfolk*, 22 How. 318, 328, 16 L. Ed. 370.

Where the purchaser had notice of an encumbrance when he made and performed his agreement of purchase, and did not stipulate for any additional indemnity to that resulting from the covenant of warranty, the court concluded that he was willing to rely upon the protection afforded by the covenants in his deed, and the court will not add an obligation to require the vendor's heirs to deposit additional security for the fulfillment of the contract. *Refeld v. Wood-*

folk, 22 How. 318, 330, 16 L. Ed. 370.

As to action to recover purchase money by minor whose guardian had illegally purchased real estate for minor, see the title **GUARDIAN AND WARD**, vol. 6, p. 604.

89. *LeRoy v. Beard*, 8 How. 451, 12 L. Ed. 1151. See ante, "Defenses," V, A, 1, b.

90. **Vendee in default—Recovery of purchase money**.—*Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520.

91. **Contract providing for annulment of contract**.—*Hansbrough v. Peck*, 5 Wall. 497, 505, 18 L. Ed. 520.

92. **Money paid for proportion of alley may be recovered when vendee acquires no title**.—In the sales of lots, in the city of Washington, the lots are not chargeable for their proportion of an internal alley, laid out for the common benefit of those lots; although the practice so to charge them has been heretofore universally acquiesced in by purchasers; and if a purchaser had acquiesced in that practice, and has received a conveyance, accordingly, without objection, yet he does not thereby acquire a fee simple in such proportion of the alley, and may, in equity, recover back the purchase money which he has paid therefor. *Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 792.

93. **Vendee in possession may disaffirm contract where vendor unable to convey**.—*Bank v. Hagner*, 1 Pet. 454, 455, 468, 7 L. Ed. 219.

(2) *Mistake, Imposition or Deceit*.—He who sells property on a description given by himself, is bound in equity to make good that description; and if it be untrue in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.⁹⁴

d. *Dismissal of Bill for Specific Performance as Bar*.—The general dismissal of a bill for a specific performance of a contract for the sale of land will not operate as a bar to future proceedings at law, to recover the money paid on the contract and to be returned under the term terms of the contract.⁹⁵

e. *Form of Action*.—If the contract of sale has been fully executed by a conveyance with a covenant of warranty, and the payment of the purchase money, the remedy for a defect of title is by an action on the covenant.⁹⁶

f. *Evidence*.—In an action of assumpsit for money had and received, to recover back the purchase money of land, the deed from the vendor to the purchaser is admissible in evidence to prove the amount paid and acknowledgment of such payment, and, to maintain the action, it is sufficient for the plaintiff to prove that the defendant received the money by mistake, imposition or deceit.⁹⁷

2. FOR BREACH OF CONTRACT—*a. Measure of Damages*.—In an action at law, by the vendee, against the vendor, for a breach of the contract, in not conveying the property, the proper measure of damage is not the price stipulated in the contract, but the value at the time of the breach.⁹⁹ In a case where it would be difficult to ascertain the injury resulting from

Payment in wheat—Price of wheat may be recovered in case of breach to convey.

—It would, therefore, appear that there was a contract whereby the defendant below was to grant and convey unto the plaintiff certain tracts of land by a good and sufficient deed of conveyance, in consideration whereof the plaintiff was to deliver to the defendant twelve thousand bushels of wheat; that the plaintiff performed his part of the contract by delivering the said wheat, which was received by the defendant; that the plaintiff thereupon demanded of the defendant a conveyance of the land; that defendant neglected and refused to grant and convey said tracts of land by any good or sufficient deed; and that, as to one of the tracts, the defendant had no title to convey. Upon such a state of facts it seems plain that the plaintiff had a right to treat the contract as at an end, and to bring an action to recover the value of the wheat he had delivered to the defendant, and such other damages as he might have suffered by reason of the failure of the latter to perform his part of the contract; and, a fortiori, that he might waive any demand for consequential damages, and confine his claim to a demand for the value of the wheat. In the latter event he might well assert his claim by a count alleging the delivery and receipt of the wheat, a consequent duty on the defendant to pay its value, and a demand for the same. Under the ordinary system of pleadings, an action of assumpsit would lie to recover back purchase money paid upon a contract of sale which has been rescinded. *Ankeny v. Clark*, 148 U. S. 345, 352, 37 L. Ed. 475.

94. *McFerran v. Taylor*, 3 Cranch 269, 2 L. Ed. 436. See *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42. See post, "Evidence," V, B, 1, f.

95. *Dismissal of bill for specific performance as bar to action*.—*Holt v. Rogers*, 8 Pet. 420, 433, 8 L. Ed. 995.

96. *Proper action where covenant of warranty*.—*Kimball v. West*, 15 Wall. 377, 21 L. Ed. 95.

If a grantor undertakes to sell or mortgage a larger interest than he possesses, or an interest unencumbered, which is in fact encumbered, the remedy for such an excess in the conveyance is an action on the covenants, and not to construe the deed as granting more than the grantor himself possessed. *Foxcroft v. Mallett*, 4 How. 351, 378, 11 L. Ed. 1008.

97. *Evidence*.—*D'Utricht v. Melchor*, 1 Dall. 428, 1 L. Ed. 208.

Purchaser insolvent—Evidence to show indorser was substituted.—Where there was a contract for the sale of land for the purchase of which indorsed notes were given, but before the time arrived for the making of a deed, the purchaser failed, and the liability to pay the note became fixed upon the indorser; and a new contract was made between the vendor and the indorser, held, in order to protect the indorser, he should be substituted in place of the original purchaser, fresh notes given and the time of payment extended, and that evidence was admissible to show that the latter contract was a substitute for the former. *Bradford v. Union Bank*, 13 How. 57, 14 L. Ed. 49.

99. *Measure of damages for breach of contract*.—*Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218.

the breach of contract, or the sum in damages by which the injury might be compensated, the supreme court will not themselves ascertain the injury nor the damages, nor direct an issue quantum damnificatus, where the court can lay hold of a simple, equitable, and precise rule to ascertain the amount. If the contract has been partly executed by a conveyance of a part of the land, and the vendor is unable to convey the residue, a court of equity will decree a repayment of a portion of the purchase price with interest.¹

b. *Pleading*.—An averment as to eviction, in an action for breach of a contract to convey land, is mere surplusage; the declaration need not allege eviction by due process of law or by entry and eviction under legal title.²

c. *Evidence*.—It is admissible for the vendee who sues on a contract, to make a title to a lot of ground in fee simple which he had purchased, to give in evidence an examination of the records of the office for the recording of deeds, by a witness who was searching into the title of a lot, and also a letter, giving to the party who made the contract, a notice that the lot was about to be sold, under a title superior to that under which he held. A deed from the vendor, informally executed, and which did not convey the title the vendor agreed to give, was also admissible in evidence, in an action against the vendor, on the contract.³

3. *RECOVERY OF VALUE OF IMPROVEMENTS*.—A fraudulent purchaser of property, when deprived of its possession, cannot recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession.⁴

4. *INJUNCTION TO RESTRAIN COLLECTION OF PURCHASE MONEY*.—It is an established rule in equity, that when a vendor of land has not the power to make a title, the vendee may, before the time of performance, enjoin the payment of the purchase money until the ability to comply with the agreement is shown; but, then, the court will give a reasonable time to procure the title,

Quære, whether it is the proper measure of damages, in case of an action for eviction. *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218.

The rule is settled in the federal supreme court, that in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price, at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise, the vendor, if the article has risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property, if the lands have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case. As to the damages recoverable upon an eviction of real property, see 2 Wheat. 62, note. *Hopkins v. Lee*, 6 Wheat. 108, 109, 117, 5 L. Ed. 218.

1. *Rule where injury is difficult of estimation*.—*Pratt v. Law*, 9 Cranch 456, 3 L. Ed. 792.

2. *Where averment as to eviction unnecessary*.—*Bank v. Guttschlick*, 14 Pet. 19, 27, 10 L. Ed. 335.

3. *Evidence*.—*Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335.

The proceedings in an action against the indorser of a note, by the holder, which gave to a trustee, by the terms of the deed of trust, a right to sell property held for the indemnity of the indorser, were proper evidence, in an action on a contract for the sale of the lot, from which the party, who had purchased under another title, had been evicted by a title obtained under the deed of trust. *Bank v. Guttschlick*, 14 Pet. 19, 10 L. Ed. 335.

4. *Recovery of value of improvements*.—*Railroad Co. v. Soutter*, 13 Wall. 517, 523, 20 L. Ed. 543.

Civil-law rule not rule of common law.—By the civil-law, the possessor of property, even in bad faith, may have the value of his improvements, if the real owner choose 'o take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity, one of whose maxims is, "He that hath committed iniquity shall not have equity." Rail-

if it appears probable that it may be procured.⁵ But a bill in chancery filed by the purchaser in possession against his vendor, to restrain the collection of the purchase money, upon the grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained.⁶ But where the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase money, and may offset the damages occasioned by the breach of the covenants of seisin or warranty, against such unpaid purchase money. A discharge in bankruptcy of a purchaser who assumed his vendor's notes given for the purchase price of property will relieve such purchaser from paying notes, but it will not give him a legal title in fee to the lands. That title, subject to the equity of the vendee, or of the purchaser from him, remains in the vendor.⁷

road Co. *v.* Soutter, 13 Wall. 517, 523, 20 L. Ed. 543. See, generally, the title IMPROVEMENTS, vol. 6, p. 896.

5. Injunction before time of performance.—Galloway *v.* Finley, 12 Pet. 264, 9 L. Ed. 1079.

If the object of a complainant's, a grantee of property, bill is to obtain an injunction to prevent the grantor from collecting the purchase price until he make a good title, it cannot be doubted that, where the cause of action at law is a covenant in the same deed, which stipulates for such a title, he would be enjoined until he make a title. *Boyce v. Grundy*, 3 Pet. 210, 217, 7 L. Ed. 655.

6. Purchaser in possession cannot enjoin in absence of fraud.—Patton *v.* Taylor, 7 How. 132, 12 L. Ed. 637.

Original purchase void as defense.—

Hence, where a party had remained for ten years in the undisturbed enjoyment of the property which he purchased, it was no ground for an injunction to stay proceedings for the recovery of the purchase money, to say that the original purchase was void by law of the state, but that he had neglected to urge that defense at law, or to say that he had heard that some persons unknown might possibly at some future time assert a title to the property, as such an injunction, if granted, must be dissolved. *Truly v. Wanzer*, 5 How. 141, 12 L. Ed. 88.

7. Discharge in bankruptcy as defense to payment of notes.—*Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

Covenants broken—Grantor insolvent.—*Wanzer v. Truly*, 17 How. 584, 15 L. Ed. 216.

VENDORS' LIENS.

BY CHAS. W. FOURL.

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As to admission of unstamped deed in action to enforce vendor's lien raising a federal question, see the title APPEAL AND ERROR, vol. 1, p. 691, note 86. As to when United States courts enforce vendor's lien, see the title COURTS, vol. 4, p. 1111. As to enforcement of vendor's lien against married woman giving notes for purchase price, see the title HUSBAND AND WIFE, vol. 6, p. 719, note 7. As to lien on sale of personalty, see the title SALES, vol. 10, p. 1045.

I. Implied Lien.

A. Nature and Extent of Lien.—It is a general principle that a vendor of land, though he has made an absolute conveyance by deed, and though the consideration is in the instrument expressed to be paid, has an equitable lien for the unpaid purchase money, unless there has been an express or an implied waiver of it. And this lien will be enforced in equity against the vendee and all persons holding under him, except bona fide purchasers, without notice.¹ The rule, however, is manifestly founded on a supposed conformity with the intentions of the parties, upon which the law raises an implied contract; and, therefore, it is not inflexible, but ceases to act, where the circumstances of the case do not justify such a conclusion.² The lien of the vendor, if in the nature of a trust, is a secret trust; and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with such advantage.³ Such a lien is one which appeals strongly to the favorable consideration of a court of equity.⁴ The foundation of the doctrine is that if one person has gotten the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration.⁵

B. When Lien Arises.—A vendor's lien, as distinguished from a contract lien, arises upon a transfer of title.⁶

C. Parties in Whose Favor Lien Exists—1. IN GENERAL.—The vendor of real property, who has not taken a separate security for the purchase money, has a lien for it, and the land, as against the vendee and his heirs.⁷ This rule

1. Unpaid vendor has lien for purchase price unless waived.—*Cordova v. Hood*, 17 Wall. 1, 5, 21 L. Ed. 587.

Purchase price payable in installments.—Where a party agrees to sell land to another and as consideration therefor the vendee gives his promissory notes payable at a future date named, and the vendor gives his bond conditioned that on the payment of the notes he will convey the premises in fee to the vendee, but makes no deed, the legal estate remains, until the payment of the purchase money, in the vendor, and he has, by the law of those states where such liens are recognized a "vendor's lien." The vendee has an equitable title only; one indeed which he can sell or devise, but one which if the purchase money is unpaid he cannot sell so as to exclude the vendor's right to have payment of it. Any purchaser from the vendee who assumes to pay the notes takes the same title that the vendee had; that is to say, an equitable title, the land being still charged with the payment of the purchase money. *Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

2. Lien does not exist where intention to reserve non existent.—*Brown v. Gilman*, 4 Wheat. 255, 291, 4 L. Ed. 564.

3. Lien postponed to subsequent equal equity connected with legal advantages.—*Bayley v. Greenleaf*, 7 Wheat. 46, 56, 5 L. Ed. 393.

4. Lien appeals favorably to court of equity.—*Slide, etc., Gold Mines v. Sey-*

mour, 153 U. S. 509, 517, 38 L. Ed. 802.

5. Foundation of doctrine.—*Chilton v. Braiden*, 2 Black 458, 460, 17 L. Ed. 304; *Fisher v. Shropshire*, 147 U. S. 133, 139, 37 L. Ed. 109; *Slide, etc., Gold Mines v. Seymour*, 153 U. S. 509, 516, 38 L. Ed. 802.

It is a doctrine of equitable jurisprudence which says that land, which is immovable, is the best security for its own price, and that title thereto should therefore pass subject to the equitable burden of such security. *Slide, etc., Gold Mines v. Seymour*, 153 U. S. 509, 520, 38 L. Ed. 802.

6. Vendor's lien arises upon transfer of title.—*Slide, etc., Gold Mines v. Seymour*, 153 U. S. 509, 520, 38 L. Ed. 802.

Sale of public lands.—Where the settler upon the public lands had a pre-emption right to them and sold them to a person who again sold them to a third party, the original vendor has a lien upon the land for the balance of the purchase money still due, and can enforce it by a bill in chancery, notwithstanding the vendee has taken out a patent in his own name under a subsequent pre-emption law. *Thredgill v. Pintard*, 12 How. 24, 13 L. Ed. 877, distinguished in *Harkness v. Underhill*, 1 Black 316, 325, 17 L. Ed. 208.

7. Exists in favor of vendee taking no security.—*Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393; *Chilton v. Braiden*, 2 Black 458, 17 L. Ed. 304.

applies with as much force to the case of a purchase by a married woman as to any other case.⁸

2. **VENDOR'S ASSIGNEE.**—It is a well-settled principle that the equitable lien for unpaid purchase money exists equally in the hands of the vendor or his assignee.⁹ But in many of the states, the implied lien which equity raises in favor of the vendor of real property to secure the payment of the purchase money does not pass by an assignment of the debt.¹⁰

D. Enforcement—1. **HOW ENFORCED**—a. *In General.*—In Texas¹¹ and Iowa the remedy at law need not first be exhausted or shown not to exist before a bill in equity can be filed to enforce such a lien.¹² All equitable considerations are open in a suit to enforce a vendor's lien.¹³

b. *Against Nonresidents.*—A general provision as to the institution of suits against absent and nonresident defendants is applicable to an action to enforce an equitable lien for the purchase money against a nonresident.¹⁴ Although there is no statute of a state especially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, a general provision for the institution of suits against absent and nonresident defendants, and laying down a method of procedure applicable to all such cases, will authorize the enforcement of liens against nonresidents.¹⁵

2. **AGAINST WHOM ENFORCEABLE**—a. *In General.*—The lien unless waived will be enforced in equity against the vendee and all persons holding under him, except bona fide purchasers without notice.¹⁶

b. *Purchasers with Notice.*—This lien may be enforced against all subsequent purchasers taking with notice of nonpayment of the purchase price.¹⁷ And where the vendee's deed recites the consideration as yet to be paid, a subsequent purchaser is charged with notice of nonpayment of the purchase price.¹⁸ In order to ascertain whether the purchase money has been paid, inquiry should

8. **Rule applicable to married woman when purchaser.**—Chilton v. Braiden, 2 Black 458, 17 L. Ed. 304.

The disabilities imposed upon married women are intended for their protection, and the law will not allow them to be used as the means of committing fraud. Chilton v. Braiden, 2 Black 458, 17 L. Ed. 304.

9. **Lien exists in favor of vendee's assignee.**—McLearn v. Wallace, 10 Pet. 625, 640, 9 L. Ed. 559.

10. **In many states lien does not exist in favor of assignee.**—Ober v. Gallagher, 93 U. S. 199, 206, 23 L. Ed. 829.

In Texas an assignment of the notes given for purchase money carries with it the lien to the assignee. Cordova v. Hood, 17 Wall. 1, 9, 21 L. Ed. 587.

11. **Texas.**—In Texas in order to enforce a vendor's lien, the bill need not show that the complainant has exhausted his remedy at law against the personal estate of the vendee, or show that he has no adequate remedy at law. Cordova v. Hood, 17 Wall. 1, 9, 21 L. Ed. 587.

12. **Iowa—Remedy at law need not first be exhausted.**—Fisher v. Shropshire, 147 U. S. 133, 144, 37 L. Ed. 109. See, generally, the title EQUITY, vol. 5, p. 803.

13. **All equitable considerations open in suit.**—Fisher v. Shropshire, 147 U. S. 133, 147, 37 L. Ed. 109.

14. *Roller v. Holly*, 176 U. S. 398, 406, 44 L. Ed. 520.

15. **Texas—Action against nonresident.**—Roller v. Holly, 176 U. S. 398, 406, 44 L. Ed. 520.

16. **Enforceable against all except bona fide purchasers.**—Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587.

17. **Enforceable against purchasers with notice.**—Florida v. Anderson, 91 U. S. 667, 669, 23 L. Ed. 290; Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587; Brown v. Gilman, 4 Wheat. 255, 290, 4 L. Ed. 564.

Sale of railroad.—The equitable lien for the unpaid purchase money accruing upon the sale of a railroad by the trustees of an internal improvement fund as agents for the state resulted primarily to them as vendors, and became binding on the road in the hands of all subsequent purchasers taking with notice of the nonpayment. Florida v. Anderson, 91 U. S. 667, 669, 23 L. Ed. 290.

18. **Deed reciting consideration was yet "to be paid."**—Where a deed of land shows on its face that the consideration is yet "to be paid," a second purchaser (that is to say, a purchaser from the vendee), who has notice of the deed, takes the land in those states (of which Texas is one) where the English chancery doctrine of a vendor's lien prevails, subject to the vendor's lien, unless such lien has been in some way waived. Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587.

be made of the vendor. Inquiry of the debtor is an idle ceremony.¹⁹

c. *Bona Fide Purchaser*.—This lien is defeated by alienation to a bona fide purchaser, without notice.²⁰

d. *Creditors*.—The lien cannot be asserted against creditors who are mortgagees and hold under a bona fide conveyance from the vendee.²¹

e. *Purchaser Assuming Notes*.—The purchaser from a vendee, who assumes to pay the notes, takes the same title the vendee had, subject to the vendor's lien.²²

f. *Assignee in Bankruptcy*.—Quære, whether the lien can be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser, by act of law?²³

3. PARTIES.—If the vendee of land gives his notes for the payment of the purchase price of land, takes a bond for title, and sells such land to a third person who assumes the notes, and such third person dies, his heirs at law should be made parties to a bill to enforce the vendor's lien.²⁴

4. LIMITATION.—Although a debt for unpaid purchase money may be barred by limitation, the right to enforce the lien for the purchase money may still exist.²⁵

5. IN UNITED STATES COURTS.—The courts of the United States enforce

19. Inquiry as to payment of purchase price should be made of vendor.—*Cordova v. Hood*, 17 Wall. 1, 8, 21 L. Ed. 587.

20. Lien lost by conveyance to bona fide purchaser.—*Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393; *Brown v. Gilman*, 4 Wheat. 255, 291, 4 L. Ed. 564; *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587.

Reason of rule.—But whether the lien of the vendor be established as "a natural equity," or from analogy to the principle that in a bargain and sale, the bargainor stands seised in trust for the bargainee, unless the money be paid, still it is a secret invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity, as well as law. A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of bona fide creditors. *Bayley v. Greenleaf*, 7 Wheat. 46, 50, 5 L. Ed. 393.

Land corporation issuing shares—Sale of certificates to bona fide purchaser.—Land was bought by several parties and a company formed and the legal title taken in the name of three trustees, and assignable certificates were issued, declaring that the holder is entitled to a specified share of the land, and that the

certificates were complete evidence of title. One of the purchasers failed to pay his share of the purchase price, but he had assigned one of his certificates to a bona fide purchaser. The company never took possession of the land, but congress indemnified them. Held, the company could not deduct the amount of the lien for the unpaid purchase price from the share of such bona fide purchaser, but the lien was chargeable on the fund generally. *Brown v. Gilman*, 4 Wheat. 255, 291, 4 L. Ed. 564.

21. Not enforceable against creditors.—*Bayley v. Greenleaf*, 7 Wheat. 46, 50, 5 L. Ed. 393.

In the United States, the claims of creditors stand on high ground. There is not perhaps a state in the Union, the laws of which do not make all conveyances, not recorded, and all secret trusts, void as to creditors, as well as subsequent purchasers without notice. To support the secret lien of the vendor against a creditor who is a mortgagee, would be to counteract the spirit of these laws. *Bayley v. Greenleaf*, 7 Wheat. 46, 56, 5 L. Ed. 393.

22. Purchaser assuming notes.—*Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

23. Quære, whether enforceable against assignee of bankrupt.—*Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393.

24. Parties.—*Lewis v. Hawkins*, 23 Wall. 119, 23 L. Ed. 113.

25. Lien not barred by barring of debt by limitation.—*Hardin v. Boyd*, 113 U. S. 756, 765, 28 L. Ed. 1141; *Lewis v. Hawkins*, 23 Wall. 119, 127, 23 L. Ed. 113.

The bar to a debt does not necessarily preclude a mortgagee or vendor retaining the legal title from proceeding in rem in a court of equity to enforce his specific lien upon the land itself. Unless the defendant can show that the lien has

grantor's and vendor's liens if in harmony with the jurisprudence of the state in which the action is brought.²⁶

E. Waiver or Discharge—1. *IN GENERAL*.—The vendor's lien may be defeated if the grantor or vendor do any act manifesting an intention not to rely on the land for security; but this must be an act substantially inconsistent with the continued existence of the lien, and cannot be inferred from the mere fact that the parties may not have contemplated the assertion of the lien in the first instance.²⁷ An intent to abandon a vendor's lien is not to be presumed, and while, of course, like any other right, it may be abandoned or waived, the evidence of an intent to so abandon or waive should be clear and satisfactory,²⁸ and if under all the circumstances the waiver remains in doubt, then the lien attaches.²⁹

2. *BY TAKING SEPARATE SECURITY*—a. *In General*.—The equitable lien of the vendor of land, for unpaid purchase money, is waived, by any of the parties showing that the lien is not intended to be retained, as by taking separate securities for the purchase money.³⁰ But the taking of security raises only a presumption of waiver, which is open to rebuttal.³¹

b. *Taking Vendee's Personal Obligation*.—It is everywhere ruled that where such a lien is recognized at all, it is not affected by the vendor's taking the bond or bill single of the vendee, or his negotiable promissory note, or his check, if not presented or if unpaid, or any instrument involving merely his personal liability.³² And the giving of a new note for an old one does not affect the lien.³³

c. *Taking Note or Bond with Surety*.—The taking of a note with a surety from the vendee is generally evidence of an intention to rely exclusively upon the personal security taken, and therefore, presumptively, is an abandonment

been in some way discharged and extinguished, or lost upon some equitable principles, such as estoppel, he can only interpose the bar of adverse possession of the land for such time as would bar the action at law for its recovery. *Hardin v. Boyd*, 113 U. S. 756, 765, 28 L. Ed. 1141.

26. Jurisdiction of United States courts.—Slide, etc., *Gold Mines v. Seymour*, 153 U. S. 509, 516, 38 L. Ed. 802; *Fisher v. Shropshire*, 147 U. S. 133, 139, 37 L. Ed. 109; *Chilton v. Braiden*, 2 Black 458, 17 L. Ed. 304; *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393. See, also, *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587.

27. Lien abandoned by vendor doing acts showing intention to abandon.—*Fisher v. Shropshire*, 147 U. S. 133, 143, 37 L. Ed. 109; *Brown v. Gilman*, 4 Wheat. 255, 4 L. Ed. 564.

28. Intent to waive not presumed.—Slide, etc., *Gold Mines v. Seymour*, 153 U. S. 509, 517, 38 L. Ed. 802.

29. Lien remains if waiver in doubt.—2 Story's Eq. Jur., § 1224; Slide, etc., *Gold Mines v. Seymour*, 153 U. S. 509, 517, 38 L. Ed. 802.

30. Taking security as waiver.—*Brown v. Gilman*, 4 Wheat. 255, 256, 4 L. Ed. 564; *Bayley v. Greenleaf*, 7 Wheat. 46, 5 L. Ed. 393; *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587; *Fisher v. Shropshire*, 147 U. S. 133, 37 L. Ed. 109; Slide, etc.,

Gold Mines v. Seymour, 153 U. S. 509, 38 L. Ed. 802.

31. Taking security raises only presumption of waiver.—*Cordova v. Hood*, 17 Wall. 1, 6, 21 L. Ed. 587; Slide, etc., *Gold Mines v. Seymour*, 153 U. S. 509, 517, 38 L. Ed. 802.

32. Taking personal note does not waive lien.—*Cordova v. Hood*, 17 Wall. 1, 6, 21 L. Ed. 587.

33. Giving new note for old one.—*Cordova v. Hood*, 17 Wall. 1, 8, 21 L. Ed. 587.

Where a vendor already has a lien, evidenced by a note for the payment of all and every part of the purchase money so long as it remains unpaid, the lien for any purchase money afterwards still unpaid is not lost by the fact of his receiving part payment of the note before its maturity, taking a new note payable at the same time and in the same way and place as the original note, and a destruction of such original one. *Cordova v. Hood*, 17 Wall. 1, 21 L. Ed. 587.

The original lien is for all the purchase money, and for every part of it so long as it remained unpaid. It is not merely security for notes which may be given, it is for the debt of which the notes were evidence. Giving a new note is not payment of the debt, it is only a change of the evidence, and, therefore, the fact that it was given does not affect the lien. *Cordova v. Hood*, 17 Wall. 1, 8, 21 L. Ed. 587.

or waiver of a lien,³⁴ yet this raises only a presumption, and as a presumption only it may be rebutted by evidence that such was not the intention of the parties.³⁵ The presumption that the vendor intended to waive his lien by taking the note of his vendee with a surety for the unpaid portion of a larger note given at the time of the sale, is rebutted where it "was positively and unequivocally stipulated and agreed by the vendor and vendee that the original lien was retained, and that the land should continue liable as before."³⁶

d. *Taking Note of Third Person*.—If the receipt of a note of a third person in payment of the purchase money be a waiver of an equitable lien on the real estate conveyed, yet it would seem, where a fraud had been practised in the assignment of the note, there would be no waiver.³⁷

e. *Taking Stock of Vendee Corporation as Security*.—An agreement by which a portion of the stock of the vendee corporation was held as security for the payment of the unpaid purchase price, the corporation, owning no other stock, does not waive the lien.³⁸ And the presumption that the lien is waived is rebutted by an agreement that the vendor should have the control and management of the property until the purchase money is all paid.³⁹

f. *Taking Mortgage*.—The lien is discharged by a mortgage, which added a large amount of personal property to the real estate to secure the payment of the purchase money.⁴⁰

3. BY CONTRACT TO RETAIN TO SPECIFIED EXTENT.—An express contract, that the lien shall be retained to a specified extent, is equivalent to a waiver of the lien to any greater extent.⁴¹

4. BY AGREEMENT TO PASS TITLE "FREE FROM ALL CHARGES AND INCUMBRANCES".—A new agreement to pass title "free from all charges and incumbrances" does not waive the lien.⁴²

34. *Cordova v. Hood*, 17 Wall. 1, 6, 21 L. Ed. 587.

Taking note with surety.—Where the notes for which the vendors stipulated are to be indorsed by persons approved by themselves, this is a collateral security, on which they relied, and which discharges any implied lien on the land itself for the purchase money. *Brown v. Gilman*, 4 Wheat. 255, 256, 291, 4 L. Ed. 564; *Cordova v. Hood*, 17 Wall. 1, 6, 21 L. Ed. 587.

Vendor consenting to rely on notes.—Where the deed itself remains in escrow, until the first payment is made, and is then delivered as the deed of the party, and the vendor consents to rely upon the negotiable notes of the purchaser, indorsed by third persons, for the residue of the purchase money, this is equivalent to a mortgage of the premises to secure the first payment and a consent to rely upon the vendee's separate notes for the residue of the purchase money and is such a separate security as extinguishes the lien. *Brown v. Gilman*, 4 Wheat. 255, 256, 4 L. Ed. 564.

35. **Presumption is rebuttable.**—*Cordova v. Hood*, 17 Wall. 1, 6, 21 L. Ed. 587.

36. **Presumption as to waiver abutted by stipulation retaining lien.**—*Cordova v. Hood*, 17 Wall. 1, 7, 21 L. Ed. 587.

37. **Receipt of note of third person.**—*Shelton v. Tiffin*, 6 How. 163, 187, 12 L. Ed. 387.

38. **Taking stock of vendee corporation as security.**—*Slide, etc., Gold Mines v.*

Seymour, 153 U. S. 509, 520, 38 L. Ed. 802.

39. **Agreement that vendor should control property.**—An agreement that the vendor "hereby undertakes and agrees to take the control of the management of the said property until the payments hereinafter mentioned are completed, and it is understood and agreed that he shall retain such control until the said payments are completed," negatives the idea that the vendors were relying for the payment of the unpaid purchase money solely upon the security of shares of stock, placed in the hands of a trustee for security. It is an express affirmation that their dominion over the property is not to cease until the purchase money is all paid. *Slide, etc., Gold Mines v. Seymour*, 153 U. S. 509, 521, 38 L. Ed. 802.

40. **Mortgages on realty and personality.**—*McLearn v. Wallace*, 10 Pet. 625, 640, 9 L. Ed. 559.

41. **Waiver by contract to retain to specified extent.**—*Brown v. Gilman*, 4 Wheat. 255, 256, 4 L. Ed. 564.

42. **Waiver by agreement to pass "free from all incumbrances and charges."**—Where a new agreement of sale was made, by which the vendors were to pass a title "free from all charges and incumbrances," it means simply that the grantors shall have removed all burdens which rested upon the property prior to the time of making their deed, and that that deed shall pass the title perfect and un-

5. BY DELIVERY OF DEED.—There is no presumption from the delivery of the deed that the vendors intended to waive their lien for the purchase money.⁴³

6. BY CONVEYANCE BY VENDEE.—Under the Iowa code of 1873, after the execution of a conveyance by the vendee, the lien ceases to exist, even though the grantee knows that the purchase money has not been paid, because the grantee has the right to assume that a vendor's lien as against him is waived; a presumption which cannot be indulged in where suit to enforce such lien is pending.⁴⁴

II. Express or Reserved Lien—Nature and Extent of Lien.

Where the lien is not left to implication, but is expressly reserved, it is more than a lien. In equity, it is a mortgage, so made by express contract, and the acceptance by the vendee of the deed containing a reservation amounts to an express agreement on his part that the land should be held as security for the payment of what he owes on account of the purchase money, and creates an equitable mortgage; and such a security passes by an assignment of the debt it secures.⁴⁵

VENIRE.—See the title JURY, vol. 7, p. 767.

VENIRE DE NOVO.—See the title MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 115.

VENTE A REMERE.—As to sales *vente a remere*, see the title MORTGAGES AND DEEDS OF TRUST, vol. 8, p. 458.

encumbered, but not that the grantee shall take it free from all obligation of payment or discharged from the lien for the purchase price which rests upon real estate until such price is paid. *Slide, etc., Gold Mines v. Seymour*, 153 U. S. 509, 519, 38 L. Ed. 802.

43. **Presumption of waiver from delivery of deed.**—*Slide, etc., Gold Mines v. Seymour*, 153 U. S. 509, 520, 38 L. Ed. 802.

44. **By conveyance to vendee.**—*Fisher v. Shropshire*, 147 U. S. 133, 142, 37 L. Ed. 109.

After the filing of a petition for the enforcement of a vendor's lien, no subsequent grantee can presume it has been waived. The filing of the petition is notice of the assertion of the lien and not merely of the fact that the purchase money has not been paid. *Fisher v. Shropshire*, 147 U. S. 133, 142, 37 L. Ed. 109.

45. **Express or reserved lien.**—*Ober v. Gallagher*, 93 U. S. 199, 206, 23 L. Ed. 829; *Batesville Institute v. Kauffman*, 18 Wall. 151, 154, 21 L. Ed. 775.

VENUE.

BY T. B. BENSON.

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I. In Actions Generally.

A. In General.—There is a distinction between local and transitory actions as old as actions themselves.¹

B. In Local Actions.—Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated.² Laws which prescribe generally where one shall be sued, do not include such suits as are local in their character, either by statute or the common law, unless it is expressly so declared.³

C. In Transitory Actions.—In transitory actions the venue is immaterial.⁴ It follows the person.⁵ Any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.⁶

II. In Civil Actions.

A. Actions at Law—1. IN FEDERAL COURTS—*a. In General.*—A right arising under or a liability imposed by either the common law or the statute of a state may, where the action is transitory, be asserted and enforced in any circuit court of the United States having jurisdiction of the subject matter and the parties.⁷

b. Under Statute.—It is provided by act of congress that no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.⁸ Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides.⁹ A suit, in which there are more than one plaintiff or more than one defendant, should be brought in the district in which all the plaintiffs or all the defendants, are inhabitants.¹⁰ The provisions of this act

1. *Casey v. Adams*, 102 U. S. 66, 67, 26 L. Ed. 52.

2. *Massie v. Watts*, 6 Cranch 148, 162, 3 L. Ed. 181; *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75; *United States v. Jackalow*, 1 Black 484, 486, 17 L. Ed. 225; *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 36 L. Ed. 829; *Huntington v. Attrill*, 146 U. S. 657, 669, 36 L. Ed. 1123; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 39 L. Ed. 913; *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 134, 48 L. Ed. 900.

3. *Casey v. Adams*, 102 U. S. 66, 67, 26 L. Ed. 52.

4. *Huntington v. Attrill*, 146 U. S. 657, 669, 36 L. Ed. 1123; *McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439.

5. *Massie v. Watts*, 6 Cranch 148, 162, 3 L. Ed. 181; *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445, 448, 42 L. Ed. 537.

6. *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117.

7. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439.

8. See § 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, to amend the act of March 3, 1875, to amend § 11, c. 20, of Judiciary Act of Sept. 24, 1789.

The following cases were decided under act of 1887 and 1888; *McCormick, etc., Mach. Co. v. Walthers*, 134 U. S. 41, 43, 33 L. Ed. 833; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Wolfe v. Hartford, etc., Ins. Co.*, 148 U. S. 389, 37 L. Ed. 493; *Empire Coal, etc., Co. v. Empire, etc., Min. Co.*, 150 U. S. 159, 163, 37 L. Ed. 1037; *In re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *In re Keasbey, etc., Co.*, 160 U. S. 221, 40 L. Ed. 402; *In re Louisville Underwriters*, 134 U. S. 488, 491, 33 L. Ed. 991, decided under act of 1875; *Butterworth v. Hill*, 114 U. S. 128, 131, 29 L. Ed. 119.

9. *McCormick, etc., Mach. Co. v. Walthers*, 134 U. S. 41, 43, 33 L. Ed. 833.

10. *Smith v. Lyon*, 133 U. S. 315, 33 L.

apply to a suit in equity against the commissioner of patents to compel the issuance of a patent.¹¹ The provisions of this act have no application to a suit against an alien or a foreign corporation; but such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant.¹² A corporation incorporated in one state only cannot be compelled to answer in a circuit court of the United States held in another state, to a civil suit, at law or in equity, brought by a citizen of a different state, even if the corporation has a usual place of business in that state.¹³ These acts do not give jurisdiction to a circuit court held in a state of which neither party is a citizen.¹⁴ In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the state and district in which it has been incorporated or in the state of which the other party is a citizen.¹⁵ In a proceeding by attachment of property, it is elementary that the defendant is found, to the extent of the property levied upon, where the property is attached.¹⁶ The benefit of this act may be waived by the defendant appearing and pleading to the merits.¹⁷ By giving a written acceptance of service to have the same effect as if duly served in a suit by the commissioner of patents does not amount to a waiver of the privilege of being sued in Washington in the District of Columbia.¹⁸

Ed. 635; Interior Const., etc., Co. v. Gibney, 160 U. S. 217, 220, 40 L. Ed. 401.

11. Such suit must be brought at the official residence of the commissioner of patents, which is at the city of Washington, in the District of Columbia. *Butterworth v. Hill*, 114 U. S. 128, 29 L. Ed. 119. See the title PATENTS, vol. 9, p. 214.

12. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *In re Hohorst*, 150 U. S. 653, 37 L. Ed. 1211; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 38 L. Ed. 248; *In re Keasbey, etc., Co.*, 160 U. S. 221, 40 L. Ed. 402.

13. *McCormick, etc., Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. Ed. 833; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *In re Keasbey, etc., Co.*, 160 U. S. 221, 229, 40 L. Ed. 402; *Mexican Cent. R. Co. v. Eckman*, 187 U. S. 429, 433, 47 L. Ed. 245. See the title FOREIGN CORPORATIONS, vol. 6, p. 332.

It was so held under the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866. *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 446, 36 L. Ed. 768.

14. *In re Hohorst*, 150 U. S. 653, 662, 37 L. Ed. 1211; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 501, 502, 38 L. Ed. 248.

"In this as well as in prior acts regulating the jurisdiction of the circuit courts, a distinction is made between citizens of states and inhabitants of districts." *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 500, 38 L. Ed. 248.

15. *In re Hohorst*, 150 U. S. 653, 662, 37 L. Ed. 1211; *In re Louisville Underwriters*, 134 U. S. 488, 33 L. Ed. 991; *Ex parte Schollenberger*, 96 U. S. 369, 24 L.

Ed. 853. See the title FOREIGN CORPORATIONS, vol. 6, pp. 317, 330.

A corporation cannot be considered a citizen, an inhabitant or a resident of a state in which it has not been incorporated; and, consequently, a corporation incorporated in a state of the union cannot be compelled to answer to a civil suit, at law or in equity, in a circuit court, of the United States held in another state, even if the corporation has a usual place of business in that state. *McCormick, etc., Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. Ed. 833; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. Ed. 943; *In re Keasbey, etc., Co.*, 160 U. S. 221, 229, 40 L. Ed. 402.

"In *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 36 L. Ed. 768, a citizen of Massachusetts sought to maintain a bill in equity in the circuit court for the southern district of New York against the Quincy Mining Company, a corporation organized under the laws of Michigan, and having a usual place of business in the city of New York, and the question arose whether the court had jurisdiction over such a suit. It was held that it did not." *Galveston, etc., R. Co. v. Gonzales*, 151 U. S. 496, 501, 38 L. Ed. 248.

16. "It would be an extremely strained construction of the language of the act to hold that congress intended to prohibit a remedy universally pursued, that of proceeding against the property of non-residents in the place in the territory where the property of such nonresident is found." *Central Loan, etc., Co. v. Campbell Commission Co.*, 173 U. S. 84, 97, 43 L. Ed. 623.

17. See the title APPEARANCES, vol. 2, p. 452.

18. *Butterworth v. Hill*, 114 U. S. 128, 29 L. Ed. 119.

2. IN STATE COURTS.—It is provided by statute in Missouri that if all the defendants are nonresidents, and an action will lie against them, it may be brought in any county. A foreign corporation doing business in the state of Missouri is a nonresident, and is suable in any county.¹⁹

3. IN PARTICULAR ACTIONS—*a. Actions on Contract.*—An action on an implied contract is transitory.²⁰

b. Actions for Tort.—(1) *In General.*—An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found.²¹ An action for neglect of duty is transitory.²²

(2) *For Personal Injuries.*—(a) *In General.*—An action to recover damages for personal injuries is transitory.²³

(b) *For Death by Wrongful Act.*—An action for death by wrongful act does not belong to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed. It is, though a statutory remedy, a civil action to recover damages for a civil injury, always held to be transitory and the venue immaterial.²⁴

(3) *For Trespass.*—Actions of trespass, except those for injury to real property, are transitory in their character.²⁵ Whether actions to recover pecuniary damages for trespasses to real estate are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. By the common law of England, adopted in most of the states of the Union, such actions are regarded as local, and can be brought only where the land is situated.²⁶ But in some states and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to land in one state can

19. It is so provided in the act of 1849, p. 76. *New York, etc., R. Co. v. Estill*, 147 U. S. 591, 609, 37 L. Ed. 292.

20. *Massie v. Watts*, 6 Cranch 148, 162, 3 L. Ed. 181.

21. *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445, 448, 42 L. Ed. 537.

22. *Massie v. Watts*, 6 Cranch 148, 162, 3 L. Ed. 181.

23. *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117; *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Dennick v. Railroad Co.*, 103 U. S. 11, 18, 26 L. Ed. 439; *Huntington v. Attrill*, 146 U. S. 657, 669, 36 L. Ed. 1123; *Stewart v. Baltimore, etc., R. Co.*, 168 U. S. 445, 42 L. Ed. 537; *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 112, 42 L. Ed. 964.

24. *Dennick v. Railroad Co.*, 103 U. S. 11, 17, 26 L. Ed. 439. And see the title DEATH BY WRONGFUL ACT, vol. 5, p. 201.

"It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here." *Dennick v. Railroad*

Co., 103 U. S. 11, 17, 26 L. Ed. 439.

25. *McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117; *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

An action of trespass to recover damages for injuries to personalty is not local but transitory. *Huntington v. Attrill*, 146 U. S. 657, 36 L. Ed. 1123.

An action quare clausum fregit is local. *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117.

26. *Livingston v. Jefferson*, 1 Brock, 203; *McKenna v. Fisk*, 1 How. 241, 247, 248, 11 L. Ed. 117; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 242, 251, 14 L. Ed. 674; *Huntington v. Attrill*, 146 U. S. 657, 669, 670, 36 L. Ed. 1123; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 107, 39 L. Ed. 913; *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 124, 48 L. Ed. 900.

"The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio." *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 108, 39 L. Ed. 913.

A federal court of a state where defendant is found has jurisdiction of an action of trespass to recover timber unlawfully cut from the lands of the United States in another state. The action is transitory. *Stone v. United States*, 167 U. S. 178, 182, 42 L. Ed. 127, distinguishing *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 39 L. Ed. 913.

be brought in another state depends on the view which the latter state takes of the nature of the action.²⁷ Where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff and a seizure and destruction of goods, it covers a transitory as well as a local action.²⁸ Where a trespass is committed out of the limits of the United States an action for it may be maintained in the circuit court for any district in which the defendant may be found upon process against him, where the citizenship of the respective parties gives jurisdiction to a court of the United States.²⁹

c. *Actions Affecting Title to Real Estate*.—Proceedings in rem to determine the title to land must necessarily be brought in the state within whose borders the land is situated, and whose courts and officers alone can put the party in possession.³⁰

d. *Actions against National Banks*.—National banks are exempt from suits in state courts out of the county or municipal corporation in which they are located.³¹ The exemption, however, does not extend to actions local in their nature.³² It is also a personal privilege which may be waived by appearing to the action brought in another county or municipal corporation.³³

4. LAYING VENUE—*a. Necessity for*.—In transitory actions a venue is only necessary to be laid to give a place for trial. Such a venue is indispensable, for, without it, it would not appear in what county the trial was to take place, nor could a jury be summoned to try the issue. It is a legal fiction, devised for the furtherance of justice, and cannot be traversed.³⁴

b. *Manner of*.—In transitory actions, a venue is good without stating where the trespass was in fact committed, with a scilicet of the county in which the action is brought.³⁵

c. *Objections to*—(1) *In General*.—The venue for trial in a transitory action is a legal fiction, devised for the furtherance of justice, and cannot be traversed.³⁶

(2) *Waiver*.—See elsewhere.³⁷

B. Suits in Equity.—A suit in chancery by one who has the prior equity against him who has the eldest patent, is in its nature local, and if it be a mere question of title, must be tried in the district where the land lies.³⁸ But if it be a case of contract, or trust, or fraud, it is to be tried in the district where the defendant may be found.³⁹ A bill in equity to abate a nuisance is a local

27. *Huntington v. Attrill*, 146 U. S. 657, 669, 36 L. Ed. 1123.

28. *McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117.

29. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

30. *Huntington v. Attrill*, 146 U. S. 657, 669, 36 L. Ed. 1123; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 39 L. Ed. 913; *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117.

31. It is so provided in the act of February 18, 1875. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

32. It applies to transitory actions only. *Casey v. Adams*, 102 U. S. 66, 26 L. Ed. 52.

33. *First Nat. Bank v. Morgan*, 132 U. S. 141, 33 L. Ed. 282.

34. *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117.

35. *McKenna v. Fisk*, 1 How. 241, 249, 11 L. Ed. 117; *Holder v. Aultman*, 169 U. S. 81, 90, 42 L. Ed. 669.

In a transitory action of trespass, it is only necessary to lay a venue for a

place of trial, and such venue is good without stating where the trespass was in fact committed, with a scilicet of the county in which the action is brought. *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117.

36. *McKenna v. Fisk*, 1 How. 241, 248, 11 L. Ed. 117.

37. See the titles APPEARANCES, vol. 2, p. 452; PROHIBITION, vol. 9, p. 802. See cross references from the title JURISDICTION, vol. 7, p. 747.

38. *Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181.

39. "If the location be sustainable, and the locator, instead of showing the land really covered by the entry, shows other land, and appropriates to himself the land actually entered, this appears to the court to be a species of mala fides, which will, in equity, convert him into a trustee for the party originally entitled to the land. In either case, the jurisdiction of the court of the state in which the person is found, is sustainable. If we reason by analogy from the distinction be-

suit, and can be brought only in the district where the nuisance is situated.⁴⁰

C. Libels in Admiralty.—See elsewhere.⁴¹

III. In Criminal Actions.

A. In General.—Crimes are local in nature.⁴² The place where trials shall be had in a judicial district depends entirely on the legislation upon the subject.⁴³

B. In Federal Courts—1. **CRIMES COMMITTED WITHIN A STATE OR DISTRICT**—a. *In General.*—Crimes against the laws of the United States, if committed within a state, are local.⁴⁴ The constitution, art. 3, § 2, provides that the trial of crimes, except in cases of impeachment, shall be held in the state where committed.⁴⁵ The sixth amendment to the constitution provides that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury of the state and district within which the crime shall have been committed,⁴⁶ which district shall have been previously ascertained by law.⁴⁷

b. *In Particular Division of District.*—A circuit court of each judicial district sits within and for that district; and its jurisdiction as a general rule is bounded by its local limits.⁴⁸ At the same time courts may be required to be held at different places in a judicial district, and prosecutions for offenses committed in certain counties may be required to be tried, and writs and recognizances to be returned at each place.⁴⁹ Under the judiciary act, in capital cases the judges have a legal discretion to hold a special court in the proper county; if in other respects they do not deem it greatly inconvenient.⁵⁰

tween actions local and transitory at common law, this action would follow the person, because it would be founded on an implied contract, or on neglect of duty. If we reason from those principles which are laid down in the books relative to the jurisdiction of courts of equity, the jurisdiction of the court of Kentucky is equally sustainable, because the defendant, if liable, is either liable under his contract, or as trustee." *Massie v. Watts*, 6 Cranch 148, 162, 3 L. Ed. 181.

40. *Mississippi, etc., R. Co. v. Ward*, 2 Black 485, 17 L. Ed. 311. See the title **NUISANCES**, vol. 8, p. 948.

41. See the titles **ADMIRALTY**, vol. 1, p. 158; **PILOTS**, vol. 9, p. 410; **SHIPS AND SHIPPING**, vol. 10, p. 1158.

42. See the titles **ALIENS**, vol. 1, p. 240; **CRIMINAL LAW**, vol. 5, pp. 75, 87.

43. *Barrett v. United States*, No. 1, 169 U. S. 218, 221, 42 L. Ed. 723; *Rosencrans v. United States*, 165 U. S. 257, 41 L. Ed. 708; *Post v. United States*, 161 U. S. 583, 40 L. Ed. 816. As to constitutionality of law changing trial after commission of offense, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 524.

44. *United States v. Dawson*, 15 How. 467, 488, 14 L. Ed. 775; *United States v. Jackalow*, 1 Black 484, 486, 17 L. Ed. 225; *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691; *Cook v. United States*, 138 U. S. 157, 182, 183, 34 L. Ed. 906.

45. *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691.

46. *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691.

"The right thereby secured is not a right to be tried in the district where

the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district 'wherein the crime shall have been committed.'" *In re Palliser*, 136 U. S. 257, 265, 34 L. Ed. 514.

47. "In respect to that clause of the sixth amendment declaring that the 'district shall have been previously ascertained by law,' it need only be said that if those words import immunity from prosecution where the district is not ascertained by law before the commission of the offense, or that the accused can only be tried in the district in which the offense was committed (such district having been established before the offense was committed), that amendment has reference only to offenses against the United States committed within a state. *United States v. Dawson*, 15 How. 467, 487, 488, 14 L. Ed. 775; *Jones v. United States*, 137 U. S. 202, 211, 212, 34 L. Ed. 691; *Cook v. United States*, 138 U. S. 157, 181, 34 L. Ed. 906.

48. *Toland v. Sprague*, 12 Pet. 300, 328, 9 L. Ed. 1093; *Devoe Mfg. Co., Petitioner*, 108 U. S. 401, 27 L. Ed. 764. See the title **JURISDICTION**, vol. 7, p. 741.

49. *Barrett v. United States*, No. 1, 169 U. S. 218, 221, 42 L. Ed. 723; *Logan v. United States*, 144 U. S. 263, 36 L. Ed. 429; *Post v. United States*, 161 U. S. 583, 40 L. Ed. 816. See the title **GRAND JURY**, vol. 6, p. 577.

50. "The act of congress, passed the 2d of March, 1793 (1 U. S. Stat. 334, § 3), empowers the judges to 'direct a special session of the circuit court to be holden for the trial of criminal cases, at any convenient place within the district.

2. **CRIMES COMMITTED WITHOUT A STATE.**—Crimes against the United States committed without the limits of a state are not local.⁵¹ Article 3, § 2, of the constitution of the United States, provides that crimes not committed within any state shall be tried at such place or places as the congress may by law have directed.⁵² This provision imposes no restrictions as to the place of trial, except that the trial cannot occur until congress designates the place, and may occur at any place which shall have been designated by congress previous to the trial.⁵³ Congress may provide a different place of trial from the place in which the accused might have been tried at the time the offense was committed.⁵⁴ The sixth amendment to the constitution does not apply to offenses committed without the limits of a state.⁵⁵ Congress has directed that the trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought.⁵⁶ This act applies only to offenses committed on the high seas, or in some river, haven, basin or bay, not within the jurisdiction of a particular state, and not to the territories of the United States, where regular courts are established, competent to try those offenses.⁵⁷ To give a circuit court of the United States jurisdiction of an of-

feense nearer to the place where the offenses may be said to be committed, than the place or places appointed by law for the ordinary sessions; but this provision does not expressly discriminate between cases of a capital, and of an inferior nature, and a provision having been previously made for capital cases, it would be justifiable to apply this to inferior cases." *United States v. The Insurgents*, 3 Dall. 513, 1 L. Ed. 700.

Persons charged with levying war against the United States in the counties of North Hampton and Bucks in the state of Pennsylvania were tried out of the counties. It was held that the 29th section of the judiciary act was not affected by the act of March 2, 1793, empowering the judges to direct a special session of the circuit court in criminal cases at any convenient place within the district, as to capital cases; the operation of the latter act being construed to apply to inferior cases only. *United States v. The Insurgents*, 3 Dall. 513, 1 L. Ed. 700.

51. *United States v. Dawson*, 15 How. 467, 487, 14 L. Ed. 775; *United States v. Jackalow*, 1 Black 484, 17 L. Ed. 225; *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691; *Cook v. United States*, 138 U. S. 157, 182, 34 L. Ed. 906.

52. *Jones v. United States*, 137 U. S. 202, 211, 34 L. Ed. 691; *United States v. Dawson*, 15 How. 467, 488, 14 L. Ed. 775.

53. *Cook v. United States*, 138 U. S. 157, 182, 34 L. Ed. 906.

54. *Cook v. United States*, 138 U. S. 157, 182, 34 L. Ed. 906.

55. *United States v. Dawson*, 15 How. 467, 487, 14 L. Ed. 775.

56. *Ex parte Bollman*, 4 Cranch 75, 136, 2 L. Ed. 554; *United States v. Dawson*, 15 How. 467, 14 L. Ed. 775; *Jones v. United States*, 137 U. S. 202, 211, 212, 34 L. Ed. 691; *Cook v. United States*, 138 U. S. 157, 181, 34 L. Ed. 906.

It was so provided in the act of April 30, 1790. *Cook v. United States*, 138 U. S. 157, 182, 34 L. Ed. 906.

The words "out of the jurisdiction of any particular state," in the act of April 30th, 1790, § 8, must be construed to mean out of the jurisdiction of any particular state of the Union. *United States v. Furlong*, 5 Wheat. 184, 5 L. Ed. 64.

"In those cases, there is no court which has particular cognizance of the crime, and, therefore, the place in which the criminal shall be apprehended, or, if he be apprehended, where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offense was committed." *Ex parte Bollman*, 4 Cranch 75, 136, 2 L. Ed. 554.

Under the act of March 3d, 1825, § 22, by which an assault on a person upon the high seas with a dangerous weapon is made an offense against the United States, and the trial of the offense is to be "in the district where the offender is apprehended, or into which he may first be brought," a person is triable in the southern district of New York who, on a vessel owned by citizens of the United States, has committed on the high seas the offense specified; has been then put in irons for safe-keeping, has, on the arrival of the vessel, at anchorage at the lower quarantine in the eastern district of New York, been delivered to officers of the state of New York, in order that he may be forthcoming, etc., and has been by them carried into the southern district and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued. *United States v. Arwo*, 19 Wall. 486, 22 L. Ed. 67.

57. *Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554.

fense not committed within its district, it must appear, not only that the accused party was first apprehended in that district, but also that the offense was committed out of the jurisdiction of any state, and not within any other district of the United States.⁵⁸

3. **CRIMES COMMITTED PARTLY IN ONE AND PARTLY IN ANOTHER DISTRICT.**—When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate; and congress has accordingly provided that when any offense against the United States is begun in one judicial district and completed in any other, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner and as if it had been actually and wholly committed therein.⁵⁹

4. **CRIMES PUNISHABLE IN MILITARY COURTS.**—Where a tribunal for the trial of offense against the laws of the United States, wherever it may have been committed, had been provided by congress; and where, at the place where the prisoners were seized by the authority of a commander of the military power, there existed such a tribunal; it cannot be said, because the prisoners were apprehended, not by civil magistrate, but by military power, there can be given by law a right to try the persons so seized in any place where the commander of the military power might select, and to which he might direct them to be carried.⁶⁰

C. In State Courts.—See elsewhere.⁶¹

D. Laying Venue.—See elsewhere.⁶²

IV. Change of Venue.

See elsewhere.⁶³

VERBAL AGREEMENTS.—See the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

58. *United States v. Jackalow*, 1 Black 484, 17 L. Ed. 225.

59. *Putnam v. United States*, 162 U. S. 687, 40 L. Ed. 1118; *Horner v. United States*, No. 1, 143 U. S. 207, 214, 36 L. Ed. 126; *Benson v. Henkel*, 198 U. S. 1, 49 L. Ed. 919. See Rev. Stat., § 731. And see the titles **CONSPIRACY**, vol. 3, p. 1103; **POSTAL LAWS**, vol. 9, p. 582.

"The offense charged may have been begun in Massachusetts, if it was completed in New Hampshire the court had jurisdiction, under Rev. Stat., § 731." In *re Palliser*, 136 U. S. 257, 266, 34 L. Ed. 514.

The offense of a United States senator in receiving compensation for services in a suit against the United States does not come within the rule of the commencement of the crime in one district and its completion in another so as to

give the courts of either district jurisdiction, where the compensation in the form of a check on the St. Louis bank was sent to the senator at Washington from St. Louis. *Burton v. United States*, 196 U. S. 283, 49 L. Ed. 482.

60. *Ex parte Bollman*, 4 Cranch 75, 136, 2 L. Ed. 554. See, also, the title **MILITARY LAW**, vol. 8, p. 347.

61. See the titles **CONSPIRACY**, vol. 3, p. 1103; **CONSTITUTIONAL LAW**, vol. 4, p. 502.

62. See the titles **INDIANS**, vol. 6, pp. 912, 913; **INDICTMENTS, INFORMATION, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 997.

63. See the titles **APPEAL AND ERROR**, vol. 1, pp. 559, 774, 986; **CONSTITUTIONAL LAW**, vol. 4, p. 524; **CRIMINAL LAW**, vol. 5, p. 101.

VERDICT.

BY T. B. BENSON

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As to questions of law and fact see the title *EVIDENCE*, vol. 5, p. 1055.

I. Kinds of Verdicts.

Verdicts are either general¹ or special.²

II. Finding Verdict.**A. Custody of Jury.**—See elsewhere.³

B. Deliberation.—Where the court may direct a verdict, it may properly refuse to allow the jury to retire a second time for deliberation.⁴ While the verdict should represent the opinion of each individual juror, this opinion may be changed by conference in the jury room.⁵ In the absence of evidence of fraud, a quotient verdict is valid.⁶

C. Unanimity of Consent.—The seventh amendment to the constitution secures unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and no act of congress can change the constitutional rule.⁷

D. As to Part of Counts.—Where the jurors agree as to a part of the counts of an indictment but are unable to agree as to other counts, a verdict may be rendered as to those agreed upon.⁸

1. See post, "General Verdict," III.

2. *Insurance Co. v. Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358; *Insurance Co. v. Folsom*, 18 Wall. 237, 248, 21 L. Ed. 827; *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756. See post, "Special Verdict," IV.

3. See the title *JURY*, vol. 7, p. 777.

4. *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483, 41 L. Ed. 524. And see *Selvester v. United States*, 170 U. S. 262, 42 L. Ed. 1029; *Georgia v. Brailsford*, 3 Dall. 1, 1 L. Ed. 483.

As to instructions for manner of arriving at verdict, see the title *INSTRUCTIONS*, vol. 7, p. 56.

5. *Allen v. United States*, 164 U. S. 492, 501, 41 L. Ed. 528.

6. *Cowperthwaite v. Jones*, 2 Dall. 55, 1 L. Ed. 287. See the title *NEW TRIAL*, vol. 8, p. 915.

7. *Springville v. Thomas*, 166 U. S. 707, 708, 41 L. Ed. 1172.

8. *Selvester v. United States*, 170 U. S. 262, 42 L. Ed. 1029.

E. Against Whom Found.—See elsewhere.⁹**III. General Verdict.**

A. In General.—A general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict.¹⁰ A verdict of guilty without specifying any offense is general and refers to the offense charged in the indictment.¹¹ A verdict of guilty on one count and not guilty on the other counts of an indictment is general.¹² The only way in which the jury can decide the law of a case is by finding a general verdict.¹³

B. Form and Requisites—1. **IN GENERAL.**—Strict form in a verdict is not required. It needs only to be understood what the intent of the jury was, agreeable to which the verdict may afterwards be moulded into form.¹⁴

2. **WHAT LAW GOVERNS.**—See elsewhere.¹⁵

3. **SIGNING.**—The irregularity of the jury in not signing a verdict is waived by the party against whom rendered, where he has the jury polled but makes no objection or request that it be signed.¹⁶

4. **GRAMMAR AND ORTHOGRAPHY.**—A verdict which, though expressed in bad English, clearly manifests the intention and finding of the jury upon the issue submitted to them is sufficient.¹⁷

5. **CERTAINTY.**—A verdict which is not certain and unambiguous is not valid.¹⁸ It is valid if certain to a common intent.¹⁹ A verdict generally of "guilty" is sufficient;²⁰ and, under the Oregon practice, a verdict for "the plaintiff" is sufficient.²¹

6. **CONFORMITY TO ISSUE.**—A verdict is bad, if it vary from the issue in

9. See the titles **DISMISSAL**, **DISCONTINUANCE** AND **NONSUIT**, vol. 5, p. 391; **EJECTMENT**, vol. 5, p. 716.

10. *Walker v. New Mexico*, etc., R. Co., 165 U. S. 593, 596, 41 L. Ed. 837.

11. *Statler v. United States*, 157 U. S. 277, 39 L. Ed. 700.

12. *Statler v. United States*, 157 U. S. 277, 39 L. Ed. 700. See post, "Surplusage," III, D.

13. *Georgia v. Brailsford*, 3 Dall. 1, 5, 1 L. Ed. 483.

14. *Thompson v. Musser*, 1 Dall. 458, 462, 1 L. Ed. 222.

As to strictness of form under statute of jeofails of 1789, see the title **AMENDMENTS**, vol. 1, p. 308. As to form of verdict in criminal cases, see the title **DUE PROCESS OF LAW**, vol. 5, p. 673. As to form of verdict in action of debt, see the title **DEBT, THE ACTION OF**, vol. 5, p. 211. As to verdict in action on insurance contract, see the title **INSURANCE**, vol. 7, p. 214.

Where a verdict substantially finds the issues between the parties, it is sufficient although informal. *Lincoln v. Iron Co.*, 103 U. S. 412, 417, 26 L. Ed. 518.

Mere informality in the verdict in an action of assumpsit is not fatal to it, if there is sufficient to authorize the court to enter it in form. *Downey v. Hicks*, 14 How. 240, 14 L. Ed. 404. See the title **ASSUMPSIT**, vol. 2, p. 658.

15. See the title **COURTS**, vol. 4, p. 1144.

16. *Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 277, 39 L. Ed. 977.

17. In *Snyder v. United States*, 112 U.

S. 216, 28 L. Ed. 697, it was held that a verdict which spoke of "evaluating" instead of "valuing" was sufficient.

It is not a matter for reversal that the language of the verdict is that the jury find the "issue," etc., instead of the "issues." *Laber v. Cooper*, 7 Wall. 565, 19 L. Ed. 151.

18. *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160. See the titles **EJECTMENT**, vol. 5, p. 716; **ESCAPE**, vol. 5, p. 895; **INSURANCE**, vol. 7, p. 214.

19. *Liter v. Green*, 2 Wheat. 306, 309, 4 L. Ed. 246; *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477.

Under the pleas, and the replication prescribed by the statute, the mise was joined; the parties proceeded to trial; and the following general verdict was found, viz: "The jury find the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants or either of them, have, to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned." It was held, that this verdict being certain to a common intent, was sufficient to sustain a judgment. *Liter v. Green*, 2 Wheat. 306, 4 L. Ed. 246.

20. *Statler v. United States*, 157 U. S. 277, 39 L. Ed. 700.

In this case the verdict was, generally, "guilty," and did not, in terms, indicate of what particular offense the accused was found guilty. *St. Clair v. United States*, 154 U. S. 134, 154, 38 L. Ed. 936.

21. *Bennett v. Harkrader*, 158 U. S. 441, 39 L. Ed. 1046.

a substantial matter,²² or if it find only a part of that which is in issue.²³ The reason of the rule is obvious; it results from the nature and the end of the pleading.²⁴ This is an artificial and technical rule, which, however it may be founded in wisdom and promotive of good in general; yet, like all other rules, is capable of producing evil when made to operate beyond the objects of its creation.²⁵

22. A finding by the jury, which contradicts a fact admitted by the pleadings, is to be disregarded. *McFerran v. Taylor*, 3 Cranch 270, 2 L. Ed. 436; *Fairfax v. Fairfax*, 5 Cranch 19, 3 L. Ed. 24; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907; *Bennett v. Butterworth*, 11 How. 669, 13 L. Ed. 859; *Downey v. Hicks*, 14 How. 240, 246, 14 L. Ed. 404; *Beauregard v. Case*, 91 U. S. 134, 142, 23 L. Ed. 263; *Brooklyn v. Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416; *Lincoln v. Iron Co.*, 103 U. S. 412, 417, 26 L. Ed. 518; *Maddock v. Magone*, 152 U. S. 368, 372, 38 L. Ed. 482. See the titles ASSUMPSIT, vol. 2, p. 658; DEBT, THE ACTION OF, vol. 5, p. 210; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, vol. 6, p. 32; MARINE INSURANCE, vol. 8, p. 217; PARTNERSHIP, vol. 9, p. 129.

Though the court may give form to a general finding, so as to make it harmonize with the issue, yet if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. *Downey v. Hicks*, 14 How. 240, 246, 14 L. Ed. 404.

In this case the matter in issue was the property in certain negroes, and the verdict did not find that they were the property of the plaintiff or the defendant, but found for the plaintiff their value, which was not in issue. It ought, therefore, to have been set aside upon the motion of either party, as no judgment could lawfully be entered upon it. It was a verdict for a matter different from that which they were empaneled to try. *Bennett v. Butterworth*, 11 How. 669, 676, 13 L. Ed. 859.

In an action of debt, upon a bond to the United States, with condition that certain merchandise imported and re-shipped for exportation should not be relanded within the United States, and that the certificate and other proofs required by law, of the delivery of the same, without the limits of the United States, should be produced at the collector's office, within one year from the date of the bond; an issue was formed upon the defendant's plea, that the merchandise was not relanded, etc., and that the certificate and other proofs required by law, of the delivery of the same at Archangel, in Russia, were produced, etc., within one year from the date of the bond, the jury found a verdict, that "the within-mentioned writing obligatory is the deed of the within-named R. P., etc.,

and they find there is really and justly due upon the said writing obligatory the sum of \$23,989,58." Held, that the verdict was so defective no judgment could be rendered upon it. *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224, approved in *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907.

The jury, in rendering their verdict, failed to respond separately to the distinct issues they were sworn to try. The defendant had pleaded three pleas: 1. Covenants performed; 2. Payments; 3. Set-off, greater in amount than the claim of the plaintiff. On these three pleas, the jury gave a general verdict of damages in favor of the plaintiff. The three issues were joined on affirmative allegations by the defendant, and the verdict was for the plaintiff on these issues, admitting that this verdict is not affirmatively responsive to these issues, it virtually answers and negatives them all; for if all or either of them had been true, the verdict was untrue. *Roach v. Hulings*, 16 Pet. 319, 10 L. Ed. 979.

As to judgment non abstanti, see the title JUDGMENTS AND DECREES, vol. 7, p. 571.

23. *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224; *Garland v. Davis*, 4 How. 131, 11 L. Ed. 907. See the title NEW TRIAL, vol. 8, p. 917, n. 35.

"A verdict which finds but part of the issue and says nothing as to the rest is insufficient, because the jury have not tried the whole issue." *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160.

"If several pleas are joined, and the jury find some of them well, and as to others find a special verdict which is imperfect, a venire facias de novo will be granted for the whole." *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160.

A verdict of guilty or not guilty as to one count of an indictment does not find all the issues raised in other counts and is not responsive. *Dealy v. United States*, 152 U. S. 539, 38 L. Ed. 545.

Upon the issue of plene administravit, the jury must find specially the amount of assets in the hands of the executor; otherwise, the court cannot render judgment upon the verdict. *Fairfax v. Fairfax*, 5 Cranch 19, 3 L. Ed. 24. See the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 173.

24. *Patterson v. United States*, 2 Wheat. 221, 225, 4 L. Ed. 224.

25. *Roach v. Hulings*, 16 Pet. 319, 10 L. Ed. 979.

7. **CONFORMITY TO EVIDENCE.**—The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them.²⁶

8. **CONFORMITY TO INSTRUCTIONS.**—Though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformable to them.²⁷ Where the record does not show that the finding of the jury is contrary to the instruction of the court, the presumption is that they followed it.²⁸

9. **DESIGNATION OF PROPERTY.**—A general description of the premises in an action in ejectment is sufficient.²⁹

10. **DESIGNATION OF AMOUNT.**—A court acting strictly upon common-law forms and modes of proceeding can enter no judgment on a verdict which omits to specify, in express terms and in the established form, the amount of recovery.³⁰ The amount of a verdict may be designated in dollars and cents.³¹ The omission of the word "dollars" in a verdict is not such a defect as to prevent the rendering of judgment according to the manifest intent of the jury, although it might have been more regular to amend the verdict before judgment.³² Where no valuation of property is necessary to enable the court to impose a proper fine, that part of the verdict may be regarded as surplusage.³³

11. **DESIGNATION OF OFFENSE.**—See elsewhere.³⁴

12. **OBJECTIONS.**—An objection that the verdict does not respond to each of several issues, if not presented at the proper stage of the proceedings, has no favor in the courts and should be entertained only in obedience to the strictest requirements of law.³⁵ After the jury has been polled and no objection is made to the verdict because not signed, such objection is waived.³⁶

C. Validity—1. **IN GENERAL.**—Where the generality of a verdict prevents the court from perceiving upon which plea the jury found, if upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld.³⁷

2. **ON GOOD AND BAD COUNTS.**—If the finding of the jury conform to any one of the counts in a declaration³⁸ or indictment³⁹ which, in itself, will support the verdict, it is sufficient, and judgment may be given thereon. It is so

26. *Sparf v. United States*, 156 U. S. 51, 99, 39 L. Ed. 343.

27. *Bingham v. Cabot*, 3 Dall. 19, 33, 1 L. Ed. 491. See *Statler v. United States*, 157 U. S. 277, 279, 39 L. Ed. 700.

"It is, nevertheless, proper for the judge to instruct them as to the law, to inform them that their only safe course is to take the law from the court, and to warn them of the consequences of disregarding it." *Georgia v. Brailsford*, 3 Dall. 1, 5, 1 L. Ed. 483.

28. *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740.

29. *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477. See the title **EJECTMENT**, vol. 5, p. 716.

30. *Parks v. Turner*, 12 How. 39, 45, 13 L. Ed. 883. See the title **REPLEVIN**, vol. 10, p. 724.

31. "This, I believe, is the first instance of a judicial compensation in dollars, in the state courts of Pennsylvania." *Ingraham v. Gibbs*, 2 Dall. 219, 1 L. Ed. 356, note.

32. *Hopkins v. Orr*, 124 U. S. 510, 513, 31 L. Ed. 523.

33. *United States v. Tyler*, 7 Cranch 285, 3 L. Ed. 344. See the title **EMBARGO AND NONINTERCOURSE LAWS**, vol. 5, p. 739.

34. See ante, "Certainty," III, B, 5.

35. *Roach v. Hulings*, 16 Pet. 319, 321, 10 L. Ed. 979. See the title **APPEAL AND ERROR**, vol. 2, p. 117.

36. *Northern Pac. R. Co. v. Urlin*, 158 U. S. 271, 277, 39 L. Ed. 977.

37. *Maryland v. Baldwin*, 112 U. S. 490, 493, 28 L. Ed. 822.

38. *Hopkins v. Orr*, 124 U. S. 510, 31 L. Ed. 523.

"An amendment may be made to apply the verdict to a good count, if another be bad, and the minutes of the judge show that the evidence sustained the good one." *Insurance Co. v. Boon*, 95 U. S. 117, 126, 24 L. Ed. 395; *Matheson v. Grant*, 2 How. 263, 282, 11 L. Ed. 261.

Judgment will not be arrested, because one of the counts of the declaration is defective; but the verdict will be directed to be entered on the good count. *Burrall v. Du Blois*, 2 Dall. 229, 1 L. Ed. 360. See the title **JUDGMENTS AND DECREES**, vol. 7, p. 595.

39. See the titles **FORGERY AND COUNTERFEITING**, vol. 6, p. 385; **INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS**, vol. 6, p. 1004.

provided in some of the states by statutes which control proceedings in the federal courts.⁴⁰

3. **PRESUMPTION.**—A general verdict is entitled to be supported by the presumption that sufficient facts existed to sustain it.⁴¹

D. Surplusage.—If the jury find the issue, and something more, the latter part of the finding will be rejected as surplusage,⁴² but this rule does not apply to a case where the facts found in the verdict are substantially variant from those which are in issue.⁴³

E. Construction—1. **IN FAVOR OF VALIDITY.**—That construction which gives effect to the verdict is to be preferred.⁴⁴

2. **WITH REFERENCE TO INTENT OF JURY.**—The intent of the jury should be the guide to the construction of their verdict.⁴⁵

3. **WITH REFERENCE TO PLEADINGS.**—A verdict is to be construed with reference to the pleadings.⁴⁶ A verdict of guilty is to be construed with reference to the indictment.⁴⁷

4. **WITH REFERENCE TO ISSUES.**—The court looks to the issues simply to see what questions were submitted to the jury, and if they left it open to the jury to find for a party upon either of two propositions, and the verdict does not specify upon which the jury acted, there can be no certainty that they found upon one rather than the other.⁴⁸

5. **AIDS TO CONSTRUCTION.**—A verdict on an issue to try whether a sale was fraudulent, finding the same to be fraudulent, will not be set aside on a certificate or affidavit of some of the jurors, afterwards made, as to what they meant.⁴⁹

F. Amount—1. **IN GENERAL.**—See elsewhere.⁵⁰

2. **EXCESSIVE AMOUNT.**—No judgment can be entered upon a verdict for the

40. *Bond v. Dustin*, 112 U. S. 604, 609, 28 L. Ed. 835. See the title **COURTS**, vol. 4, p. 1144.

"The technical rule of the common law in this matter has been changed by statute in many parts of the United States." *Hopkins v. Orr*, 124 U. S. 510, 514, 31 L. Ed. 523.

41. *Ward v. Cochran*, 150 U. S. 597, 608, 37 L. Ed. 1195. See the title **APPEAL AND ERROR**, vol. 2, p. 330.

42. *Patterson v. United States*, 2 Wheat. 221, 225, 4 L. Ed. 224; *Statler v. United States*, 157 U. S. 277, 279, 39 L. Ed. 700.

Where no valuation by the jury is necessary to enable the court to impose the proper fine, that part of the verdict may be regarded as surplusage, and cannot deprive the United States of the judgment to which they became entitled by the defendant's conviction of the offense laid in the indictment. *United States v. Tyler*, 7 Cranch 285, 3 L. Ed. 344. And see the title **EMBARGO AND NONINTERCOURSE LAWS**, vol. 5, p. 739.

"The verdict being general and not special, any words attached to the finding 'guilty on the first count' are clearly superfluous and are to be so treated. * * * The words attached to the verdict are simply those found on the back of the indictment describing the first count, and this fact indicates that the jury

affixed them simply as words of description of the first count, and therefore did not intend by their use to qualify in any way the conclusion of guilt expressed in their verdict." *Statler v. United States*, 157 U. S. 277, 280, 39 L. Ed. 700.

43. *Patterson v. United States*, 2 Wheat. 221, 225, 4 L. Ed. 224.

44. *Larkin v. Upton*, 144 U. S. 19, 21, 36 L. Ed. 330.

45. *Proprietary v. Ralston*, 1 Dall. 18, 1 L. Ed. 18; *Thompson v. Musser*, 1 Dall. 458, 462, 1 L. Ed. 222; *Parks v. Turner*, 12 How. 39, 46, 13 L. Ed. 883; *Larkin v. Upton*, 144 U. S. 19, 21, 36 L. Ed. 330.

46. *Parks v. Turner*, 12 How. 39, 44, 13 L. Ed. 883; *Statler v. United States*, 157 U. S. 277, 280, 39 L. Ed. 700; *Matheson v. Grant*, 2 How. 263, 11 L. Ed. 261. See the title **PARTNERSHIP**, vol. 9, p. 129.

47. *Statler v. United States*, 157 U. S. 277, 278, 39 L. Ed. 700.

"The verdict of 'guilty' in this case will be interpreted as referring to the single offense specified in the indictment." *St. Clair v. United States*, 154 U. S. 134, 154, 38 L. Ed. 936.

48. *De Sollar v. Hanscome*, 158 U. S. 216, 222, 39 L. Ed. 956.

49. *Doss v. Tyack*, 14 How. 297, 14 L. Ed. 428. See, also, *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. Ed. 580. And see post, "Proof of Verdict," XI.

50. See the titles **INSURANCE**, vol. 7, p. 214; **PATENTS**, vol. 9, p. 205.

plaintiff for an amount in excess of the amount prayed for in his petition.⁵¹

G. Delivery.—Where a case is committed to the jury on Saturday, their verdict may be received and the jury discharged on Sunday.⁵²

H. Polling Jury.—That generally the right to poll a jury exists may be conceded. Its object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent. But it is not a matter which is vital, is frequently not required by litigants; and, while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict.⁵³

I. Amendment.—1. **IN GENERAL.**—Although the rule was anciently very strict in not permitting amendments to verdicts, yet, in later cases, this strictness has been relaxed in order to prevent a failure of justice.⁵⁴ The statute of jeofails embraces verdicts defective in form, but substantially sufficient to enable the court to perceive the right of the case.⁵⁵

2. **DISCRETION OF COURT.**—The question of amendment is one of discretion in the trial court.⁵⁶

3. **TIME OF AMENDMENT.**—All that is required is that the court should amend the verdict within a reasonable time.⁵⁷

4. **WHEN VERDICT MAY BE AMENDED.**—A verdict defective in form may be amended.⁵⁸ The court may give form to a general finding so as to make it harmonize with the issue, but, if it appears that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.⁵⁹

5. **HOW VERDICT MAY BE AMENDED.**—A verdict may be amended by making it harmonize with the issues,⁶⁰ or, where the jury have misapplied the law,

51. The petition by which the suit on the bond was instituted, stated the debt to be \$15,555.18; the verdict of the jury was for \$20,000; and upon this a judgment was entered up against the estate of two of the obligors in the bond, jointly and severally, for \$20,000, and a judgment against two of the legal representatives of one of the obligors, for \$10,000 each. "Upon no possible ground can this judgment be sustained." *Cox v. United States*, 6 Pet. 172, 8 L. Ed. 359.

52. *United States v. Ball*, 163 U. S. 662, 671, 41 L. Ed. 300.

Whatever may be said as to the right of a court on Sunday to deliver to the jury special questions to be answered by them, a general verdict of the jury is not a nullity by reason of its being received or recorded on a Sunday. *Stone v. United States*, 167 U. S. 178, 195, 42 L. Ed. 127.

53. On November 30, the case was submitted to the jury with the instructions that when they had agreed upon a verdict it should be written out, signed by the jurors, dated, sealed and delivered to the foreman, to be delivered in open court on December 1, in the presence of all who signed it. On December 1, the jurors returned a verdict for the plaintiff in court which was signed by them all. The record of the proceedings shows that one of the jurors was not present when the jury returned in open court. His physician testified that he was too

ill to be present. The defendant objected to the reception of the verdict. The remaining jurors testified on oath that they each signed the verdict, and that they saw the absent juror sign the same. The defendant requested that the jury be polled. The eleven jurors were polled. It was held that the fact that all the jurors were not present and polled did not invalidate their verdict. *Humphries v. District of Columbia*, 174 U. S. 190, 43 L. Ed. 944. See the title **DUE PROCESS OF LAW**, vol. 5, p. 624.

54. *Parks v. Turner*, 12 How. 39, 45, 13 L. Ed. 883.

55. See the title **AMENDMENTS**, vol. 1, p. 308, et seq.

56. *Matheson v. Grant*, 2 How. 263, 11 L. Ed. 261.

57. *Matheson v. Grant*, 2 How. 263, 11 L. Ed. 261.

58. *Downey v. Hicks*, 14 How. 240, 246, 14 L. Ed. 404.

Where on a plea of nonassumpsit the verdict is that the defendant is guilty in manner and form as alleged in the declaration, it is formally defective but this is a mere clerical error properly amendable. *Lincoln v. Iron Co.*, 103 U. S. 412, 417, 26 L. Ed. 518.

59. *Patterson v. United States*, 2 Wheat. 221, 4 L. Ed. 224. See the title **JUDGMENTS AND DECREES**, vol. 7, p. 571.

60. However, if it appears to that court, or to the appellate court, that the

by correctly applying the law to the facts as found by them.⁶¹ It may be amended by changing a word from the singular to the plural number.⁶²

6. EVIDENCE ON WHICH AMENDED.—A verdict may be amended upon the judge's notes of the evidence given at the trial or upon any other clear and satisfactory evidence.⁶³

J. Recording—1. NECESSITY FOR RECORDING.—In Georgia, the omission to record the verdict upon which a judgment is rendered does not deprive the plaintiff of his lien upon the real estate of the defendant.⁶⁴

2. TIME OF RECORDING.—A verdict may be recorded on Sunday.⁶⁵

3. MANNER OF RECORDING.—Any particular practice prevailing in any of the states as to the manner of entering upon the record the finding of the jury, is a mere matter of practice as to the form of taking and entering the verdict of the jury, and cannot be binding upon the courts of the United States.⁶⁶

4. BY WHOM RECORDED.—A verdict is recorded by the clerk of the court.⁶⁷

5. MISTAKE IN RECORDING.—See elsewhere.⁶⁸

K. Effect—1. AS CURE OF IRREGULARITIES.—See elsewhere.⁶⁹

2. AS RES ADJUDICATA—*a. In General.*—See elsewhere.⁷⁰

b. Distinguished from Nonsuit.—In the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted, either upon motion or upon appeal.⁷¹

3. AS EVIDENCE.—Verdicts are evidence between parties and privies.⁷²

4. ON ORIGINAL TRANSACTION.—After verdict, every assumpsit in the declaration is to be taken as an express assumpsit.⁷³

5. ON JUDGMENT.—See elsewhere.⁷⁴

finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. *Patterson v. United States*, 2 Wheat. 221, 225, 4 L. Ed. 224.

61. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 598, 41 L. Ed. 837.

"The jury found there was \$7,500 due on the debt and one cent damages for the detention. That finding, reduced to proper form, was in favor of the plaintiff for the penalty of the bond, to be discharged on payment of \$7,500. All the court did was to enter the verdict in that form. In doing so it only gave legal effect to what the jury unmistakably found. This was allowable, both under § 954 of the Revised Statutes and the practice act of Illinois." *Koon v. Insurance Co.*, 104 U. S. 106, 107, 26 L. Ed. 670.

62. *Laber v. Cooper*, 7 Wall. 565, 570, 19 L. Ed. 151.

63. *Matheson v. Grant*, 2 How. 263, 11 L. Ed. 261; *Insurance Co. v. Boon*, 95 U. S. 117, 126, 24 L. Ed. 395; *Laber v. Cooper*, 7 Wall. 565, 570, 19 L. Ed. 151.

64. *Gunn v. Plant*, 94 U. S. 664, 24 L. Ed. 304.

65. *Stone v. United States*, 167 U. S. 178, 195, 42 L. Ed. 127.

66. *Long v. Palmer, etc., Co.*, 16 Pet. 65, 10 L. Ed. 888. See the title COURTS, vol. 4, p. 1144.

According to the practice in Pennsylvania, where a defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant, and according

to their mode of keeping records this result is entered by way of note; e. g., "new trial refused and judgment on the verdict." Although this may be a good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States. *Reese v. Walker*, 11 How. 272, 13 L. Ed. 693. See the title SET-OFF, RECOURPMENT AND COUNTERCLAIM, vol. 10, p. 1114.

67. *Thompson v. Musser*, 1 Dall. 458, 1 L. Ed. 222.

68. See the title MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 118.

69. See the titles AMENDMENTS, vol. 1, p. 308; APPEAL AND ERROR, vol. 2, p. 378; BILLS, NOTES AND CHECKS, vol. 3, p. 362; CERTIORARI, vol. 3, p. 654, n. 12; COVENANT, ACTION OF, vol. 5, p. 3; INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 1008; INSTRUCTIONS, vol. 7, p. 32.

70. See the title RES ADJUDICATA, vol. 10, pp. 734, 781, 784.

71. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 39, 35 L. Ed. 55; *Oscanyan v. Arms Co.*, 103 U. S. 261, 264, 26 L. Ed. 539.

72. *Vigel v. Naylor*, 24 How. 208, 212, 16 L. Ed. 646; *Davis v. Wood*, 1 Wheat. 6, 8, 4 L. Ed. 22; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639. See the title RES ADJUDICATA, vol. 10, p. 784.

73. *Marine Ins. Co. v. Young*, 1 Cranch 332, 2 L. Ed. 126.

74. See the title JUDGMENTS AND DECREES, vol. 7, p. 570.

6. OF VERDICT FOR PARTY GENERALLY.—A verdict generally for one of the parties is equivalent to a special finding upon each and every one of the issues tried, and authorizes any judgment that could be entered on such a finding.⁷⁵ Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint.⁷⁶

7. OF VERDICT ON PART OF COUNTS.—A verdict of guilty upon a part only of the counts of an indictment is equivalent to a verdict of not guilty as to the other counts.⁷⁷

L. Interest on Verdict.—See elsewhere.⁷⁸

M. Review.—See elsewhere.⁷⁹

IV. Special Verdict.

A. Definition.—A special verdict is one in which the jury find the facts of the case, and refer the decision of the cause upon those facts to the court, with a conditional conclusion, that if the court should be of opinion, upon the whole matter thus found, that the plaintiff has a good cause of action, they then find for the plaintiff; and, if otherwise, they then find for the defendant.⁸⁰

B. Distinctions.—See elsewhere.⁸¹

C. Preparation.—In practice, the formal preparation of a special verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them.⁸²

D. Form—1. IN GENERAL.—The usual course is to sustain informal special verdicts if they contain all the facts necessary to a proper judgment between the parties in respect to the matter in controversy.⁸³

2. CONDITIONAL FINDING.—A special verdict is defective if it does not contain the conditional or alternative finding of the jury.⁸⁴

^{75.} *Flournoy v. Lastrapes*, 131 U. S., appx. clxi, 25 L. Ed. 406. See the title *PARTNERSHIP*, vol. 9, p. 129.

Where the indictment charges the commission of two crimes, a general verdict is proper and imports of necessity a conviction as to both crimes. *Ballew v. United States*, 160 U. S. 187, 197, 40 L. Ed. 388.

^{76.} *Bennett v. Harkrader*, 158 U. S. 441, 447, 39 L. Ed. 1046; *Malony v. Adsit*, 175 U. S. 281, 289, 44 L. Ed. 163.

^{77.} *Jolly v. United States*, 170 U. S. 402, 408, 42 L. Ed. 1085. See cases cited by Mr. Justice White in *Selvester v. United States*, 170 U. S. 262, 42 L. Ed. 1029.

^{78.} See the title *INTEREST*, vol. 7, p. 226.

^{79.} As to review of findings of fact generally, see the title *APPEAL AND ERROR*, vol. 1, p. 1005, et seq. As to appeal from state courts, see the title *APPEAL AND ERROR*, vol. 1, p. 781. As to conformity to state practice on appeal, see the title *APPEAL AND ERROR*, vol. 1, pp. 1015, 1016. As to appeal from territorial courts, see the title *APPEAL AND ERROR*, vol. 1, p. 389. As to exceptions to verdict, see the title

APPEAL AND ERROR, vol. 2, pp. 117, 203. As to waiver of exceptions, see the title *APPEAL AND ERROR*, vol. 2, p. 351.

^{80.} *Suydam v. Williamson*, 20 How. 427, 432, 15 L. Ed. 978; *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756; *Insurance Co. v. Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358; *Collins v. Riley*, 104 U. S. 322, 324, 26 L. Ed. 752; *Statler v. United States*, 157 U. S. 277, 278, 39 L. Ed. 700; *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 596, 41 L. Ed. 837.

^{81.} See the title *DEMURRER TO THE EVIDENCE*, vol. 5, p. 289.

^{82.} *Suydam v. Williamson*, 20 How. 427, 432, 15 L. Ed. 978; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756.

^{83.} *Insurance Co. v. Piaggio*, 16 Wall. 378, 387, 21 L. Ed. 358.

^{84.} *Mumford v. Wardwell*, 6 Wall. 423, 433, 18 L. Ed. 756.

"Correct practice in such cases is that the jury find the facts of the case and refer the decision of the cause upon those facts to the court, with a conditional conclusion that if the court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff, but

E. Requisites and Sufficiency—1. FINDING OF FACTS.—A special verdict must find the facts on which the court is to pronounce the judgment according to law,⁸⁵ and not merely state the evidence of facts,⁸⁶ nor conclusions of

if otherwise, then they find for the defendant." *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756.

Where a paper in the form of a special verdict—except that after stating the facts, it did not refer the decision on them to the court in the conditional and alternative way usual in such verdicts, but found "a general verdict for the plaintiff subject to the opinion of the court upon the foregoing recited facts"—was "agreed to as a special verdict" by counsel in the cause, filed of record and passed on as an agreed case by the court below, the federal supreme court—remarking that as a special verdict the paper was defective, because not ending with the usual conclusion—in view of the facts just mentioned considered it as a special verdict or agreed case, and on error to a judgment given on it below adjudged the case presented by it. *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756.

"The finding of the jury is not in the usual form of a special verdict, but the jury make certain findings, and the statement is that the court reserves the three points stated; and each point reserved is stated in one and the same form, namely, that if the court should be of opinion that the shells are dutiable thus and so, or are free from duty, then judgment is to be entered for the plaintiff for a specified sum. As the circuit court, and the counsel for both parties in that court, appear to have treated the findings and the reservation as amounting to either a special verdict or an agreed statement of facts, we are disposed to overlook the irregularity, and to consider the case on its merits." *Hartranft v. Wiegmann*, 121 U. S. 609, 613, 30 L. Ed. 1012; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756.

85. *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508; *Prentice v. Zane*, 8 How. 470, 484, 12 L. Ed. 1160; *Carrington v. Pratt*, 18 How. 63, 15 L. Ed. 267; *Graham v. Bayne*, 18 How. 60, 63, 15 L. Ed. 265; *Guild v. Frontin*, 18 How. 135, 15 L. Ed. 290; *Suydam v. Williamson*, 20 How. 427, 432, 441, 15 L. Ed. 978; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756; *Norris v. Jackson*, 9 Wall. 125, 127, 19 L. Ed. 608; *Smith v. Sac County*, 11 Wall. 139, 161, 20 L. Ed. 102; *Insurance Co. v. Piaggio*, 16 Wall. 378, 387, 388, 21 L. Ed. 358; *French v. Edwards*, 21 Wall. 147, 151, 22 L. Ed. 534; *Stickney v. Wilt*, 23 Wall. 150, 163, 23 L. Ed. 50; *Tvng v. Grinnell*, 92 U. S. 467, 472, 23 L. Ed. 733; *Mining Co. v. Taylor*, 100 U. S. 37, 42, 25 L. Ed. 541; *Hodges v. Easton*, 106 U. S. 408, 27 L. Ed. 169; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 501, 27 L.

Ed. 337; *Raimond v. Terrebonne Parish*, 132 U. S. 192, 33 L. Ed. 309; *Hathaway v. First Nat. Bank*, 134 U. S. 494, 499, 33 L. Ed. 1004. See the title MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 117.

In *Hodges v. Easton*, 106 U. S. 408, 27 L. Ed. 169, it was held that an imperfect special verdict could not be pieced out and the missing facts be supplied by reference to the other parts of the record. *Ward v. Cochran*, 150 U. S. 597, 608, 37 L. Ed. 1195.

In a prosecution in a circuit court of the United States entertaining jurisdiction on the ground that the offense was committed out of the jurisdiction of any state, a special verdict finding that the offense was committed by the prisoner at a place designated, but omitting to find that it was outside the limits of any state, must be set aside. *United States v. Jackalow*, 1 Black 484, 17 L. Ed. 225.

A special verdict in a criminal case must find the criminal intent. *United States v. Buzzo*, 18 Wall. 125, 128, 21 L. Ed. 812.

Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be found. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220; *Prentice v. Zane*, 8 How. 470, 12 L. Ed. 1160; *Collins v. Riley*, 104 U. S. 322, 327, 26 L. Ed. 752; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 500, 27 L. Ed. 337; *Ward v. Cochran*, 150 U. S. 597, 608, 37 L. Ed. 1195. See the title MARINE INSURANCE, vol. 8, pp. 207, 208.

If a special verdict finds but parts of the facts in issue, and is silent as to others, it is a mistrial. *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

86. It is not sufficient, although the evidence found by them be sufficient to establish the fact. *Chesapeake Ins. Co. v. Stark*, 6 Cranch 268, 3 L. Ed. 220; *Barnes v. Williams*, 11 Wheat. 451, 6 L. Ed. 508; *Prentice v. Zane*, 8 How. 470, 483, 12 L. Ed. 1160; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 501, 27 L. Ed. 337; *Ward v. Cochran*, 150 U. S. 597, 608, 37 L. Ed. 1195.

Where, in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, the federal supreme court will not render a judgment upon such an imperfect special verdict, but will remand the cause to the court below, with directions to award a venire facias de novo. *Barnes v. Williams*, 11 Wheat. 415, 6 L. Ed. 508. See the title MANDATE AND PROCEEDINGS THEREON, vol. 8, p. 117.

law.⁸⁷ Different facts cannot be confounded together in a special verdict.⁸⁸

2. **FINDING OF LAW.**—If a special verdict on a mixed question of fact and law, find facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury themselves have not drawn such conclusions, and stated them as facts in the case.⁸⁹

3. **CERTAINTY.**—A special verdict must be certain and unambiguous.⁹⁰

4. **RESPONSIVENESS.**—A special verdict must be responsive to the issues made by the pleadings.⁹¹

5. **DESIGNATION OF PROPERTY.**—See elsewhere.⁹²

F. Contents.—By leave of the court a special verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury.⁹³

G. Construction.—Where special findings are irreconcilable with a general verdict, the former control the latter.⁹⁴

H. Rendition and Reception.—A special verdict requires the presence and assent of the court.⁹⁵ If it is not received by the court, nor in any way made matter of record, and where, with the assent of the attorney of the party in whose favor it was given, the jury retire by the court's direction and consider further of their verdict, and return another verdict upon which the judgment of ouster is entered, it is of no weight as evidence for any purpose.⁹⁶

I. Amendment.—It seems a special verdict is not amendable by the notes of the judge.⁹⁷

J. Recording.—After a special verdict is arranged and reduced to form, it is entered on the record, together with the other proceedings in the cause.⁹⁸ It should be filed as of the term when the trial took place.⁹⁹ The entry follows the verdict and is no part of the finding of the jury.¹

K. Effect.—1. **FINDING OF FACTS.**—See elsewhere.²

2. **FINDING OF LAW.**—If the jury find the fact specially, and draw the legal conclusion that the fact amounts to a justification, the court is not bound by that conclusion.³

L. Judgment.—To the facts as found in a special verdict, the court applies the law.⁴ The questions of law arising on the facts found are decided

87. A special verdict, which states that the plaintiff's right to recover against the defendants was barred by the statute of limitations, is a conclusion of law, rather than a statement of facts upon which it rests. *Collins v. Riley*, 104 U. S. 322, 325, 26 L. Ed. 752.

88. Although the effect of a breach of a warranty, and of a material misrepresentation, may be the same on a policy of insurance, yet they cannot be confounded together, in deciding on a special verdict. *Livingston v. Maryland Ins. Co.*, 6 Cranch 274, 278, 3 L. Ed. 222.

89. *French v. Edwards*, 21 Wall. 147, 151, 22 L. Ed. 534.

90. *Graham v. Bayne*, 18 How. 60, 15 L. Ed. 265; *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

91. *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 656, 23 L. Ed. 341.

92. See the title **EJECTMENT**, vol. 5, p. 716.

93. *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756.

94. *Larkin v. Upton*, 144 U. S. 19, 21, 36 L. Ed. 330; *Insurance Co. v. Piaggio*,

16 Wall. 378, 388, 21 L. Ed. 358. See the title **JUDGMENTS AND DECREES**, vol. 7, p. 571.

95. *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978.

96. *United States v. Addison*, 6 Wall. 291, 18 L. Ed. 919.

97. *Laber v. Cooper*, 7 Wall. 565, 570, 19 L. Ed. 151.

98. *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756.

99. *Suydam v. Williamson*, 20 How. 427, 438, 15 L. Ed. 978.

1. *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756.

2. See the titles **EVIDENCE**, vol. 5, p. 1056; **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 28; **INSURANCE**, vol. 7, p. 214; **JUDGMENTS AND DECREES**, vol. 7, p. 571; **JUDICIAL NOTICE**, vol. 7, p. 700.

3. *King v. Delaware Ins. Co.*, 6 Cranch 71, 80, 3 L. Ed. 155; *Collins v. Riley*, 104 U. S. 322, 325, 26 L. Ed. 752.

4. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 598, 41 L. Ed. 837.

by the court, as in case of a demurrer.⁵

M. Review.—See elsewhere.⁶

V. Sealed Verdict.

A. By Agreement.—Where the record shows that a sealed verdict was returned by the jury by agreement of counsel for both parties in open court and in the presence of the defendant, it was rightly received and recorded.⁷ The stipulation "that the jury might, when they had agreed on their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," was equivalent to an agreement by both parties, on the retirement of the jury, that the court might, when the sealed verdict was handed in by the officer, open it in the absence of the jury and reduce it to proper form, if necessary.⁸

B. Polling Jury.—The stipulation "that the jury might, when they had agreed on their verdict, if the court should not then be in session, sign and seal the same, and deliver the same to the officer in charge and disperse," was a waiver of the right to poll the jury if they should not be in court.⁹

VI. Partial Verdict.

A partial verdict is one in which the accused is acquitted of a part of the accusation against him and found guilty of the residue.¹⁰ Where an indictment charges an offense in a higher degree and one of a lesser is intended, there may be a finding by a partial verdict of the latter.¹¹

VII. Verdict Subject to Opinion of Court.

A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon, are stated on the record.¹²

VIII. Special Interrogatories.

It was a common practice at common law when no special verdict was demanded and when only a general verdict was returned, to interrogate the jury upon special matters of fact. The right to propound such interrogatories was undoubted and often recognized.¹³ The right has been recognized independ-

5. *Suydam v. Williamson*, 20 How. 427, 15 L. Ed. 978; *Mumford v. Wardwell*, 6 Wall. 423, 432, 18 L. Ed. 756.

6. See the titles *APPEAL AND ERROR*, vol. 1, p. 1058; vol. 2, p. 351; *MANDATE AND PROCEEDINGS THEREON*, vol. 8, p. 117.

7. *Pounds v. United States*, 171 U. S. 35, 38, 43 L. Ed. 62. See the title *JURY*, vol. 7, p. 777.

8. *Koon v. Insurance Co.*, 104 U. S. 106, 107, 26 L. Ed. 670.

9. *Koon v. Insurance Co.*, 104 U. S. 106, 107, 26 L. Ed. 670.

10. "As when there is an acquittal on one count, and a verdict of guilty on another. Or when the charge is of a higher degree, including one of a lesser, there may be a finding by a partial verdict of the latter. As upon a larger charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault." *Dynes v. Hoover*, 20 How. 65, 79, 15 L. Ed. 838. See the titles *ADUL-*

TERY, FORNICATION AND LEWDNESS, vol. 1, p. 197; *MARINE INSURANCE*, vol. 8, p. 217.

11. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry, so, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault. *Dynes v. Hoover*, 20 How. 65, 80, 15 L. Ed. 838.

12. "The jury did not intend to find a general verdict; but to submit the points of law to the court. If the law had been for the plaintiffs, the court could only have awarded a venire de novo. The facts ought to have appeared, so that the judgment might have been either reversed or affirmed, upon the merits." *Smith v. Delaware Ins. Co.*, 7 Cranch 434, 435, 3 L. Ed. 396. See, also, the title *JUDICIAL NOTICE*, vol. 7, p. 700.

13. Whether or no a jury was compelled to answer such interrogations, or whether, if it refused or failed to answer, the general verdict would stand or not,

ently of any statute. The value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial—to end the controversy so far as the trial court is concerned upon that single response from the jury. It is within the power of the legislature of a territory to provide that on a trial of a common-law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel.¹⁴

IX. Discretion of Jury as to Nature of Verdict.

By the common law, the jury cannot be compelled to render a special verdict.¹⁵

X. Directing Verdict.

A. Distinguished from Demurrer to Evidence.—A motion for the directing a verdict is in the nature of a demurrer to the evidence,¹⁶ though less technical, and has in many of the states superseded the ancient practice of a demurrer to evidence.¹⁷

B. Distinguished from Nonsuit.—Involuntary nonsuits not being allowed in the federal courts,¹⁸ the proper course in lieu thereof is to proceed by directing a verdict.¹⁹ The difference in the two modes is rather a matter of form than of substance, except in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended, unless a new trial be granted either upon motion or upon appeal.²⁰

C. Power of Court to Direct.—Although jurors are the recognized triers of questions of fact,²¹ the power of a federal court to direct a verdict for one party or the other is undoubted,²² and when the court has done so and its action has been approved by the unanimous judgment of the direct appellate court, the supreme court will rightfully pay deference to their concurring opinions.²³ This power is not controlled by the acts of congress requiring conformity to state laws.²⁴

D. Motion to Direct—1. **NECESSITY FOR MOTION.**—Where no motion is made to direct a verdict, it cannot be complained of on appeal that issues of fact were submitted to the jury.²⁵

may be questioned. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 597, 41 L. Ed. 837. See the title **COURTS**, vol. 4, p. 1144.

14. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 598, 41 L. Ed. 837.

15. *Duncan v. United States*, 7 Pet. 435, 8 L. Ed. 739.

16. *Parks v. Ross*, 11 How. 362, 13 L. Ed. 730; *Richardson v. Boston*, 19 How. 263, 15 L. Ed. 639; *Schuchardt v. Allens*, 1 Wall. 359, 17 L. Ed. 642; *Merrick v. Giddings*, 115 U. S. 300, 29 L. Ed. 403; *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. Ed. 1032. See the title **DEMURRER TO THE EVIDENCE**, vol. 5, p. 290.

"The instruction to find a verdict for the defendant must be tested by the same rules that apply in the case of a demurrer to evidence." *Merrick v. Giddings*, 115 U. S. 300, 305, 29 L. Ed. 403.

17. *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. Ed. 1032.

18. See the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 5, p. 391.

19. *Oscanyan v. Arms Co.*, 103 U. S. 261, 264, 26 L. Ed. 539.

20. *Oscanyan v. Arms Co.*, 103 U. S. 261, 264, 26 L. Ed. 539; *Coughran v. Bigelow*, 164 U. S. 301, 307, 41 L. Ed. 442.

21. *Pythias Knights' Supreme Lodge v. Beck*, 181 U. S. 49, 52, 45 L. Ed. 741; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 45 L. Ed. 361; *Marande v. Texas, etc., R. Co.*, 184 U. S. 173, 191, 46 L. Ed. 487.

22. *Spring Co. v. Edgar*, 99 U. S. 645, 656, 25 L. Ed. 487.

23. *Leach v. Burr*, 188 U. S. 510, 513, 47 L. Ed. 567.

24. Section 914 of the Revised Statutes is not applicable. *Lincoln v. Power*, 151 U. S. 436, 38 L. Ed. 224. See, generally, the title **COURTS**, vol. 4, p. 1144.

25. *Hartford, etc., Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. Ed. 496; *Means v. Bank*, 146 U. S. 620, 630, 36 L. Ed. 1107; *Hansen v. Boyd*, 161 U. S. 397, 40 L. Ed. 746; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. Ed. 811. See the title **INSTRUCTIONS**, vol. 7, p. 29.

2. **MOTION BY BOTH PARTIES.**—A motion by each party to direct a verdict is not equivalent to a submission of the case to the court without a jury;²⁶ but it is equivalent to a motion for a finding of facts. The direction of the court to find for one of the parties concludes both.²⁷

3. **TIME OF MAKING MOTION.**—a. *At Close of Opening Statement.*—A motion to direct a verdict may be made by the defendant at the close of the opening statement of the counsel for the plaintiff when such statement is full and explicit and shows the plaintiff has no case.²⁸

b. *At Close of Case.*—A motion to direct a verdict in his favor may be made by a defendant at the close of the plaintiff's case.²⁹ A request for a ruling, that, upon the evidence introduced, the plaintiff is not entitled to recover, cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error.³⁰

4. **HEARING ON MOTION.**—In considering the motion the court proceeds upon the ground that all the facts stated by the witnesses of the opposite party are true.³¹

E. When Verdict Directed.—1. **IN CIVIL CASES.**—a. *In General.*—It is a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court.³²

b. *Where Evidence Insufficient.*—(1) *In General.*—When the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for a party, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for his opponent.³³ On the other hand, the case should be left

26. In *Beuttell v. Magone*, 157 U. S. 154, 39 L. Ed. 654, such motions were held not to come within the meaning of §§ 649, 700, Rev. Stat.

27. *Beuttell v. Magone*, 157 U. S. 154, 39 L. Ed. 654.

28. *Oscanyan v. Arms Co.*, 103 U. S. 261, 263, 26 L. Ed. 539; *Butler v. National Home*, 144 U. S. 64, 36 L. Ed. 346; *Liverpool, etc., Steamship Co. v. Commissioners*, 113 U. S. 33, 37, 28 L. Ed. 899.

29. *Insurance Co. v. Folsom*, 18 Wall. 237, 250, 21 L. Ed. 827.

30. *Columbia, etc., R. Co. v. Hawthorne*, 144 U. S. 202, 206, 36 L. Ed. 405.

31. *Spring Co. v. Edgar*, 99 U. S. 645, 656, 25 L. Ed. 487; *Merchants' Bank v. State Bank*, 10 Wall. 604, 655, 19 L. Ed. 1008.

32. *Wallbrun v. Babbitt*, 16 Wall. 577, 581, 21 L. Ed. 489; *Orleans v. Platt*, 99 U. S. 676, 25 L. Ed. 404; *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Carter v. Carusi*, 112 U. S. 478, 484, 28 L. Ed. 820; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 31 L. Ed. 287; *Pollak v. Brush Elec. Ass'n*, 128 U. S. 446, 456, 32 L. Ed. 474; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 35 L. Ed. 213; *Israel v. Gale*, 174 U. S. 391, 43 L. Ed. 1019.

On an issue of fact raised by a plea in abatement, where the defendant holds the affirmative of the issue, and where the evidence, introduced by the defendant himself, is all in favor of the plaintiff, positive and uncontradicted, the court properly instructs the jury when it directs them, as matter of law, to find the issue for the plaintiff. *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170.

33. *Parks v. Ross*, 11 How. 362, 372, 373, 13 L. Ed. 730; *Richardson v. Boston*, 19 How. 263, 269, 15 L. Ed. 639; *Schuchardt v. Allens*, 1 Wall. 359, 369, 370, 17 L. Ed. 642; *Hickman v. Jones*, 9 Wall. 197, 19 L. Ed. 551; *Michigan Bank v. Eldred*, 9 Wall. 544, 19 L. Ed. 763; *Merchants' Bank v. State Bank*, 10 Wall. 604, 637, 19 L. Ed. 1008; *Bevans v. United States*, 13 Wall. 56, 20 L. Ed. 531; *Ward v. United States*, 14 Wall. 28, 20 L. Ed. 792; *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Wallbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489; *Insurance Co. v. Folsom*, 18 Wall. 237, 251, 21 L. Ed. 827; *Pleasants v. Fant*, 22 Wall. 116, 120, 121, 22 L. Ed. 780; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898; *Commissioners v. Clark*, 94 U. S. 278, 284,

to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish.³⁴ The true rule is that if, to the judicial mind, the evidence, tested by the law of the issue and the rules of evidence, is not sufficient to justify a jury fairly and reasonably in finding a verdict for the plain-

24 L. Ed. 59; *Insurance Co. v. Rodel*, 95 U. S. 232, 24 L. Ed. 433; *Railroad Co. v. Jones*, 95 U. S. 439, 443, 24 L. Ed. 506; *Arthur v. Zimmerman*, 96 U. S. 124, 24 L. Ed. 770; *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. Ed. 958; *Spring Co. v. Edgar*, 99 U. S. 645, 656, 25 L. Ed. 487; *Railroad Co. v. Fraloff*, 100 U. S. 24, 26, 27, 25 L. Ed. 531; *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761; *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. Ed. 980; *Meguire v. Corwine*, 101 U. S. 108, 111, 25 L. Ed. 899; *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *National Bank v. Insurance Co.*, 103 U. S. 783, 786, 26 L. Ed. 459; *Stewart v. Lansing*, 104 U. S. 505, 512, 26 L. Ed. 866; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32, 42, 27 L. Ed. 65; *Montclair v. Dana*, 107 U. S. 162, 27 L. Ed. 436; *Roundtree v. Smith*, 108 U. S. 269, 277, 27 L. Ed. 722; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 170, 28 L. Ed. 385; *Thorwegan v. King*, 111 U. S. 549, 28 L. Ed. 514; *Carter v. Carusi*, 112 U. S. 478, 484, 28 L. Ed. 820; *Arthur v. Morgan*, 112 U. S. 495, 28 L. Ed. 825; *Torrent Arms Lumber Co. v. Rodgers*, 112 U. S. 659, 669, 28 L. Ed. 842; *Anderson County Comm'r v. Beal*, 113 U. S. 227, 241, 242, 28 L. Ed. 966; *Spaids v. Cooley*, 113 U. S. 278, 28 L. Ed. 984; *Baylis v. Travellers' Ins. Co.*, 113 U. S. 316, 320, 28 L. Ed. 989; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 618, 29 L. Ed. 224; *Lancaster v. Collins*, 115 U. S. 222, 29 L. Ed. 373; *Higgins v. McCrea*, 116 U. S. 671, 682, 29 L. Ed. 764; *Marshall v. Hubbard*, 117 U. S. 415, 419, 29 L. Ed. 919; *Eldred v. Bell Tel. Co.*, 119 U. S. 513, 39 L. Ed. 496; *Hubbard v. Investment Co.*, 119 U. S. 696, 30 L. Ed. 548; *Metropolitan R. Co. v. Moore*, 121 U. S. 558, 570, 30 L. Ed. 1022; *Goodlett v. Louisville, etc., Railroad*, 122 U. S. 391, 411, 30 L. Ed. 1230; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 733, 31 L. Ed. 287; *Hinchman v. Lincoln*, 124 U. S. 38, 49, 31 L. Ed. 337; *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 94, 32 L. Ed. 339; *Jones v. East Tennessee, etc., R. Co.*, 128 U. S. 443, 32 L. Ed. 478; *Pollak v. Brush Elec. Ass'n*, 128 U. S. 446, 32 L. Ed. 474; *Pinkerton v. Ledoux*, 129 U. S. 346, 354, 32 L. Ed. 706; *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 652, 32 L. Ed. 1058; *Robertson v. Edelhoff*, 132 U. S. 614, 626, 33 L. Ed. 477; *Coyne v. Union Pac. R. Co.*, 133 U. S. 370, 33 L. Ed. 651; *Searl v. School District, No. 2*, 133 U. S. 553, 33 L. Ed. 740;

Gunther v. Liverpool, etc., Ins. Co., 134 U. S. 110, 33 L. Ed. 857; *Penfield v. Chesapeake, etc., R. Co.*, 134 U. S. 351, 360, 33 L. Ed. 940; *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. Ed. 1032; *Haines v. McLaughlin*, 135 U. S. 584, 598, 34 L. Ed. 290; *Russell v. Post*, 138 U. S. 425, 426, 34 L. Ed. 1009; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. Ed. 213; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. Ed. 758; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. Ed. 829; *Mitchell v. New York, etc., R. Co.*, 146 U. S. 513, 36 L. Ed. 1064; *Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, 37 L. Ed. 1068; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 37 L. Ed. 1107; *St. Louis, etc., R. Co. v. Schumacher*, 152 U. S. 77, 38 L. Ed. 361; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434; *Maddock v. Magone*, 152 U. S. 368, 372, 38 L. Ed. 482; *Berbecker v. Robertson*, 152 U. S. 373, 377, 38 L. Ed. 484; *North v. McDonald*, 154 U. S. appx., 649, 25 L. Ed. 535; *Sparf v. United States*, 156 U. S. 51, 99, 109, 39 L. Ed. 343; *Treat Mfg. Co. v. Standard Steel, etc., Co.*, 157 U. S. 674, 675, 39 L. Ed. 853; *Rosen v. United States*, 161 U. S. 29, 42, 40 L. Ed. 606; *Texas, etc., R. Co. v. Gentry*, 163 U. S. 353, 365, 41 L. Ed. 186; *Coughran v. Bigelow*, 164 U. S. 301, 307, 41 L. Ed. 442; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 660, 45 L. Ed. 361; *District of Columbia v. Moulton*, 182 U. S. 576, 582, 45 L. Ed. 1237; *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 48, 46 L. Ed. 74; *Marande v. Texas, etc., R. Co.*, 184 U. S. 173, 191, 46 L. Ed. 487; *McGuire v. Blount*, 199 U. S. 142, 148, 50 L. Ed. 125. See the title PARTNERSHIP, vol. 9, p. 125.

In the absence of any evidence whatever to contradict or vary the case made by the plaintiff, it is not error for the court, when the legal effect of the plaintiff's evidence warrants a verdict for him, to so charge the jury. *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855.

34. *Humiston v. Wood*, 124 U. S. 12, 20, 31 L. Ed. 354; *Dunlap v. Northeastern R. Co.*, 130 U. S. 649, 652, 32 L. Ed. 1058; *Louisville, etc., R. Co. v. Woodson*, 134 U. S. 614, 621, 33 L. Ed. 1032; *Russell v. Post*, 138 U. S. 425, 426, 34 L. Ed. 1009; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. Ed. 829; *Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 37 L. Ed. 1107.

A case should be left to the jury where there is evidence tending to sustain the issues on the part of the opposite party.

tiff, the court should so tell the jury.³⁵ It is not sufficient to sustain a verdict that the testimony on which it was founded was known to the court by whom the jury was charged to find such a verdict. The evidence must be submitted to the jury, or the charge is erroneous.³⁶

(2) *Scintilla Doctrine*.—Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury;³⁷ but the modern decisions have established a more reasonable rule; to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.³⁸ Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.³⁹

c. *Where Evidence Conclusive*.—The court should direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.⁴⁰

United States v. Chidester, 140 U. S. 49, 35 L. Ed. 339.

If there be evidence from which the jury may draw an inference in the matter, the case ought not to be taken from them. It is not necessary, in order for the court properly to leave the case with the jury, that the evidence leads unavoidably to the conclusion that the plaintiff has no case. If there be evidence proper to be left to the jury, it should be left; and a remedy for a wrong verdict sought in a motion for new trial. Schuchardt v. Allens, 1 Wall. 359, 17 L. Ed. 642.

Where a policy provides that it shall be void if the insured shall "die by his own hand" the court should not take from the jury, as insufficient to sustain a recovery, evidence tending to show that he was insane when he committed the act which caused his death. Insurance Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433.

35. Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780.

36. "But we have never before heard of a case in which the jury were permitted, much less instructed, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the court." Barney v. Schneider, 9 Wall. 248, 252, 19 L. Ed. 648.

37. Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59; Hickman v. Jones, 9 Wall. 197, 19 L. Ed. 551; Drakely v. Gregg, 8 Wall. 242, 268, 19 L. Ed. 409.

Formerly it was held that if there was what is called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury. Schuchardt v. Allens, 1 Wall. 359, 369, 17 L. Ed. 642;

Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867.

Where there is evidence before the jury—whether it be weak or strong—which does so much as tend to prove the issue on the part of either side, it is error if the court wrest it from the exercise of their judgment. It should be submitted to them under instructions from the court. Hickman v. Jones, 9 Wall. 197, 19 L. Ed. 551.

In Vaughan v. Blanchard, 4 Dall. 124, 1 L. Ed. 769, it was held that the court properly refused to direct a new suit where the plaintiff had introduced some evidence. See, also, Railroad Co. v. Pollard, 22 Wall. 341, 22 L. Ed. 877; Castle v. Bullard, 23 How. 172, 16 L. Ed. 424; Schuchardt v. Allens, 1 Wall. 359, 17 L. Ed. 642.

38. Parks v. Ross, 11 How. 362, 373, 13 L. Ed. 730; Schuchardt v. Allens, 1 Wall. 359, 369, 17 L. Ed. 642; Hickman v. Jones, 9 Wall. 197, 201, 19 L. Ed. 551; Merchants' Bank v. State Bank, 10 Wall. 604, 637, 19 L. Ed. 1008; Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867; Pleasants v. Fant, 22 Wall. 116, 120, 22 L. Ed. 780; Commissioners v. Clark, 94 U. S. 278, 284, 24 L. Ed. 59.

39. Commissioners v. Clark, 94 U. S. 278, 284, 24 L. Ed. 59; Howard v. Railway Co., 101 U. S. 837, 844, 25 L. Ed. 1081; Improvement Co. v. Munson, 14 Wall. 442, 448, 20 L. Ed. 867.

40. Greenleaf v. Birth, 9 Pet. 292, 9 L. Ed. 132; United States v. Laub, 12 Pet. 1, 9 L. Ed. 977; Bank v. Gutschlick, 14 Pet. 19, 10 L. Ed. 335; Schuchardt v. Allens, 1 Wall. 359, 17 L. Ed. 642; Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008; Bevans v. United States,

d. *Where Evidence Conflicting*.—The court cannot direct a verdict for the one party or the other where the evidence is conflicting and no reasonable and proper inference, as matter of law, can be drawn therefrom.⁴¹ The court cannot direct a verdict where it would amount to a finding by the court as to weight of evidence and to a usurpation of the province of the jury, by determining the proper inference to be drawn from the evidence and deciding on which side lay the preponderance of proof.⁴²

e. *Where Evidence Credited by Jury*.—The trial court may correctly instruct the jury to find for a party, if they believe the evidence.⁴³

f. *Where Question of Law Involved*.—In cases where there are no questions of fact for the jury, it was proper for the court to direct a verdict.⁴⁴

g. *Where Question of Fact Involved*.—The court has no right to supersede the exercise of the judgment of the jury, and to direct an absolute verdict, as upon a contested matter of fact.⁴⁵

13 Wall. 56, 20 L. Ed. 531; *Arthur v. Cumming*, 91 U. S. 362, 365, 23 L. Ed. 438; *Dows v. National Exchange Bank*, 91 U. S. 618, 23 L. Ed. 214; *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. Ed. 855; *Edwards v. Kearzey*, 96 U. S. 595, 604, 24 L. Ed. 793; *Macon County v. Shores*, 97 U. S. 272, 27 L. Ed. 889; *Four Packages v. United States*, 97 U. S. 404, 24 L. Ed. 1031; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Railroad Co. v. Fraloff*, 100 U. S. 24, 26, 25 L. Ed. 531; *Meguire v. Corwine*, 101 U. S. 108, 111, 25 L. Ed. 899; *Griggs v. Houston*, 104 U. S. 553, 26 L. Ed. 840; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. Ed. 65; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478, 482, 27 L. Ed. 1003; *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. Ed. 536; *Anderson County Comm'r's v. Beal*, 113 U. S. 227, 241, 28 L. Ed. 966; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 618, 29 L. Ed. 224; *Keyes v. Grant*, 118 U. S. 23, 36, 30 L. Ed. 54; *North Pennsylvania R. Co. v. Commercial Bank*, 123 U. S. 727, 31 L. Ed. 287; *Hartman v. Langfeld*, 125 U. S. 128, 31 L. Ed. 672; *Robertson v. Edelhoff*, 132 U. S. 614, 626, 33 L. Ed. 477; *Gunter v. Liverpool, etc., Ins. Co.*, 134 U. S. 110, 33 L. Ed. 857; *Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483, 485, 34 L. Ed. 1031; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. Ed. 213; *Culver v. Wilkinson*, 145 U. S. 205, 212, 36 L. Ed. 676; *Bibb v. Allen*, 149 U. S. 481, 493, 37 L. Ed. 817; *Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, 37 L. Ed. 1068; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 156, 38 L. Ed. 391; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 283, 38 L. Ed. 434; *Southern Pac. Co. v. Pool*, 160 U. S. 438, 40 L. Ed. 485; *Northern Pac. R. Co. v. Freeman*, 174 U. S. 379, 43 L. Ed. 1014. See the title JUDGMENTS AND DECREES, vol. 7, p. 613.

The motion was refused in *Providence, etc., Steamship Co. v. Clare*, 127 U. S. 45, 50, 32 L. Ed. 199, because the case involved questions of fact for the jury.

41. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116; *Railroad Co. v. Fraloff*, 100 U. S.

24, 26, 25 L. Ed. 531; *Moulton v. Insurance Co.*, 101 U. S. 708, 25 L. Ed. 1077; *National Bank v. City Bank*, 103 U. S. 668, 678, 26 L. Ed. 417; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. Ed. 65; *Ranney v. Barlow*, 112 U. S. 207, 28 L. Ed. 662; *Union Ins. Co. v. Smith*, 124 U. S. 405, 424, 31 L. Ed. 497; *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 32 L. Ed. 1080; *United States Mut. Accident Ass'n v. Barry*, 131 U. S. 100, 33 L. Ed. 60; *McKey v. Hyde Park Village*, 134 U. S. 84, 33 L. Ed. 860; *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. Ed. 213; *Pennsylvania R. Co. v. Green*, 140 U. S. 49, 35 L. Ed. 339; *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 301, 36 L. Ed. 162; *Texas, etc., R. Co. v. Cox*, 145 U. S. 593, 594, 606, 36 L. Ed. 829; *Potts v. Wallace*, 146 U. S. 689, 706, 36 L. Ed. 1135; *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349, 37 L. Ed. 1107; *Lincoln v. Power*, 151 U. S. 436, 38 L. Ed. 224; *Baltimore, etc., R. Co. v. Mackey*, 157 U. S. 72, 83, 39 L. Ed. 624; *White v. Van Horn*, 159 U. S. 3, 40 L. Ed. 55; *Union Pac. R. Co. v. James*, 163 U. S. 435, 41 L. Ed. 236; *City, etc., Railway v. Svedborg*, 194 U. S. 201, 48 L. Ed. 935.

Where the burden of proof of certain specific defenses set up by the defendant is on him, and the evidence presents contested facts, an absolute direction from the court, that the matters produced and read in evidence on the part of the defendant were sufficient in law to maintain the issue on his part, and that the jury ought to render their verdict in favor of the defendant, is erroneous. *United States v. Tillotson*, 12 Wheat. 180, 6 L. Ed. 594.

42. *Bamberger v. Schoolfield*, 160 U. S. 149, 157, 40 L. Ed. 374.

43. *Van Winkle v. Crowell*, 146 U. S. 42, 51, 36 L. Ed. 880; *Stitt v. Huidekopers*, 17 Wall. 384, 21 L. Ed. 644.

44. *Ferguson v. Arthur*, 117 U. S. 485, 490, 29 L. Ed. 979; *Anderson County Comm'r's v. Beal*, 113 U. S. 227, 28 L. Ed. 966.

45. *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 179, 191, 7 L. Ed. 98; *Herrman*

h. *Where There Are Joint Parties*.—Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him.⁴⁶

i. *Where Party Refuses to Submit Particular Question to Jury*.—Where a party refused to go to the jury on a particular question alone, but asked leave of the court to go to the jury generally, the court properly directed a verdict for the other party where the question offered to be submitted to the jury was the only question which the party could properly ask to have submitted.⁴⁷

2. IN CRIMINAL CASES—*a. Verdict of Acquittal*.—In a criminal case the court may direct a verdict of acquittal where there is no evidence or evidence upon which a verdict of guilty cannot be based.⁴⁸

b. Verdict of Guilty.—But the court cannot direct a verdict of guilty of the offense charged⁴⁹ or of a lesser offense.⁵⁰

F. Effect—1. UPON JURY.—It seems that the jury is not bound to conform to a direction to find for a particular party.⁵¹

2. AS CURE OF IRREGULARITIES.—The direction of a verdict in favor of a party who had moved to strike out certain evidence cures any irregularity in his motion.⁵²

G. Review—1. IN GENERAL.—A motion to direct a verdict is not one addressed to the discretion of the court, but one that presents a question of law, and the court's ruling thereon is as much the subject of exceptions as any other ruling of the court in the course of the trial.⁵³

2. WAIVER OF RIGHT.—The refusal of the court to direct a verdict cannot be complained of upon error, if the party requesting such direction afterwards proceeds with his case and introduce evidence.⁵⁴

XI. Proof of Verdict.

The secret deliberations of the jury, or grounds of their proceedings while

v. Arthur, 127 U. S. 363, 32 L. Ed. 186; *Royer v. Schultz Belting Co.*, 135 U. S. 319, 34 L. Ed. 214; *Hedden v. Iselin*, 142 U. S. 676, 35 L. Ed. 1155; *Robertson v. Salomon*, 144 U. S. 603, 36 L. Ed. 560; *Richmond, etc., R. Co. v. Powers*, 149 U. S. 43, 37 L. Ed. 642; *Elliott v. Chicago, etc., R. Co.*, 150 U. S. 245, 37 L. Ed. 1068; *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 283, 38 L. Ed. 434; *Southern Pac. R. Co. v. Pool*, 160 U. S. 438, 440, 40 L. Ed. 485; *Northern Pac. R. Co. v. Charless*, 162 U. S. 359, 363, 40 L. Ed. 999; *Warner v. Baltimore, etc., R. Co.*, 168 U. S. 339, 42 L. Ed. 491; *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 660, 45 L. Ed. 361; *Pythias Knights' Supreme Lodge v. Beck*, 181 U. S. 49, 52, 45 L. Ed. 741; *Marande v. Texas, etc., R. Co.*, 184 U. S. 173, 191, 46 L. Ed. 487; *Texas, etc., R. Co. v. Carlin*, 189 U. S. 354, 363, 47 L. Ed. 849. See the titles NEGLIGENCE, vol. 8, p. 890; PATENTS, vol. 9, p. 302, n. 10; USAGES AND CUSTOMS, ante, p. 831.

46. *Castle v. Bullard*, 23 How. 172, 16 L. Ed. 424.

47. *Toplitz v. Hedden*, 146 U. S. 252, 257, 36 L. Ed. 961.

48. "The court has the right even in a capital case to instruct the jury as matter of law to return a verdict of acquittal on the evidence adduced by the prosecution." *Sparf v. United States*, 156 U. S. 51, 100, 39 L. Ed. 343; *Dunlop v. United*

States, 165 U. S. 486, 41 L. Ed. 799.

49. *Sparf v. United States*, 156 U. S. 51, 39 L. Ed. 343; *Perovich v. United States*, 205 U. S. 86, 51 L. Ed. 722; *Bucklin v. United States*, No. 2, 159 U. S. 682, 40 L. Ed. 305.

50. In *Sparf v. United States*, 156 U. S. 51, 39 L. Ed. 343, it was held that on an indictment of murder the court could not direct a verdict of guilty of manslaughter.

51. *Bingham v. Cabot*, 3 Dall. 19, 33, 1 L. Ed. 491.

52. *Berbercker v. Robertson*, 152 U. S. 373, 377, 38 L. Ed. 484.

53. *Insurance Co. v. Folsom*, 18 Wall. 237, 250, 21 L. Ed. 827; *Railroad Co. v. Jones*, 95 U. S. 439, 443, 24 L. Ed. 506; *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. Ed. 980.

"It is seldom that an appellate court reverses the action of a trial court in declining to give peremptory instruction for a verdict one way or the other." *Patton v. Texas, etc., R. Co.*, 179 U. S. 658, 660, 45 L. Ed. 361.

As to review of action of state court in directing verdict, see the title APPEAL AND ERROR, vol. 1, p. 781.

54. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. Ed. 266; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. Ed. 740; *Northern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. Ed. 296; *Means v. Bank*, 146 U. S. 620, 630, 36 L. Ed. 1107; *Wilson*

engaged in making up their verdict, are not competent or admissible evidence of their finding.⁵⁵

VERIFICATION.—See, generally, the titles *AFFIDAVIT*, vol. 1, p. 200; *OATH*, vol. 8, p. 951. As to verification of pleadings, see the titles *ABATEMENT*, *RE-VIVAL AND SURVIVAL*, vol. 1, p. 33; *PLEADING*, vol. 9, p. 427. As to verification of informations, see the title *INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS*, vol. 7, p. 973.

VERMONT.—As to right of towns to property of glebes, see the title *RELIGIOUS SOCIETIES*, vol. 10, p. 641. As to rights of aliens to recover mesne profits, see the title *ALIENS*, vol. 1, p. 232.

VESSEL.—See the titles *SHIPS AND SHIPPING*, vol. 10, p. 1148. See, also, the titles *ADMIRALTY*, vol. 1, p. 119; *MARINE INSURANCE*, vol. 8, p. 149; *MARITIME LIENS*, vol. 8, p. 218; *SALVAGE*, vol. 10, p. 1067. And see note 1.

VESTED REMAINDERS.—See the title *REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS*, vol. 10, p. 646.

VESTED RIGHTS.—See the titles *CONSTITUTIONAL LAW*, vol. 4, p. 412; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 758. As to distinction between vested, expectant and contingent rights, see *CONTINGENT RIGHTS*, vol. 4, p. 542. As to an act of congress protecting vested rights, meaning rights lawfully vested, and not protecting a location made on public land reserved from sale, see the title *PUBLIC LANDS*, vol. 10, p. 136.

VESTRY.—See the title *RELIGIOUS SOCIETIES*, vol. 10, pp. 640, 641.

VETO.—See the title *STATUTES*, ante, p. 75.

VICE COMMERCIAL AGENTS.—See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 275.

VICE CONSULS.—See the title *AMBASSADORS AND CONSULS*, vol. 1, p. 275.

VICE PRESIDENT.—See the title *BANKS AND BANKING*, vol. 3, p. 86.

VICE PRINCIPALS.—See the title *FELLOW SERVANTS*, vol. 6, p. 245.

VIEW OF PROPERTY.—As to duty of appraisers to view land in eminent domain proceedings, see the title *EMINENT DOMAIN*, vol. 5, p. 792.

VILLAGE.—See the title *TOWNS AND TOWNSHIPS*, ante, p. 613. As to town and "village" being used synonymously in Illinois, see the titles *MUNICIPAL, COUNTY, STATE AND FEDERAL AID*, vol. 8, p. 624.

VINDICTIVE DAMAGES.—See the title *EXEMPLARY DAMAGES*, vol. 6, p. 193.

VIRGINIA.—As to office of supersedeas in Virginia practice, see the title *SUPERSEDEAS AND STAY OF PROCEEDINGS*, ante, p. 333. As to boundaries of, see the title *BOUNDARIES*, vol. 3, p. 494. As to Virginia coupon cases, see the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 786. As to construction of Virginia statute providing for service of process on cities, see the title *SUMMONS AND PROCESS*, ante, p. 299. As to alien laws, see the title *ALIENS*, vol. 1, p. 221. As to retrocession of territory to Virginia by the District of Columbia, see the title *DISTRICT OF COLUMBIA*, vol. 5, p. 406.

VIRTUE.—As to "by reason of" being equivalent to "by virtue of," in a government contract, see *REASON*, vol. 10, p. 534.

v. Haley Live Stock Co., 153 U. S. 39, 38 L. Ed. 627.

55. *Packet Co. v. Sickles*, 5 Wall. 580, 593, 18 L. Ed. 550. See ante, "Aids to Construction," III, E, 5.

1. **Vessels the United States.**—As to what constitutes "a vessel of the United States" within the meaning of the registry, enrollment and license laws, see the

title *SHIPS AND SHIPPING*, vol. 10, p. 1155.

Vessels of the navy.—See *NAVY*, vol. 8, p. 869, and references there given.

A vessel wrecked and abandoned to the under writers having lost her own power of locomotion, but capable of being towed as a vessel, had not lost her identity as a vessel. *Craig v. Continental Insurance Co.*, 141 U. S. 638, 645, 35 L. Ed. 886.

VISIBLE SIGN.—As to meaning of term, “external and visible sign” of bodily injuries, in a policy of insurance, see **EXTERNAL**, vol. 6, p. 213.

VISITATION.—See the title **CORPORATIONS**, vol. 4, p. 633. As to visitation of banking corporation, see the title **BANKS AND BANKING**, vol. 3, p. 128. As to visitatorial power over eleemosynary corporations, see the title **CHARITIES**, vol. 3, p. 695.

VIS MAJOR.—See **ACT OF GOD**, vol. 1, p. 115; **CAS FORTUITS**, vol. 3, p. 645; **FORTUITIOUS EVENT**, vol. 6, p. 391. See, also, the titles **CARRIERS**, vol. 3, p. 593; **SHIPS AND SHIPPING**, vol. 10, p. 1180. As to vis major as a defense to demurrage, see the title **SHIPS AND SHIPPING**, vol. 10, p. 1205.

VOID AND VOIDABLE.—See the title **ILLEGAL CONTRACTS**, vol. 6, p. 737. As to distinction between *malum in se* and *malum prohibitum*, see the title **ILLEGAL CONTRACTS**, vol. 6, p. 749. The words “void and of no effect” are often used as voidable merely and all that can be meant by the phrase is that courts of law will not aid in enforcing contracts made expressly to effect that forbidden by the law of the land.¹ Things are voidable which are valid and effectual until they are avoided by some act.²

VOIR DIRE.—As to right of clerk to fees for administering oaths on voir dire of jurors, see the title **CLERKS OF COURT**, vol. 3, p. 857.

VOLUNTARY—INVOLUNTARILY.—See note 3.

VOLUNTARY BANKRUPT.—See the title **BANKRUPTCY**, vol. 2, pp. 808, 840.

VOLUNTARY CONFESSIONS.—See the title **CONFESSIONS**, vol. 3, p. 1010.

VOLUNTARY CONVEYANCES.—See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**, vol. 6, p. 505.

VOLUNTARY DISMISSAL AND NONSUIT.—See the title **DISMISSAL, DISCONTINUANCE AND NONSUIT**, vol. 5, p. 359.

VOLUNTARY PARTITION.—See the title **PARTITION**, vol. 9, p. 66.

VOLUNTARY PAYMENT.—See the title **PAYMENT**, vol. 9, p. 319. As to what are voluntary and involuntary payments of custom duties, see the title **REVENUE LAWS**, vol. 10, p. 941.

VOLUNTARY STRANDING.—See the title **GENERAL AVERAGE**, vol. 6, p. 555.

VOLUNTEERS.—See the title **MILITIA**, vol. 8, p. 361.

1. Void and of no effect.—In *Ewell v. Daggs*, 108 U. S. 143, 149, 27 L. Ed. 682, in construing a Texas statute which declared certain contracts of loan, so far as the whole interest was concerned, to be “void and of no effect,” the court said: “But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. * * * All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land.”

Void act unaided by confirmation.—“A thing void as to all persons, and for all purposes, can derive no strength from confirmation.” *Dewing v. Perdicaries*, 96 U. S. 193, 195, 24 L. Ed. 654.

2. Voidable.—“It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed.” *Weeks v. Bridgman*, 159 U. S. 541, 547, 40 L. Ed. 253, citing *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682.

3. Voluntarily serving on a vessel engaged in the slave trade meant serving with knowledge of the business in which she was employed. *United States v. Morris*, 14 Pet. 464, 476, 10 L. Ed. 543.

VOTER.—As to requirement of two-thirds of “qualified voters” at an election meaning two-thirds of those actually voting, not of the number enrolled as qualified, see the titles *ELECTIONS*, vol. 5, p. 727; *MUNICIPAL, COUNTY, STATE AND FEDERAL AID*, vol. 8, p. 635.

VOTING TRUSTS.—As to the legality of a combination of shareholders of competing railroads to hold the stock of the constituent companies, see the title *MONOPOLIES AND CORPORATE TRUSTS*, vol. 8, pp. 440, 441. As to injunction against illegal voting by holding companies, see the title *STOCK AND STOCK-HOLDERS*, ante, p. 197.

VOUCHERS.—As to notice from comptroller of treasury to defaulter to return vouchers for expenditures of moneys received, see the title *UNITED STATES*, ante, p. 747. As to necessity for itemized vouchers for expenses of interstate commerce commission, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 516. As to negotiability of county vouchers, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 662.

VOYAGES.—See the title *SHIPS AND SHIPPING*, vol. 10, p. 1148. As to what voyages constitute a deviation and change of risk within the meaning of a policy of marine insurance, see the title *MARINE INSURANCE*, vol. 8, p. 185. As to voyages as regards seamen's contracts, see the title *SEAMEN*, vol. 10, p. 1083.

WAGER OF LAW.—The wager of law, if it ever had a legal existence in the United States, is completely abolished by the constitutional provisions for trial by jury.¹

WAGERS.—See the titles *GAMBLING CONTRACTS*, vol. 6, p. 537; *GAMING*, vol. 6, p. 544.

WAGES.—As to “wages of officers and employees” not including charges for services of counsel employed for special purposes, see the title *RECEIVERS*, vol. 10, p. 577. As to statutory priority of wage earner, see the titles *ASSIGNMENTS*, vol. 2, p. 577; *BANKRUPTCY*, vol. 2, p. 918. As to wages of seamen, see the title *SEAMEN*, vol. 10, p. 1084. See, also, *FEES*, vol. 6, p. 244. As to wages as subject of general average, see the title *GENERAL AVERAGE*, vol. 6, p. 559. As to priority of seamen for their wages, see the title *MARITIME LIENS*, vol. 8, p. 235.

WAIVER AND ABANDONMENT.

CROSS REFERENCES.

See the titles *AGREED CASE*, vol. 1, p. 204; *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 660; *BANKRUPTCY*, vol. 2, p. 792; *BANKS AND BANKING*, vol. 3, p. 1; *BONDS*, vol. 3, p. 382; *COMPROMISE AND SETTLEMENT*, vol. 3, p. 980; *CORPORATIONS*, vol. 4, pp. 621, 673; *CREDITOR'S SUITS*, vol. 5, p. 22; *ELECTION OF REMEDIES*, vol. 5, p. 719; *ESTOPPEL*, vol. 5, p. 913; *EVIDENCE*, vol. 5, p. 1004; *FRAUD AND DECEIT*, vol. 6, p. 394; *INSOLVENCY*, vol. 7, p. 1; *JUDGMENTS AND DECREES*, vol. 7, p. 544; *JUDICIAL SALES*, vol. 7, p. 703; *LANDLORD AND TENANT*, vol. 7, p. 827; *MANDAMUS*, vol. 8, p. 1; *MORTGAGES AND DEEDS OF TRUST*, vol. 8, p. 452; *PAYMENT*, vol. 9, p. 319; *PLEADING*, vol. 9, p. 418; *POSTAL LAWS*, vol. 9, p. 550; *RECEIVERS*, vol. 10, p. 538; *REMOVAL OF CAUSES*, vol. 10, p. 663; *RESCISSION, CANCELLATION AND REFORMATION*, vol. 10, p. 799; *REVENUE LAWS*, vol. 10, p. 838; *SALES*, vol. 10, p. 1022; *SHIPS AND SHIPPING*, vol. 10, p. 1148; *STATES*, ante, p. 33; *STOCK AND STOCK-HOLDERS*, ante, p. 182; *SUMMONS AND PROCESS*, ante, p. 299; *TAXATION*, ante, p. 356; *TENDER*, ante, p. 590; *TRIAL*, ante, p. 667; *UNITED STATES*, ante, p. 747; *VENUE*, ante, p. 909; *WITNESSES*.

As to waiver of objections to jurisdiction, see the titles *ABATEMENT, RE-*

1. *Childress v. Emory*, 8 Wheat. 642. *MON LAW*, vol. 3, pp. 966, 974.
674, 5 L. Ed. 705. See the title *COM-*

VIVAL AND SURVIVAL, vol. 1, p. 39, et seq.; COURTS, vol. 4, p. 1166; EQUITY, vol. 5, p. 803; RECEIVERS, vol. 10, p. 561; VENUE, ante, p. 909. As to waiver of right to appeal, see the title APPEAL AND ERROR, vol. 2, pp. 80, 83. As to waiver of exceptions and objections, see the title APPEAL AND ERROR, vol. 2, p. 119. As to waiver of signing and service of citation, see the title APPEAL AND ERROR, vol. 2, pp. 170, 173. As to effect of appearance as waiver, see the title APPEAL AND ERROR, vol. 2, p. 288. As to effect of waiver of error on appeal, see the title APPEAL AND ERROR, vol. 2, p. 351. As to appearance waiving privileges respecting particular courts, see the title APPEARANCES, vol. 2, p. 448. As to waiver of notice and demand on negotiable paper, see the title BILLS, NOTES AND CHECKS, vol. 3, p. 334, et seq. As to waiver of conditions of carriers' contract, see the title CARRIERS, vol. 3, p. 571. As to waiver of constitutional rights, see the title CONSTITUTIONAL LAW, vol. 4, p. 78, et seq. As to waiver of performance of a contract, see the title CONTRACTS, vol. 4, p. 588. As to waiver of reserved power to amend charters, see the title CORPORATIONS, vol. 4, p. 702. As to waiver of defect of jurisdiction in criminal prosecution, see the title CRIMINAL LAW, vol. 5, p. 95. As to waiver of right of presence at trial of accused, see the title CRIMINAL LAW, vol. 5, p. 117. As to waiver of objections to depositions, see the title DEPOSITIONS, vol. 5, p. 332. As to waiver of compensation for property taken for public use, see the title EMINENT DOMAIN, vol. 5, p. 786. As to waiver of objections to answer in equity, see the title EQUITY, vol. 5, p. 868. As to waiver of objections to manner of impaneling grand jury, see the title GRAND JURY, vol. 6, p. 576. As to waiver of notice of acceptance of guaranty, see the title GUARANTY, vol. 6, p. 590. As to waiver of the illegality of a contract, see the title ILLEGAL CONTRACTS, vol. 6, p. 755. As to waiver of objections to indictment, see the title INDICTMENTS, INFORMATIONS, PRESENTMENTS AND COMPLAINTS, vol. 6, p. 1008. As to waiver of forfeiture of insurance contracts, see the title INSURANCE, vol. 7, p. 127. As to abandonment of contract by insurer, see the title INSURANCE, vol. 7, p. 149. As to waiver of conditions by insured, see the title INSURANCE, vol. 7, p. 177. As to waiver of proof of loss under insurance contract, see the title INSURANCE, vol. 7, p. 190. As to waiver of right to jury trial, see the title JURY, vol. 7, p. 760, et seq. As to effect of ca. sa. as a waiver of judgment lien, see the title JUDGMENTS AND DECREES, vol. 7, p. 604. As to waiver of liens, see the title LIENS, vol. 7, p. 896. As to waiver of statute of limitations, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 921. As to waiver of mechanics' lien, see the title MECHANICS' LIENS, vol. 8, pp. 333, 334. As to waiver of objections to pleading, see the title PLEADING, vol. 9, p. 451. As to abandonment of homestead or other right to government land, see the title PUBLIC LANDS, vol. 10, pp. 44, 95, 113. As to waiver of right to remove cause, see the title REMOVAL OF CAUSES, vol. 10, p. 666. As to waiver of objections to removal because of delay in filing petition, see the title REMOVAL OF CAUSES, vol. 10, p. 701. As to waiver of shipowner's lien, see the title SHIPS AND SHIPPING, vol. 10, p. 1203. As to waiver of maritime liens, see the title MARITIME LIENS, vol. 8, p. 236. As to privileged communications as evidence by waiver, see the title PRIVILEGED COMMUNICATIONS, vol. 9, p. 742. As to waiver of tender of deed and tender of purchase money, see the title VENDOR AND PURCHASER, ante, p. 864. As to waiver of vendor's lien, see the title VENDORS' LIENS, ante, p. 902.

Essentials of Waiver.—A waiver, to be effectual, must be made intentionally and with a full knowledge of the rights waived.¹ At the same time a party may not willfully shut his eyes to what he might readily and ought to

1. **Must have knowledge of facts.**—Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420; Bennecke v. Insurance Co., 105 U. S. 355, 359, 26 L. Ed. 990; Cordova v. Hood, 17 Wall. 1, 7, 21 L. Ed. 587.

have known, but when fully advised, he must decide and act with reasonable despatch and cannot rest until the rights of third persons are involved and the situation of the wrongdoer is materially changed.²

What Rights May Be Waived.—A party may waive any provision, either of a contract³ or of a statute, intended for his benefit,⁴ and under certain circumstances, constitutional provisions in his favor.⁵

Waiver a Question of Fact.—Waiver is a question of fact for the jury.⁶

WALKING.—As to walking not constituting travelling by either public or private conveyance, within the meaning of an accident insurance policy, see the title ACCIDENT INSURANCE, vol. 1, p. 59.

WALLS.—See the title PARTY WALLS, vol. 9, p. 134.

2. Must not neglect his rights.—Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420.

But a wrongdoer cannot make extreme vigilance and promptitude conditions of the rescission of a contract. Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420.

3. May waive contract provision.—Shutte v. Thompson, 15 Wall. 151, 159, 21 L. Ed. 123; Insurance Co. v. Norton, 96 U. S. 234, 240, 24 L. Ed. 689.

The terms of a contract under seal may be varied by a subsequent parol agreement. Canal Co. v. Ray, 101 U. S. 522, 527, 25 L. Ed. 792.

Oral agreements subsequently made, on a new and valuable consideration, and before the breach of the contract, in cases falling within the general rules of the common law, may have the effect to enlarge the time or performance specified in the contract, or may vary any other of its terms, or may waive and discharge it altogether. Emerson v. Slater, 22 How.

28, 41, 16 L. Ed. 360. See the title CONTRACTS, vol. 4, p. 577.

4. May waive a statutory right.—Shutte v. Thompson, 15 Wall. 151, 159, 21 L. Ed. 123.

5. May waive constitutional right.—Phillips v. Payne, 92 U. S. 130, 132, 23 L. Ed. 649; Pierce v. Somerset Railway, 171 U. S. 641, 648, 43 L. Ed. 316; Railroad Co. v. Trimble, 10 Wall. 367, 382, 19 L. Ed. 948. See the title CONSTITUTIONAL LAW, vol. 4, p. 78.

Constitutional right lost by waiver not a federal question.—A person may, by his acts or omission to act, waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a federal one. Pierce v. Somerset Railway, 171 U. S. 641, 648, 43 L. Ed. 316.

6. Waiver a question of fact.—Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420.

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As to questions arising under the abandoned and captured property act, see the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1. As to questions relating to the army and navy and the officers and privates thereof, see the title ARMY AND NAVY, vol. 2, p. 494, and the cross references thereto attached. As to blockade, see the title BLOCKADE, vol. 3, p. 364. As to what goods are contraband, see CONTRABAND, vol. 4, p. 548, and see, also, the title PRIZE, vol. 9, p. 744. As to the embargo and nonintercourse laws passed by congress in the latter part of the eighteenth and beginning of the nineteenth centuries, see the title EMBARGO AND NONINTERCOURSE LAWS, vol. 5, p. 732. As to martial law, see the title MARTIAL LAW, vol. 8, p. 272. As to military law and military tribunals, see the title MILITARY LAW, vol. 8, p. 342. As to the militia, see the title MILITIA, vol. 8, p. 358. As to the rights and duties of neutrals and offenses against the United States neutrality laws, see the title NEUTRALITY, vol. 8, p. 894. As to payment of debts to a conquering state and as to Confederate

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I. Definition.

Public War.—Every contention by force, between two nations, in external matters, under the authority of their respective governments, is public war.¹

When Insurrection Becomes War.—Insurrection may or may not culminate in an organized rebellion, and it may or may not assume such aggressive proportions as to be justly denominated territorial war, the universal rule being that rebellion becomes such, if at all, by virtue of its numbers and the organization and power of the persons who originate it and are engaged in its prosecution.² But when the party in rebellion hold and occupy certain portions of the territory of the rightful sovereign, and have declared their independence, cast off their allegiance, and formed a new government, and have organized armies and raised supplies to support it, and to oppose, and if possible to destroy, the government from which they have separated, the law of nations acknowledges them as belligerents engaged in civil war.³

II. Power to Make.

A. In General.—War can alone be entered into by national authority. Where enmity exists between two nations an individual of one is not justified in any offensive hostile act against an individual of the other, unless it be authorized by some act of the government, giving the public sanction to it.⁴

B. In the United States—1. **POWER OF THE COLONIES BEFORE THE REVOLUTION.**—The charters granted by Great Britain to the colonies conferred the power of making war. But defensive war alone seems to have been contemplated.⁵

2. **UNDER THE FEDERAL CONSTITUTION.**—The federal constitution confers absolutely on the government of the Union the power of making war.⁶

Power of Congress.—In congress is vested the power to declare war and

1. **Public war defined.**—The *Eliza*, 4 Dall. 37, 40, 1 L. Ed. 731.

Perfect and imperfect war.—If war be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers. The *Eliza*, 4 Dall. 37, 40, 1 L. Ed. 731; *Montoya v.*

United States, 180 U. S. 261, 267, 45 L. Ed. 521. See, also, *The Resolution*, 2 Dall. 19, 21, 1 L. Ed. 271.

Indian wars are of the latter class. *Montoya v. United States*, 180 U. S. 261, 267, 45 L. Ed. 521.

War of the imperfect sort existed between the United States and France in March, 1799. The *Eliza*, 4 Dall. 37, 41, 1 L. Ed. 731.

2. **When insurrection becomes war.**—Concurring opinion of Mr. Justice Clifford in *Ford v. Surget*, 97 U. S. 594, 609, 24 L. Ed. 1018.

3. Concurring opinion of Mr. Justice Clifford in *Ford v. Surget*, 97 U. S. 594, 610, 24 L. Ed. 1018. See post, "Civil War," IV, B.

4. **National authority essential.**—*Talbot v. Jansen*, 3 Dall. 133, 1 L. Ed. 540.

5. **Power of the colonies before the Revolution.**—*Worcester v. Georgia*, 6 Pet. 515, 545, 8 L. Ed. 483.

6. **Constitution confers power absolutely on government of union.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 96.

suppress insurrection.⁷ It is empowered to declare a general war, or it may wage a limited war; limited in place, in objects, and in time.⁸ It is not deprived of these powers when the necessity for their exercise is called out by domestic insurrection and internal civil war.⁹

The president of the United States has no power to initiate or declare a war either against a foreign nation or a domestic state. But by the acts of congress of February 28th, 1795, and March 3rd, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States.¹⁰

III. Commencement and Termination.

A. Commencement—1. **IN GENERAL**.—A state of actual war may exist without any formal declaration of it by either party.¹¹ This is true of both a civil and a foreign war.¹²

2. **WHERE THE UNITED STATES IS A BELLIGERENT**—a. *In General*.—As between the United States and other civilized nations, an act of congress is necessary to a formal declaration of war.¹³ But no such act is necessary to constitute a state of war with an Indian tribe.¹⁴

b. *Commencement of the Civil War*.—The late Civil War did not begin at the same time in all the states.¹⁵ Its commencement in certain states will be

7. **Power of congress**.—Raymond v. Thomas, 91 U. S. 712, 714, 23 L. Ed. 434; The Amelia, 1 Cranch 1, 28, 2 L. Ed. 15; Tyler v. Defrees, 11 Wall. 331, 20 L. Ed. 161.

"By the constitution, congress alone has the power to declare a national or foreign war." Prize Cases, 2 Black 635, 668, 17 L. Ed. 459.

8. Mr. Justice Chase in The Eliza, 4 Dall. 37, 43, 1 L. Ed. 731.

9. Tyler v. Defrees, 11 Wall. 331, 20 L. Ed. 161. But see Prize Cases, 2 Black 635, 668, 17 L. Ed. 459.

10. **Power of president**.—Prize Cases, 2 Black 635, 668, 17 L. Ed. 459.

"If a war be made by invasion of a foreign nation, the president is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." Prize Cases, 2 Black 635, 668, 17 L. Ed. 459.

11. **Formal declaration not necessary**.—Prize Cases, 2 Black 635, 636, 17 L. Ed. 459.

12. Prize Cases, 2 Black 635, 636, 17 L. Ed. 459.

A civil war exists, and may be prosecuted on the same footing as if those opposing the government were foreign invaders, whenever the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts cannot be kept open. Prize Cases, 2 Black 635, 636, 17 L. Ed. 459.

13. **Act of congress necessary to formal declaration of war**.—Montoya v. United States, 180 U. S. 261, 267, 45 L. Ed. 521.

Commencement of war with Spain.—Congress adopted a resolution, April 20,

demanding "that the government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters," and directing and empowering the president "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several states, to such extent as may be necessary to carry these resolutions into effect." Time was given by the executive until April 23 for Spain to signify compliance with the demand, but the Spanish government at once, on April 21, recognized the resolution as "an evident declaration of war," and diplomatic relations were broken off. Blockade had been proclaimed April 22, and put into effective operation at Havana, and, immediately thereupon, elsewhere, under the proclamation. And by the act of congress of April 25, it was declared that war had existed since the twenty-first day of April. It was held that on April 22, the two countries were at war. The Pedro, 175 U. S. 354, 363, 44 L. Ed. 195. See, also, The Guido, 175 U. S. 382, 44 L. Ed. 206.

14. **Act of congress not necessary to constitute state of war with Indian tribe**.

—Montoya v. United States, 180 U. S. 261, 267, 45 L. Ed. 521.

"The fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war." Montoya v. United States, 180 U. S. 261, 267, 45 L. Ed. 521.

15. **Commencement of the Civil War**.—The Protector, 12 Wall. 700, 20 L. Ed. 463.

referred to the first proclamation of blockade embracing them, and made on the 19th of April, 1861; and as to other states to the second proclamation of blockade embracing them, and made on the 27th of April, 1861.¹⁶ These proclamations were a recognition of a war waged, and conclusive evidence that a state of war existed between the inhabitants of the states mentioned in them and the United States.¹⁷

B. Termination—1. IN GENERAL.—A treaty of peace is the evidence of the time when a foreign war closed.¹⁸ In a domestic war, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated.¹⁹

2. TERMINATION OF THE CIVIL WAR.—The late Civil War was closed and peace inaugurated on the twentieth of August, 1866, on which day the president announced, by proclamation, that the insurrection against the national authority was at an end, and that "peace, order, tranquility, and civil authority" then existed "in and throughout the whole of the United States of America."²⁰ The effect of that proclamation, as fixing the time when the rebellion closed, was distinctly recognized by congress.²¹ The declaration of congress on the subject must be received as settling the question wherever private rights are affected.²² But while the Civil War as a whole did not close until the 20th of August, 1866, and still existed in Texas until that date,²³ its termination as to certain states must be referred to the president's proclamation of April 2nd, 1866, declaring that the war had closed in those states.²⁴

IV. Rights of War in General and Rules Governing Its Conduct.

A. War in General.—The conduct of nations at war is generally governed and limited by their exigencies and necessities.²⁵ If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the war of nations. But if a partial war is waged, its extent and operation depend on municipal laws.²⁶ In time of war, bulwarks may be built on private ground,²⁷ and upon competent authority, articles necessary to

16. *The Protector*, 12 Wall. 700, 20 L. Ed. 463; *Adger v. Alston*, 15 Wall. 555, 560, 21 L. Ed. 234.

The first proclamation embraced the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. *The Protector*, 12 Wall. 700, 20 L. Ed. 463; *Matthews v. McStea*, 91 U. S. 7, 9, 23 L. Ed. 188; *Adger v. Alston*, 15 Wall. 555, 21 L. Ed. 234.

The second proclamation embraced the states of Virginia and North Carolina. *Adger v. Alston*, 15 Wall. 555, 560, 21 L. Ed. 234; *Brown v. Hiatts*, 15 Wall. 177, 183, 21 L. Ed. 128.

17. *Matthews v. McStea*, 91 U. S. 7, 9, 23 L. Ed. 188.

18. **Foreign war.**—*United States v. Anderson*, 9 Wall. 56, 70, 19 L. Ed. 615.

19. **Domestic war.**—*United States v. Anderson*, 9 Wall. 56, 70, 19 L. Ed. 615.

20. **Termination of the Civil War.**—14 Stat. 814; *McElrath v. United States*, 102 U. S. 426, 438, 26 L. Ed. 189; *United States v. Anderson*, 9 Wall. 56, 70, 19 L. Ed. 615.

21. Act of March 2, 1867, 14 Stat. 422; *McElrath v. United States*, 102 U. S. 426, 438, 26 L. Ed. 189; *United States v. Anderson*, 9 Wall. 56, 70, 19 L. Ed. 615.

22. *United States v. Anderson*, 9 Wall.

56, 71, 19 L. Ed. 615.

In *McKee v. Rains*, 10 Wall. 22, 25, 19 L. Ed. 860, the court is reported to have said: "The rebellion must be regarded as having closed, in all cases where private rights are affected by the time of its termination, on the 2d of August, 1866."

23. *The Protector*, 12 Wall. 700, 20 L. Ed. 463; *Adger v. Alston*, 15 Wall. 555, 560, 21 L. Ed. 234.

24. *The Protector*, 12 Wall. 700, 20 L. Ed. 463; *Adger v. Alston*, 15 Wall. 555, 560, 21 L. Ed. 234.

The states embraced in this proclamation were Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana and Arkansas. *Adger v. Alston*, 15 Wall. 555, 560, 21 L. Ed. 234; *Raymond v. Thomas*, 91 U. S. 712, 714, 23 L. Ed. 434; *The Protector*, 12 Wall. 700, 20 L. Ed. 463.

25. **Conduct of war governed by exigencies and necessities.**—Justice Chase, in *Ware v. Hylton*, 3 Dall. 199, 228, 1 L. Ed. 568.

26. **Laws governing extent and operations.**—Mr. Justice Chase, in *The Eliza*, 4 Dall. 37, 43, 1 L. Ed. 731.

27. **Bulwarks may be built on private ground.**—*Respublica v. Sparhawk*, 1 Dall. 357, 363, 1 L. Ed. 174.

the maintainance of the army, or useful to the enemy, and in danger of falling into their hands, may be removed.²⁸ Either party to the war may receive and list among his troops such as quit the other, unless there has been a previous stipulation that they shall not be received.²⁹ By virtue of its power to make war and to suppress insurrection, the government of the United States has a right to transport troops through all parts of the Union by the usual and most expeditious modes of transportation.³⁰

B. Civil War—1. **IN GENERAL**.—The general usage of nations regards a civil war as entitling both the contending parties to all the rights of war as against each other, and even as it respects neutral nations.³¹ The parties to such a war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.³²

2. **IN THE UNITED STATES**.—The United States, in the enforcement of their constitutional rights against armed insurrection, have all the powers not only of a sovereign, but also of the most favored belligerent.³³ As belligerent, they may by capture enforce their authority, and, as sovereign, by pardon, and restoration to all rights, civil as well as political, recall their revolted citizens to allegiance.³⁴

The Civil War between the United States and the Confederate States had such character and magnitude as to give the United States the same rights and powers which they might exercise in the case of a national or foreign war.³⁵ Each party to the war was entitled to the benefit of belligerent rights,³⁶ and the rules of war, as recognized by the public law of civilized nations, were applicable to the contending forces.³⁷ But the conces-

28. Removal of property.—*Republica v. Sparhawk*, 1 Dall. 357, 362, 1 L. Ed. 174. In this case it was held that during the Revolutionary War congress had power to direct the removal of such articles.

29. Enlisting troops that have deserted the other belligerent.—*United States v. Reading*, 18 How. 1, 10, 15 L. Ed. 291.

When they have been so received, a high moral faith irrevocable honor, sanctioned by the usages of all nations, gives to them protection personally, and security for all that they have or may possess. Nothing that they claim as their own can be taken from them, upon the imputation that they had forfeited or meant to relinquish it by the abandonment of their allegiance to the sovereignty which they had left. *United States v. Reading*, 18 How. 1, 10, 15 L. Ed. 291.

30. Transportation of troops.—*Crandall v. Nevada*, 6 Wall. 35, 18 L. Ed. 745.

31. Rights of contending parties in a civil war.—*Miller v. United States*, 11 Wall. 268, 306, 20 L. Ed. 135, quoting Wheaton on International Law, § 296.

32. Concession of belligerent rights.—*Prize Cases*, 2 Black 635, 667, 17 L. Ed. 459.

When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights; but to what extent they shall be accorded to the insurgents de-

pends upon the considerations of justice, humanity, and policy controlling the government. *Williams v. Bruffey*, 96 U. S. 176, 177, 24 L. Ed. 716.

33. Sovereign and belligerent powers.—*Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650; *Prize Cases*, 2 Black 635, 673, 17 L. Ed. 459; *Miller v. United States*, 11 Wall. 268, 307, 20 L. Ed. 135.

34. Lamar v. Browne, 92 U. S. 187, 23 L. Ed. 650. See the title PARDON, vol. 9, p. 1.

35. Rights and powers of United States.—*Prize Cases*, 2 Black 635, 636, 17 L. Ed. 459.

36. Each party entitled to belligerent rights.—*Freeland v. Williams*, 131 U. S. 405, 416, 33 L. Ed. 193.

Important belligerent rights were conceded to the insurgents in arms, during the late Civil War. *Hickman v. Jones*, 9 Wall. 197, 200, 19 L. Ed. 551; *Coppell v. Hall*, 7 Wall. 542, 554, 19 L. Ed. 244; *Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 584.

But the recognition did not extend to the government of the Confederacy. *Hickman v. Jones*, 9 Wall. 197, 200, 19 L. Ed. 551.

To the Confederate army was conceded such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other. *Ford v. Surget*, 97 U. S. 594, 605, 24 L. Ed. 1018; *Stevens v. Griffith*, 111 U. S. 48, 51, 28 L. Ed. 348.

37. Rules of war applicable.—*United*

sion of belligerent rights to the Confederate government sanctioned no hostile legislation against the citizens of the loyal states.³⁸

V. Effect of War upon the Status of Individuals.

A. In General.—In a state of war, the nations who are engaged in it, and all their citizens or subjects,³⁹ and all residents within their territorial boundaries,⁴⁰ are enemies of each other. If when war breaks out a citizen of one belligerent is in the country of the other belligerent, it is his duty to return to his own country without delay.⁴¹

Individual acts of friendship by a subject of one belligerent toward the other belligerent cannot change his status as an enemy.⁴²

Subjects of a Friendly State in the Service of the Enemy.—Those must be considered as public enemies, and amendable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them. Even under municipal law this doctrine is recognized.⁴³

B. Civil War—1. **IN GENERAL.**—The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the government and of all the citizens or subjects of the other, applies as well to civil as it does to international wars.⁴⁴ And in the case of a civil war, those must also be considered enemies who, though subjects or citizens of the lawful government, are residents of the territory under the power or control of the party resisting

States v. Pacific Railroad, 120 U. S. 227, 233, 30 L. Ed. 634; *Brown v. Hiatts*, 15 Wall. 177, 184, 21 L. Ed. 128.

"The war, in many of its aspects, was conducted as if it had been a public one with a foreign enemy." *Coppell v. Hall*, 7 Wall. 542, 554, 19 L. Ed. 244.

The soldiers of the insurgents when captured were treated as prisoners of war, and were exchanged and not held for treason. Their vessels when captured were dealt with by our prize courts. Their ports were blockaded and the blockades proclaimed to neutral nations. Property taken at sea, belonging to persons domiciled in the insurgent states, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign nation. *Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 584. See, also, *United States v. Pacific Railroad*, 120 U. S. 227, 233, 30 L. Ed. 634.

38. No hostile legislation against citizens of loyal states sanctioned.—*Williams v. Bruffy*, 96 U. S. 176, 177, 24 L. Ed. 716; *Stevens v. Griffith*, 111 U. S. 49, 51, 28 L. Ed. 348. See the title *STATES*, ante, p. 58.

39. Who are enemies in war.—*Matthews v. McStea*, 91 U. S. 7, 9, 23 L. Ed. 188; *The Venice*, 2 Wall. 258, 274, 17 L. Ed. 866; *Jecker, etc., Co. v. Montgomery*, 18 How. 110, 15 L. Ed. 311; *White v. Burnley*, 20 How. 235, 249, 15 L. Ed. 886; *The Julia*, 8 Cranch 181, 184, 3 L. Ed. 528.

40. Lamar v. Browne, 92 U. S. 187, 194, 23 L. Ed. 650.

"It is ever a presumption that inhabitants of an enemy's territory are enemies,

even though they are not participants in the war, though they are subjects of neutral states, or even subjects or citizens of the government prosecuting the war against the state within which they reside." *Miller v. United States*, 11 Wall. 268, 310, 20 L. Ed. 135.

"A neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi*, and if the state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence." *The Venus*, 8 Cranch 253, 279, 3 L. Ed. 353. See, also, *The William Bagaley*, 5 Wall. 377, 409, 18 L. Ed. 583.

41. Duty of citizen to return to his own country.—*Gates v. Goodloe*, 101 U. S. 612, 617, 25 L. Ed. 895; *The William Bagaley*, 5 Wall. 377, 408, 18 L. Ed. 583.

42. Status as enemy not changed by individual acts of friendship.—*The Benito Estenger*, 176 U. S. 568, 574, 44 L. Ed. 592.

43. Subjects of friendly state in service of enemy.—*Miller v. United States*, 11 Wall. 268, 311, 20 L. Ed. 135.

44. Who are enemies in civil war.—*The Venice*, 2 Wall. 258, 274, 17 L. Ed. 866. See ante, "In General," V, A.

"**Rebels**" and "**enemies**" synonymous.—"Whatever may be true in regard to a rebellion which does not rise to the magnitude of a war, it must be that when it has become a recognized war those who are engaged in it are to be regarded as enemies. And they are not the less such because they are also rebels. They are equally well designated as rebels or enemies. Regarded as descriptive personarum, the words 'rebels' and 'enemies,' in such a state of things, are synony-

that government,⁴⁵ or are acting with the party resisting such government.⁴⁶

2. **THE CIVIL WAR IN THE UNITED STATES.**—**The inhabitants of the Confederate States** on the one hand, and of the states which adhered to the Union on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions.⁴⁷

Citizen Espousing the Cause of the Enemy.—A citizen of the United States, who, abandoning his home, entered the military lines of the enemy, and was in sympathy and co-operation with those who strove by armed force to overthrow the Union, was, during his stay there, an enemy of the government, and liable to be treated as such, both as to his person and property.⁴⁸

Temporary and Constrained Residence of Loyal Citizens in Confederate Territory.—But citizens of the United States faithful to the Union, who resided in the Confederate States at any time during the Civil War, but who during it escaped from those states, and have subsequently resided in the loyal states, or in neutral countries, lost no rights as citizens by reason of temporary and constrained residence in the rebellious portion of the country.⁴⁹

A person who was a resident of a loyal state, where he was arrested, who was never resident in any state engaged in rebellion, nor connected with the military or naval service, cannot be regarded as a prisoner of war.⁵⁰

VI. Effect of War upon Intercourse with the Enemy and Civil Rights and Liabilities.⁵¹

A. In General.—In war, all intercourse or communication between the subjects and citizens of the belligerent countries is illegal,⁵² unless sanctioned by the authority of the government⁵³ or in the exercise of the rights of humanity.⁵⁴

mous." *Miller v. United States*, 11 Wall. 268, 309, 20 L. Ed. 135.

45. When subjects or citizens of lawful government are enemies of that government.—*Miller v. United States*, 11 Wall. 268, 311, 20 L. Ed. 135.

It is the duty of a citizen when civil war breaks out, if he is a resident in the rebellious section, to leave it as soon as practicable, and adhere to the regular established government. *Gates v. Goodloe*, 101 U. S. 612, 617, 25 L. Ed. 895; *The William Bagaley*, 5 Wall. 377, 408, 18 L. Ed. 583.

46. Persons acting with the party resisting the lawful government are enemies of that government, though they are subjects and citizens of such government, and not residents of the territory under the power or control of the party resisting it. *Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135.

47. Inhabitants of the respective belligerents enemies to each other.—*United States v. Pacific Railroad*, 120 U. S. 227, 233, 30 L. Ed. 634; *Brown v. Hiatts*, 15 Wall. 177, 184, 21 L. Ed. 128; *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, 17 L. Ed. 915.

"The district of country declared by the constituted authorities, during the late Civil War, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war,

liable to be treated by the United States, pending the war and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions." *Ford v. Surget*, 97 U. S. 594, 604, 24 L. Ed. 1018.

All persons residing within the territory occupied by the Confederate military forces, during the late Civil War, were liable to be treated as enemies. *Prize Cases*, 2 Black 635, 636, 17 L. Ed. 459.

48. Citizens espousing the cause of the enemy.—*Gates v. Goodloe*, 101 U. S. 612, 25 L. Ed. 895.

49. Temporary and constrained residence of loyal citizens in Confederate territory.—*The Peterhoff*, 5 Wall. 28, 29, 18 L. Ed. 564.

50. Not a prisoner of war.—*Ex parte Milligan*, 4 Wall. 2, 4, 18 L. Ed. 281.

51. For an interpretation of the embargo and nonintercourse acts enacted by congress in the early days of the republic, see the title EMBARGO AND NON-INTERCOURSE LAWS, vol. 5, p. 732.

52. Intercourse or communication illegal—Rule stated.—*The Julia*, 8 Cranch 181, 193, 3 L. Ed. 528; *Jecker, etc., Co. v. Montgomery*, 18 How. 110, 15 L. Ed. 311; *Ross v. Jones*, 22 Wall. 576, 586, 22 L. Ed. 730.

53. Exceptions to rule.—*The Julia*, 8 Cranch 181, 193, 3 L. Ed. 528.

54. The Julia, 8 Cranch 181, 193, 3 L. Ed. 528.

The use of a license or pass from the enemy, by a citizen of the United States, is unlawful, and one citizen has no right to purchase of, or sell to, another, such a license or pass, to be used on board an American vessel.⁵⁵

The Civil War affected the status of the entire territory of the states declared to be in insurrection, except as modified by declaratory acts of congress or proclamations of the president.⁵⁶ But during that war transactions within the Confederate lines affecting loyal citizens outside were not all unlawful.⁵⁷

B. Upon Commercial Intercourse and Contracts—1. **WAR IN GENERAL**—2. *Commercial Intercourse and Contracts between Enemies*.—War suspends all commercial intercourse between the citizens of two belligerent countries or states,⁵⁸ and all contracts growing out of such intercourse are illegal.⁵⁹ It needs no special declaration on the part of the sovereign to accomplish this result.⁶⁰ The inhibition applies not only to a direct intercourse between the enemy countries, but to an intercourse through the medium of a neutral port.⁶¹ No active business can be maintained either personally or by correspondence, by the citizens of one belligerent with the citizens of the other.⁶² Every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, is void.⁶³ A person's unlawful trading in behalf of another with an enemy can-

55. License or pass from the enemy.—*Patton v. Nicholson*, 3 Wheat. 204, 207, 4 L. Ed. 371.

56. Effect of civil war.—*Hamilton v. Dillin*, 21 Wall. 73, 74, 22 L. Ed. 528.

57. Carson v. Dunham, 121 U. S. 421, 429, 20 L. Ed. 992; *United States v. Quigley*, 103 U. S. 595, 596, 26 L. Ed. 524.

58. War suspends all commercial intercourse.—*Insurance Co. v. Davis*, 95 U. S. 425, 429, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 65, 70, 42 L. Ed. 658; *United States v. Grossmayer*, 9 Wall. 72, 74, 19 L. Ed. 627; *Mitchell v. Harmony*, 13 How. 115, 133, 14 L. Ed. 75; *Coppell v. Hall*, 7 Wall. 542, 554, 19 L. Ed. 244; *United States v. Lane*, 8 Wall. 185, 195, 19 L. Ed. 445; *Matthews v. McStea*, 91 U. S. 7, 9, 23 L. Ed. 188; *McKee v. United States*, 8 Wall. 163, 166, 19 L. Ed. 329.

"War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country." *Hanger v. Abbott*, 6 Wall. 532, 535, 18 L. Ed. 939; *The William Bagaley*, 5 Wall. 377, 405, 18 L. Ed. 583; *Ross v. Jones*, 22 Wall. 576, 586, 22 L. Ed. 730. See, also, *Matthews v. McStea*, 91 U. S. 7, 9, 23 L. Ed. 188.

59. Contracts growing out of commercial intercourse illegal.—*White v. Burnley*, 20 How. 235, 249, 15 L. Ed. 886; *Mitchell v. United States*, 21 Wall. 350, 351, 22 L. Ed. 584; *Coppell v. Hall*, 7 Wall. 542, 554, 19 L. Ed. 244.

During a state of hostility, the citizens of the hostile states are incapable of contracting with each other. *Scholefield v. Eichelberger*, 7 Pet. 586, 8 L. Ed. 793.

"No contract is considered as valid between enemies, at least, so far as to give them a remedy in the courts of either government." *The Julia*, 8 Cranch 181, 194, 3 L. Ed. 528. See post, "Upon Judicial Rights and Remedies," VI, J.

No valid contract can be made, nor can any promise arise by implication of law, from any transaction with an enemy. *Hanger v. Abbott*, 6 Wall. 532, 535, 18 L. Ed. 939.

Even after the war has terminated, the defendant, in an action founded upon a contract made in violation of the prohibition, may set up the illegality of the transaction as a defense. *Hanger v. Abbott*, 6 Wall. 532, 535, 18 L. Ed. 939.

60. No special declaration necessary.—*United States v. Lane*, 8 Wall. 185, 195, 19 L. Ed. 445; *United States v. Grossmayer*, 9 Wall. 72, 74, 19 L. Ed. 627.

61. Inhibition applies to intercourse through a neutral post.—*The Julia*, 8 Cranch 181, 195, 3 L. Ed. 528. See the title PRIZE, vol. 9, p. 744.

62. To what transactions the inhibition extends.—*Insurance Co. v. Davis*, 95 U. S. 425, 429, 24 L. Ed. 453; *Williams v. Paine*, 169 U. S. 55, 70, 42 L. Ed. 658.

63. Montgomery v. United States, 15 Wall. 395, 21 L. Ed. 97.

All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one in person, or indirectly through an agent, who is neutral, are illegal and void. *United States v. Lapene*, 17 Wall. 601, 602, 21 L. Ed. 693.

No property passes and no rights are acquired under such contracts. *United States v. Lapene*, 17 Wall. 601, 603, 21 L. Ed. 693.

not be made lawful by any ratification.⁶⁴

Neutral friends, or even citizens, who remain in the enemy country after the declaration of war, have impressed upon them so much of the character of enemies, that trading with them becomes illegal.⁶⁵

Parties Standing in the Relation of Debtor and Creditor.—Inter-course during war with an enemy is unlawful to parties standing in the relation of debtor and creditor as much as to those who do not.⁶⁶

The reasons for the rule inhibiting commercial intercourse between citizens of belligerent countries are, that, in a state of war, all the members of each belligerent are respectively enemies of all the members of the other belligerent,⁶⁷ and, were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence.⁶⁸

Commercial Intercourse under Permission of the Sovereign Authority.—The rigidity of the rule inhibiting commercial intercourse can be relaxed by the sovereign authority and the laws of war so far suspended as to permit trade with the enemy.⁶⁹ To a limited extent such trade may be authorized by a military commander.⁷⁰ Such permissions or licenses are partial suspensions of the laws of war, but not of the war itself. In modern times, they are very common.⁷¹ The permit to carry on commercial correspondence during war cannot reasonably imply more than to sanction an innocent correspondence; a correspondence leading only to legal results, not having for its objects any unpermitted acts, or acts inconsistent with the relation of members of hostile states.⁷²

Effect of War upon Contracts Existing When It Is Declared.—Executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of congress.⁷³ But the better opinion is that exe-

64. Unlawful trading cannot be made lawful by ratification.—United States *v.* Grossmayer, 9 Wall. 72, 19 L. Ed. 627.

65. Trading with neutrals or citizens remaining in enemy country.—The William Bagaley, 5 Wall. 377, 405, 18 L. Ed. 583. See ante, "Effect of War upon the Status of Individuals," V.

66. Intercourse between parties standing in relation of debtor and creditor.—United States *v.* Grossmayer, 9 Wall. 72, 19 L. Ed. 627.

67. Reasons for rule inhibiting commercial intercourse.—Matthews *v.* McStea, 91 U. S. 7, 9, 23 L. Ed. 188. See ante, "Effect of War upon the Status of Individuals," V.

68. Matthews *v.* McStea, 91 U. S. 7, 9, 23 L. Ed. 188.

69. Trading with enemy under permission of sovereign authority.—United States *v.* Lane, 8 Wall. 185, 195, 19 L. Ed. 445; Insurance Co. *v.* Davis, 95 U. S. 425, 429, 24 L. Ed. 453; Williams *v.* Paine, 169 U. S. 55, 65, 70, 42 L. Ed. 658; Coppell *v.* Hall, 7 Wall. 542, 554, 19 L. Ed. 244; Scholefield *v.* Eichelberger, 7 Pet. 586, 593, 8 L. Ed. 793; Matthews *v.* McStea, 91 U. S. 7, 10, 23 L. Ed. 188.

The government of the United States clearly has power to permit limited commercial intercourse with an enemy in

time of war, and to impose such conditions thereon as it sees fit. This power is incident to the power to declare war and to carry it on to a successful termination. Hamilton *v.* Dillin, 21 Wall. 73, 22 L. Ed. 528.

It seems that the president alone, who is constitutionally invested with the entire charge of hostile operations, may exercise this power. But whether so or not, there is no doubt that with the concurrent authority of the congress, he may exercise it according to his discretion. Hamilton *v.* Dillin, 21 Wall. 73, 74, 22 L. Ed. 528.

70. Trade authorized by military commander.—Matthews *v.* McStea, 91 U. S. 7, 10, 23 L. Ed. 188.

71. Licenses to trade partial suspensions of laws of war.—Matthews *v.* McStea, 91 U. S. 7, 10, 23 L. Ed. 188. See, also, Coppell *v.* Hall, 7 Wall. 542, 554, 19 L. Ed. 244.

72. What permit to carry on commercial correspondence implies.—Scholefield *v.* Eichelberger, 7 Pet. 586, 593, 8 L. Ed. 793.

73. Executory contracts.—Hanger *v.* Abbott, 6 Wall. 532, 536, 18 L. Ed. 939; The William Bagaley, 5 Wall. 377, 401, 18 L. Ed. 583.

cuted contracts, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain, in the language of the civilians, a *persona standi in judicio*.⁷⁴

The doctrine of revival of contracts, suspended during the war, is based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive—as where time is of the essence of the contract, or the parties cannot be made equal.⁷⁵

b. *Commercial Intercourse between Nonresident Aliens and Belligerents.*—A nonresident alien may trade with both belligerents or with either. By so doing he commits no crime. His acts are lawful in the sense that they are not prohibited. So long as he confines his trade to property not hostile or contraband, and violates no blockade, he is secure both in his person and his property.⁷⁶ But so soon as he steps outside of actual neutrality, and adds materially to the warlike strength of one belligerent, he makes himself correspondingly the enemy of the other. If he breaks a blockade or engages in contraband trade, he subjects himself to the chances of the capture and confiscation of his offending property.⁷⁷

2. CIVIL WAR—*a. In General.*—Civil war, equally with foreign war, renders commercial intercourse unlawful between the contending parties.⁷⁸

b. *The Civil War in the United States*—(1) *Commercial Intercourse and Contracts between Federals and Confederates.*—During the continuance of the late Civil War commercial intercourse and correspondence between inhabitants of the Confederate States and the inhabitants of the states which adhered to the Union was forbidden, and contracts between them were suspended.⁷⁹ This prohibition was enforced by acts of congress, which prohibited all commercial intercourse between the states in insurrection and the rest of the United States.⁸⁰ Under these acts the president could allow a restricted trade, if he

74. **Executed contracts.**—*Hanger v. Abbott*, 6 Wall. 532, 536, 18 L. Ed. 939. See post, “Upon Judicial Rights and Remedies,” VI, J.

75. **Revival of contracts suspended during war.**—*New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789. See the title INSURANCE, vol. 7, p. 123.

76. **Commercial intercourse between nonresident aliens and belligerents.**—*Young v. United States*, 97 U. S. 39, 63, 24 L. Ed. 992.

77. *Young v. United States*, 97 U. S. 39, 63, 24 L. Ed. 992.

See the titles BLOCKADE, vol. 3, p. 364; NEUTRALITY, vol. 8, p. 894; PRIZE, vol. 9, p. 744.

78. **Civil war renders commercial intercourse between belligerents unlawful.**—*Matthews v. McStea*, 91 U. S. 7, 10, 23 L. Ed. 188.

79. **Commercial intercourse forbidden and contracts suspended.**—*United States v. Pacific Railroad*, 120 U. S. 227, 233, 30 L. Ed. 634; *Brown v. Hiatts*, 15 Wall. 177, 184, 21 L. Ed. 128; *Mitchell v. United States*, 21 Wall. 350, 351, 22 L. Ed. 584; *Cutner v. United States*, 17 Wall. 517, 520, 21 L. Ed. 656; *Briggs v. United States*, 143 U. S. 346, 353, 36 L. Ed. 180; *Conrad v. Waples*, 96 U. S. 279, 287, 24 L. Ed. 721; *Maddox v. United States*, 15 Wall. 58, 21 L. Ed. 61.

A sale made in violation of such prohibition was illegal, unless made under a license to trade. *Cutner v. United States*, 17 Wall. 517, 520, 21 L. Ed. 656.

Sale of cotton held void as being a trading with a public enemy. *Montgomery v. United States*, 15 Wall. 395, 21 L. Ed. 97.

A resident of a loyal state, after the 17th of July, 1861, and just after the late Civil War had become flagrant, went, under a military pass of a federal officer into the Confederate states, and in November and December, 1864, bought a large quantity of cotton there (724 bales), and never returned to the loyal states until just after that and when the war was not far from its close—when he did return to his old domicile—having, during the time that he was in the Confederate states transacted business, collected debts, and purchased the cotton. It was held, on a question whether he had been trading with the enemy, that he had not lost his original domicile, and therefore had been so trading. *Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 584. See, also, *Desmare v. United States*, 93 U. S. 605, 609, 23 L. Ed. 959.

80. **Nonintercourse acts.**—*McKee v. United States*, 8 Wall. 163, 166, 19 L. Ed. 329; *The Ouachita Cotton*, 6 Wall. 521, 18 L. Ed. 935; *United States v. Grossmayer*, 9 Wall. 72, 74, 19 L. Ed. 627;

thought proper.⁸¹ But in so far as he did allow it, it had to be conducted according to regulations prescribed by the secretary of the treasury.⁸²

Permits granted by the proper licensing agents to purchase goods in a certain locality, were prima facie evidence that the locality was properly within the trade regulations of that department.⁸³

Removal of Restrictions upon Commercial Intercourse.—At the close of the war the president issued proclamations removing the existing restrictions upon commercial intercourse.⁸⁴

(2) *Commercial Intercourse and Contracts between Confederates.*—Persons engaged in the late rebellion were not denied the right of contracting with and selling to each other.⁸⁵ Contracts between them, not in aid of the rebellion,

Hamilton v. Dillin, 21 Wall. 73, 74, 22 L. Ed. 528.

81. Power of president to allow a restricted trade.—McKee v. United States, 8 Wall. 163, 166, 19 L. Ed. 329; United States v. Grossmayer, 9 Wall. 72, 74, 19 L. Ed. 627; Hamilton v. Dillin, 21 Wall. 73, 74, 22 L. Ed. 528.

The president alone had power to license commercial intercourse between places within the lines of military occupation, by forces of the United States, and places under the control of insurgents against it. The Ouachita Cotton, 6 Wall. 521, 18 L. Ed. 935; The Sea Lion, 5 Wall. 630, 18 L. Ed. 618; Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244.

Accordingly, any licenses given by the military authorities were nullities. The Ouachita Cotton, 6 Wall. 521, 18 L. Ed. 935. See, also, The Sea Lion, 5 Wall. 630, 18 L. Ed. 618; McKee v. United States, 8 Wall. 163, 19 L. Ed. 329.

The general orders of the officer of the United States, commanding in a department, could give no validity to intercourse with the insurgents. Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244.

82. Regulations prescribed by secretary of the treasury.—United States v. Grossmayer, 9 Wall. 72, 74, 19 L. Ed. 627; Hamilton v. Dillin, 21 Wall. 73, 74, 22 L. Ed. 528; McKee v. United States, 8 Wall. 163, 166, 19 L. Ed. 329.

For the construction of the nointer-course acts and the proclamations and executive orders of the president and regulations prescribed by the secretary of the treasury in pursuance of them, see the following cases: McKee v. United States, 8 Wall. 163, 19 L. Ed. 329; United States v. Lane, 8 Wall. 185, 19 L. Ed. 445; Briggs v. United States, 143 U. S. 346, 353, 36 L. Ed. 180; Conrad v. Waples, 96 U. S. 279, 287, 24 L. Ed. 721; Gay's Gold, 13 Wall. 358, 20 L. Ed. 606; The Sea Lion, 5 Wall. 630, 18 L. Ed. 618; The Ouachita Cotton, 6 Wall. 521, 18 L. Ed. 935; Walker v. United States, 106 U. S. 413, 27 L. Ed. 166; Maddox v. United States, 15 Wall. 58, 21 L. Ed. 61; Hamilton v. Dillin, 21 Wall. 73, 74, 22 L. Ed. 528; Matthews v. McStea, 91 U. S. 7, 23 L. Ed. 188; United States v. Mora, 97 U. S. 413, 24 L. Ed. 1013; The Reform, 3

Wall. 617, 18 L. Ed. 105; Carson v. Dunham, 121 U. S. 421, 429, 30 L. Ed. 992.

83. Permits of licensing agents as evidence.—United States v. Weed, 5 Wall. 62, 18 L. Ed. 531; Butler v. Maples, 9 Wall. 766, 19 L. Ed. 822.

84. The proclamation of the president of June 13, 1865 (13 Stat. 763), annulling, in the territory of the United States east of the Mississippi, all restrictions previously imposed upon internal, domestic, and coastwise intercourse and trade, and upon the removal of products of states theretofore declared in insurrection, took effect as of the beginning of that day. United States v. Norton, 97 U. S. 164, 24 L. Ed. 907. See the title PRESIDENT OF THE UNITED STATES, vol. 9, p. 616.

Removal of restrictions upon commercial intercourse between Tennessee and New Orleans.—The order of the president of April 29, 1865 (13 Stat. 776), removed, from that date, all restrictions upon commercial intercourse between Tennessee and New Orleans, and neither the rights nor the duties of the holder of a bill of exchange, drawn at Trenton, Tenn., which matured in New Orleans before June 13, 1865, were dependent upon, or affected by, the president's proclamation of the latter date (Id. 763). Bond v. Moore, 93 U. S. 593, 23 L. Ed. 983.

Removal of restrictions upon commerce at New Orleans.—Prior to the issuing of General Butler's proclamation of May 6, 1862, the city of New Orleans in relation to the United States was enemies' territory, and its inhabitants enemies. But upon the issuing of that proclamation the inhabitants were at once permitted to resume, under the regulations prescribed, their wonted commerce with other places as if the state had not belonged to the Confederacy, subject, however, to the inhibition of trade with the localities still under the ban of the president's proclamation of August 16, 1861. Desmare v. United States, 93 U. S. 605, 611, 23 L. Ed. 959; The Venice, 2 Wall. 258, 17 L. Ed. 866.

85. Commercial intercourse and contracts between Confederates.—Conrad v. Waples, 96 U. S. 279, 24 L. Ed. 721;

were valid.⁸⁶ As between themselves, all the ordinary business could be lawfully carried on, except in cases where it was expressly forbidden by the United States, or would have been inconsistent with or have tended to weaken its authority.⁸⁷

Contracts payable in Confederate currency, but not designed in their origin to aid the insurrectionary government, were not, because thus payable, invalid between the parties.⁸⁸ Such contracts were enforceable in the courts of the United States, after the restoration of peace, to the extent of their just obligations.⁸⁹

(3) *Contracts between Loyal Citizens in Relation to Property within Confederate Lines.*—Persons residing in loyal states and adhering to the national government could contract in relations to property situated within the Confederate lines, so long as no intercourse or connection was kept up with the inhabitants of the enemy's country.⁹⁰

C. Upon Wills.—An alien enemy may take lands by devise from a loyal citizen, and hold the same until office found.⁹¹ The voluntary residence of a person within the Confederate lines during the late Civil War, did not incapacitate him, under the act of July 17, 1862, from making a last will and testament, further, if at all, than as against the United States.⁹²

D. Upon Powers.—A sale of real estate made under a power contained in a deed of trust executed before the late Civil War is valid, notwithstanding the grantors in the deed, which was made to secure the payment of promissory notes, were citizens and residents of one of the states declared to be in insurrection at the time of the sale, made while the war was flagrant.⁹³

E. Upon Partnerships.—See the title PARTNERSHIP, vol. 9, p. 108.

F. Upon the Relation of Principal and Agent.—See the titles INSURANCE, vol. 7, p. 91; PRINCIPAL AND AGENT, vol. 9, pp. 647, 708.

G. Upon the Relation of Guardian and Ward.—See the title GUARDIAN AND WARD, vol. 6, pp. 606, 607.

H. Upon the Creation of Corporations.—See the title CORPORATIONS, vol. 4, p. 674.

I. Suspension of Interest.—As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases.⁹⁴ Interest on loans made previous to, and maturing after, the commencement of the late Civil War ceased to run during the subsequent continuance of the war, although interest was stipulated in the contract.⁹⁵

Briggs v. United States, 143 U. S. 346, 352, 36 L. Ed. 180.

86. Mitchell v. United States, 21 Wall. 350, 352, 22 L. Ed. 584.

87. Conrad v. Waples, 96 U. S. 279, 24 L. Ed. 721; Briggs v. United States, 143 U. S. 346, 352, 36 L. Ed. 180.

88. Contracts payable in Confederate currency.—Wilmington, etc., R. Co. v. King, 91 U. S. 3, 23 L. Ed. 186; Effinger v. Kenney, 115 U. S. 566, 569, 29 L. Ed. 495; Thornton v. Smith, 8 Wall. 1, 19 L. Ed. 361.

89. Effinger v. Kenney, 115 U. S. 566, 570, 29 L. Ed. 495; Thornton v. Smith, 9 Wall. 1, 19 L. Ed. 361. See the title PAYMENT, vol. 9, p. 335.

90. Contract for the sale of cotton.—Briggs v. United States, 143 U. S. 346, 353, 36 L. Ed. 180.

91. Alien enemy may take lands by devise from loyal citizen.—Fairfax v. Hunter, 7 Cranch 603, 3 L. Ed. 453.

92. Capacity of resident within Confederate lines to make will.—Corbett v. Nutt, 10 Wall. 464, 19 L. Ed. 976.

93. Effect of civil war upon power to sell real estate.—University v. Finch, 18 Wall. 106, 21 L. Ed. 818.

94. Suspension of interest.—Brown v. Hiatts, 15 Wall. 177, 185, 21 L. Ed. 128; Hoare v. Allen, 2 Dall. 102, 1 L. Ed. 307; Foxcraft v. Nagle, 2 Dall. 132, 1 L. Ed. 319.

95. Brown v. Hiatts, 15 Wall. 177, 21 L. Ed. 128.

But the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, is applicable to debts between citizens of states in rebellion and citizens of states adhering to the national government in the late Civil War, only when the money is to be paid to the belligerent directly. It cannot apply when there is a known agent appointed to receive the money,

J. Upon Judicial Rights and Remedies—1. WAR IN GENERAL—*a. Effect upon the Right to Sue.*—The existence of war closes the courts of each belligerent to the citizens of the other.⁹⁶ But though an alien enemy may not have a right to bring suits in our courts, he may be sued in them.¹ And when he is sued he has a right to appear and defend.² This rule is applicable between citizens of the same government who are only enemies in a qualified sense in a civil war.³ The restoration of peace removes the disability to sue and opens the doors of the courts."⁴

b. Effect upon the Right of Trial by Jury.—The guaranty of trial by jury contained in the constitution was intended for a state of war as well as a state of peace.⁵ But cases arising in the land or naval forces, or in the militia in time of war or public danger, are excepted from the necessity of presentment or indictment by a grand jury, and the right of trial by jury, in such cases, is subject to the same exceptions.⁶

2. THE CIVIL WAR IN THE UNITED STATES.—During the late Civil War the courts of each belligerent were closed to the citizens of the other.⁷

Judicial Sale of Property of Citizens Residing in Insurrectionary States.—The supreme court has never gone further in protecting the property of citizens residing in the insurrectionary states during the late Civil War from judicial sale than to declare that where such a citizen has been driven from his home by a special military order, and forbidden to return, judicial

resident within the same jurisdiction with the debtor. In this latter case the debt will draw interest. *Ward v. Smith*, 7 Wall. 447, 19 L. Ed. 207.

96. Courts of each belligerent closed to citizens of other.—*Masterson v. Howard*, 18 Wall. 99, 21 L. Ed. 764; *Caperton v. Bowyer*, 14 Wall. 216, 236, 20 L. Ed. 882; *Fairfax v. Hunter*, 7 Cranch 603, 620, 3 L. Ed. 453; *Wilcox v. Henry*, 1 Dall. 69, 71, 1 L. Ed. 41; *Lamar v. Micou*, 112 U. S. 452, 464, 28 L. Ed. 751. See, also, *Conrad v. Waples*, 96 U. S. 279, 289, 24 L. Ed. 721.

"Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any action in the tribunals of the other belligerent." *Caperton v. Bowyer*, 14 Wall. 216, 236, 20 L. Ed. 882; *Hanger v. Abbott*, 6 Wall. 532, 539, 18 L. Ed. 939.

1. Alien enemy may be sued in our courts.—*University v. Finch*, 18 Wall. 106, 111, 21 L. Ed. 818; *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. Ed. 80.

While the existence of war closes the courts of each belligerent to the citizens of the other, it does not prevent the citizens of one belligerent from taking proceedings for the protection of their own property in their own courts, against the citizens of the other, whenever the latter can be reached by process. *Masterson v. Howard*, 18 Wall. 99, 21 L. Ed. 764.

If a person voluntarily leaves his country or his residence for the purpose of engaging in hostilities against the former, he cannot be permitted to complain of legal proceedings regularly prosecuted against him as an absentee, on the ground

of his inability to return or to hold communication with the place where the proceedings are conducted. *Ludlow v. Ramsey*, 11 Wall. 581, 589, 20 L. Ed. 216, distinguishing *Dean v. Nelson*, 10 Wall. 158, 19 L. Ed. 926.

2. Alien enemy may appear and defend.—*University v. Finch*, 18 Wall. 106, 107, 111, 21 L. Ed. 818; *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. Ed. 80.

3. Rule applicable in a civil war.—*University v. Finch*, 18 Wall. 106, 111, 21 L. Ed. 818; *McVeigh v. United States*, 11 Wall. 259, 267, 20 L. Ed. 80.

4. Restoration of peace removes disability to sue.—*Caperton v. Bowyer*, 14 Wall. 216, 236, 20 L. Ed. 882; *Hanger v. Abbott*, 6 Wall. 532, 539, 18 L. Ed. 939; *Ross v. Jones*, 22 Wall. 576, 586, 22 L. Ed. 730; *Fairfax v. Hunter*, 7 Cranch 603, 620, 3 L. Ed. 453; *Lamar v. Micou*, 112 U. S. 452, 464, 28 L. Ed. 751.

"By the law of nations, confirmed by universal usage, at the end of the war all the rights and credits which the subjects of either power had against the other are revived, for during the war they are not extinguished but merely suspended." *Wilcox v. Henry*, 1 Dall. 69, 71, 1 L. Ed. 41.

5. Effect of war upon right of trial by jury.—*Ex parte Milligan*, 4 Wall. 2, 3, 18 L. Ed. 281. See the title JURY, vol. 7, p. 751.

6. Ex parte Milligan, 4 Wall. 2, 3, 18 L. Ed. 281.

7. Courts of each belligerent closed to citizens of the other.—*Brown v. Hiatts*, 15 Wall. 177, 184, 21 L. Ed. 128; *United States v. Pacific Railroad*, 120 U. S. 227, 233, 30 L. Ed. 634.

proceedings against him are void.⁸ The property of such citizens found in a loyal state is liable to seizure and sale for debts contracted before the outbreak of the war, as in the case of other nonresidents.⁹

Decree in Equity against a Prisoner of War.—A decree in equity in one of the loyal states against a party who, having been engaged in the rebellion, was at the time a prisoner of war of the United States, outside of the state, and against whom there was no service of process, or any step taken to bring him before the court, was void, and any sale under it was also void.¹⁰

An action will not lie for the price of goods sold in aid of the rebellion, or with knowledge that they were purchased for the Confederate States government.¹¹

When any portion of the insurgent states was in the occupation of the forces of the United States during the rebellion, the municipal laws, if not suspended or superseded, were generally administered there by the ordinary tribunals for the protection and benefit of persons not in the military service.¹² Their continued enforcement was not for the protection or the control of officers or soldiers of the army.¹³

K. Upon the Running of the Statute of Limitations.—See the titles LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 1000; LIENS, vol. 7, p. 897.

VII. Conquest of Territory and the Government Thereof.

A. Where Authority of Conquering Army Is Established.—The authority of a conquering army over a certain territory is established when it occupies and holds securely the most important places, and when there is no opposing governmental authority within the territory.¹⁴

B. Capture and Possession of Territory as Affecting Allegiance of Inhabitants.—The capture and possession of territory belonging to one belligerent by the troops of the other belligerent does not work an absolute change of the allegiance of the captured inhabitants. They owe allegiance to the conquerors, during their occupation, but it is a temporary allegiance, which does not destroy, but only suspends, their former allegiance.¹⁵

8. Judicial sale of property of citizens residing in insurrectionary states.—*University v. Finch*, 18 Wall. 106, 21 L. Ed. 818; *Lasere v. Rochereau*, 17 Wall. 437, 21 L. Ed. 694. See, also, *Dean v. Nelson*, 10 Wall. 158, 19 L. Ed. 926.

9. University v. Finch, 18 Wall. 106, 21 L. Ed. 818.

A man who has neglected his private affairs and gone away from his home and state, for the purpose of devoting his time to the cause of rebellion against the government, cannot come into equity to complain that his creditors have obtained payment of admitted debts through judicial process obtained upon constructive notice, and on a supposition wrongly made by them that he had no home in the state, or none that they knew of. Especially is this true when there is no allegation of want of actual knowledge of what they were doing. *McQuiddy v. Ware*, 20 Wall. 14, 22 L. Ed. 311.

And still more especially true is it in Missouri, where the statutes of the state allow a bill of review of decrees or judgments obtained on constructive notice at any time within three years after they are obtained, and the complainant has let

more than six years pass without an effort to have them so reviewed. *McQuiddy v. Ware*, 20 Wall. 14, 22 L. Ed. 311.

10. Decree in equity against a prisoner of war.—*Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. Ed. 948.

11. Action will not lie for price of goods sold in aid of rebellion.—*Hanauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439.

12. Administration of municipal laws in insurgent states occupied by federal forces.—*Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632. See post, "During the Civil War," VII, F, 2, b.

13. Dow v. Johnson, 100 U. S. 158, 25 L. Ed. 632.

14. When authority of conquering army is established.—*Keely v. Sanders*, 99 U. S. 441, 447, 25 L. Ed. 327; *Sherry v. McKinley*, 99 U. S. 496, 497, 25 L. Ed. 330. See the title TAXATION, ante, p. 356.

When military occupation of New Orleans, during the Civil War, was complete. *The Venice*, 2 Wall. 258, 17 L. Ed. 866.

15. Capture and possession of territory as affecting allegiance of inhabitants.—*Shanks v. Dupont*, 3 Pet. 242, 7 L. Ed.

C. Status of Conquered Territory—1. **IN GENERAL.**—If a nation be not entirely subdued, the holding of conquered territory is a mere military occupation, until its fate shall be determined at the treaty of peace.¹⁶ "If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."¹⁷

2. **TERRITORY CONQUERED BY THE UNITED STATES.**—Conquest of territory by the United States in time of war, while it subjects it to its sovereignty and dominion, does not make it part of the Union.¹⁸ That can only result from treaty or act of congress.¹⁹

The act of July 13th, 1861, § 5, excepted from the rebellious condition those parts of rebellious states "from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents."²⁰

D. Rights of Property in a Conquered Country.—When a country is conquered, the old possessors are not deprived of their estates, but only change their masters; and if the country is ceded they are entitled to such estates.²¹

E. Contracts of Conqueror Touching Things in Conquered Territory.—It would seem that as a general rule the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases.²²

F. Government of Conquered Territory—1. **IN GENERAL.**—The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer.²³ The character and form of the government to be established depend entirely upon the laws of the conquering state or the orders of its military commander.²⁴ The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror.²⁵ He, nevertheless, has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones.²⁶

666; *United States v. Rice*, 4 Wheat. 246, 253, 4 L. Ed. 562.

16. **Status of conquered territory.**—*American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243.

But although acquisitions made during war are not considered as permanent, until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them." *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch 191, 195, 3 L. Ed. 701.

17. *American Ins. Co. v. Canter*, 1 Pet. 511, 542, 7 L. Ed. 243.

18. **Status of territory conquered by United States.**—*Fleming v. Page*, 9 How. 603, 614, 13 L. Ed. 276.

19. See the title **CONSTITUTIONAL LAW**, vol. 4, p. 96.

20. **Exception from rebellious condition.**—For a construction of the terms of this statute, see *The Venice*, 2 Wall. 258, 259, 17 L. Ed. 866.

21. **Rights of property in a conquered country.**—*Wilcox v. Henry*, 1 Dall. 69, 71, 1 L. Ed. 41.

22. **Contracts of conqueror touching things in conquered territory.**—*New Or-*

leans v. Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

But a lease made July 8th, 1865, during the military occupation of New Orleans, by the municipal authorities appointed by the general commanding the department, held, under the peculiar circumstance of the case, to be taken out of the general rule, and sustained for its whole term, although before the expiration thereof the government of the city was handed back to the proper city authorities. *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354.

23. **Right of belligerent to govern territory in its military possession.**—Halleck on International Law, vol. 2, p. 444, quoted in *Dooley v. United States*, 182 U. S. 222, 230, 45 L. Ed. 1074; *Coleman v. Tennessee*, 97 U. S. 509, 517, 24 L. Ed. 1118.

24. **Character and form of government.**—*Coleman v. Tennessee*, 97 U. S. 509, 517, 24 L. Ed. 1118; *United States v. Rice*, 4 Wheat. 246, 253, 4 L. Ed. 562.

25. **Municipal laws of conquered territory.**—Halleck on International Law, vol. 2, p. 444, quoted in *Dooley v. United States*, 182 U. S. 222, 231, 45 L. Ed. 1074.

26. **Power of conqueror.**—Halleck on

But though a military commander in legislating for a conquered country may disregard the laws of that country, he is not wholly above the laws of his own. His power to administer is absolute, but his power to legislate does not extend beyond the necessities of the case.²⁷

2. **GOVERNMENT OF TERRITORY CONQUERED BY THE UNITED STATES**—a. *In General*.—The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the president as commander in chief.²⁸ Civil government can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine.²⁹ It must take effect, either by the action of the treaty-making power, or by that of the congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory; and to subject the territory to the disposition of the government of the United States.³⁰

b. *During the Civil War*.—**Laws of Tennessee in Force during Military Occupation**.—Unless suspended or superseded by the commander of the forces of the United States which occupied Tennessee, the laws of that state, so far as they affected its inhabitants among themselves, remained in force during the war, and over them its tribunals, unless superseded by him, continued to exercise their ordinary jurisdiction.³¹

The president's proclamation of the 31st of March, 1863, affected in no respect the general principles of protection to rights and property under temporary government, established after the restoration of national authority.³²

Provisional Governments during Military Occupation.—See the title CONSTITUTIONAL LAW, vol. 4, p. 342.

Provisional Courts for Trial of Civil Cases.—See the title MILITARY LAW, vol. 8, p. 356.

Appointment of Judges.—See the title MILITARY LAW, vol. 8, p. 356.

Reconstruction Acts—Power of Congress to Enact.—See the title CONSTITUTIONAL LAW, vol. 4, p. 342.

The powers and duties of the military officers placed in command during the period of reconstruction in the several states which had been in rebellion, were defined by acts of congress.³³

International Law, vol. 2, p. 444, quoted in *Dooley v. United States*, 182 U. S. 222, 231, 45 L. Ed. 1074. See, also, *United States v. Rice*, 4 Wheat. 246, 253, 4 L. Ed. 562; *New Orleans v. Steamship Co.*, 20 Wall. 387, 394, 22 L. Ed. 354.

27. **Restrictions upon power of military commander**.—*Dooley v. United States*, 182 U. S. 222, 234, 45 L. Ed. 1074.

28. **Government of territory conquered by the United States**.—Concurring opinion of Mr. Justice Gray, in *Downes v. Bidwell*, 182 U. S. 244, 345, 45 L. Ed. 1088.

29. Concurring opinion of Mr. Justice Gray, in *Downes v. Bidwell*, 182 U. S. 244, 345, 45 L. Ed. 1088.

30. Concurring opinion of Mr. Justice Gray, in *Downes v. Bidwell*, 182 U. S. 244, 345, 45 L. Ed. 1088. See the title TREATIES, ante, p. 634.

Civil government of California, in 1847, under the authority of the president of the United States as constitutional commander in chief of the army and navy.

Cross v. Harrison, 16 How. 164, 14 L. Ed. 889.

31. **Laws of Tennessee in force during military occupation**.—*Coleman v. Tennessee*, 97 U. S. 509, 510, 24 L. Ed. 1118. See ante, "The Civil War in the United States," VI, J, 2.

32. **Protection to rights and property not affected by president's proclamation**.—*The Venice*, 2 Wall. 258, 259, 17 L. Ed. 866.

33. **Powers and duties of military officers during reconstruction period**.—*Raymond v. Thomas*, 91 U. S. 712, 715, 23 L. Ed. 434.

Special order of military commander annulling decree rendered by state court.—The special order, issued May 28, 1868, by the officer in command of the forces of the United States in South Carolina, wholly annulling a decree rendered by a court of chancery in that state in a case within its jurisdiction, was void. It was not warranted by the acts approved respectively March 2, 1867 (14 Stat. 428).

VIII. Capture and Confiscation of Property.

See the titles ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1; PRIZE, vol. 9, p. 744.

A. In General.—Property is captured on land when seized or taken from hostile possession by the military forces under orders from a commanding officer.³⁴ The right to confiscate the property of all public enemies is a conceded right.³⁵ It has no reference whatever to the personal guilt of the owner of the property confiscated, and the act of confiscation is not a proceeding against him. The confiscation is because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership.³⁶ The right of capture and confiscation is not confined to a war between two independent nations, but exists in the case of a civil war.³⁷

B. Validity of Confiscation Acts.—The confiscation acts of August 6, 1861, and July 17, 1862, were constitutional.³⁸

The Maryland confiscation acts of 1780, c. 45, 49, were valid.³⁹

C. Authority to Capture and Confiscate—1. **IN GENERAL.**—War gives to the sovereign the right to confiscate the property of enemies, wherever found.⁴⁰ But, until the sovereign will shall be expressed, no power of condemnation can exist in the courts.⁴¹ Where at the time of a declaration of war property of the enemy is found within the territory of the nation making the declaration, such declaration does not, by its own operation, so vest such property in the government, as to support proceedings for its seizures and confiscation.⁴²

Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public. But the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.⁴³ The facts as they appeared to the officer must furnish the rule for the application of these principles.⁴⁴ But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march.⁴⁵

2. **IN THE UNITED STATES.**—**Power of Congress to Make Rules Concerning Capture.**—The congress of the United States is intrusted with the power to make rules concerning captures in time of war.⁴⁶ Congress is not

and July 19 of the same year (15 Id. 14), which defined the powers and duties of military officers in command of the several states then lately in rebellion. *Raymond v. Thomas*, 91 U. S. 712, 23 L. Ed. 434.

34. **What constitutes capture on land.**—*Lamar v. Browne*, 92 U. S. 187, 193, 23 L. Ed. 650; *United States v. Padelford*, 9 Wall. 531, 540, 19 L. Ed. 788.

35. **Confiscation a conceded right.**—*Miller v. United States*, 11 Wall. 268, 305, 20 L. Ed. 135.

36. **Ground for confiscation.**—*Miller v. United States*, 11 Wall. 268, 305, 20 L. Ed. 135.

37. **Right of capture and confiscation exists in Civil War.**—*Miller v. United States*, 11 Wall. 268, 307, 20 L. Ed. 135.

38. **Confiscation acts of 1861 and 1862, constitutional.**—*Miller v. United States*, 11 Wall. 268, 269, 20 L. Ed. 135; *Kirk v. Lynd*, 106 U. S. 315, 316, 27 L. Ed. 193.

39. **Maryland confiscation acts valid.**—

Morris v. United States, 174 U. S. 196, 231, 43 L. Ed. 946. See, also, *Smith v. Maryland*, 6 Cranch 286, 3 L. Ed. 225.

40. **Power of sovereign.**—*Conrad v. Waples*, 96 U. S. 279, 284, 24 L. Ed. 721; *Brown v. United States*, 8 Cranch 110, 120, 3 L. Ed. 504.

41. **Courts cannot condemn until sovereign will has been expressed.**—*Conrad v. Waples*, 96 U. S. 279, 284, 24 L. Ed. 721; *Brown v. United States*, 8 Cranch 110, 123, 3 L. Ed. 504.

42. **Effect of declaration of war.**—*Brown v. United States*, 8 Cranch 110, 123, 3 L. Ed. 504.

43. **Authority of military commander to seize private property.**—*Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

44. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

45. *Mitchell v. Harmony*, 13 How. 115, 14 L. Ed. 75.

46. **Congress has power to make rules concerning captures.**—*Tyler v. Defrees*, 11 Wall. 331, 20 L. Ed. 161.

deprived of this power when the necessity for its exercise is called out by domestic insurrection and internal civil war.⁴⁷

Condemnation of Property in Land of Persons Engaged in Late Rebellion.—Until some provision was made by law for the condemnation of property in land of persons engaged in the late rebellion, the courts of the United States could not decree a confiscation of it, and direct its sale.⁴⁸

Under the acts of August 6, 1861, and July 17, 1862, a seizure under order of the President was necessary to warrant the institution of judicial proceedings for confiscation.⁴⁹ No authority was given by such acts to a military commandant, as such, to effect any confiscation.⁵⁰ The abandoned and captured property act of March 12, 1863, did not repeal the act of July 17, 1862.⁵¹

The act of 1812, by which war was declared against Great Britain, did not authorize the seizure and confiscation of enemy property found in the United States, on land.⁵²

After the occupation of New Orleans by General Butler, and after his proclamation of May 1st, 1862, announcing that all the rights of property of whatever kind would be held inviolate, subject only to the laws of the United States, private property in New Orleans was not subject to military seizure as booty of war.⁵³

3. POWER OF A STATE BEFORE ADOPTION OF FEDERAL CONSTITUTION.—A bill of attainder and confiscation might, before the adoption of the constitution of the United States, have been enacted by the legislature of a state, in the absence of a prohibition in the state constitution.⁵⁴

D. What Property Subject to Capture and Confiscation—1. IN GENERAL.—During war, the property of alien enemies is subject to confiscation *jure belli*.⁵⁵ For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner.⁵⁶ Property in the hands of the enemy, used, or intended to be used, for hostile purposes, is subject to capture whether the ownership be public or private.⁵⁷ The right of

47. *Tyler v. Defrees*, 11 Wall. 331, 20 L. Ed. 161.

48. **Condemnation of property in land of persons engaged in late rebellion.**—*Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. 721.

49. **Acts of August 6, 1861, and July 17, 1862, construed.**—*Miller v. United States*, 11 Wall. 268, 296, 20 L. Ed. 135.

A direction given by the attorney general to seize property liable to confiscation under the latter act was regarded as a direction given by the president. *The Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 593, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326.

50. *Planters' Bank v. Union Bank*, 16 Wall. 483, 496, 21 L. Ed. 473.

51. **Act of July 17, 1862, not repealed by act of March 12, 1863.**—*United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479. See the title ABANDONED AND CAPTURED PROPERTY, vol. 1, p. 1.

52. **Act of 1812 construed.**—*Brown v. United States*, 8 Cranch 110, 127, 3 L. Ed. 504.

53. **Immunity of private property in New Orleans.**—*Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473.

54. **Power of a state before adoption of federal constitution.**—*Cooper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721.

The Georgia confiscation act of May 4, 1782, was not violative of the state constitution. *Cooper v. Telfair*, 4 Dall. 14, 1 L. Ed. 721.

55. **Property of alien enemies subject to confiscation.**—*Fairfax v. Hunter*, 7 Cranch 603, 620, 3 L. Ed. 453.

56. **Status of owner immaterial.**—*Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650.

It is immaterial to the right of confiscation whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. *Miller v. United States*, 11 Wall. 268, 305, 20 L. Ed. 135.

57. **Property used, or intended to be used, for hostile purposes.**—*Kirk v. Lynd*, 106 U. S. 315, 317, 29 L. Ed. 193.

"Any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation." *Miller v. United States*, 11 Wall. 268, 306, 20 L. Ed. 135.

confiscation exists as fully in case of a civil war, as it does when the war is foreign, and rebels in arms against the lawful government or persons inhabiting the territory exclusively within the control of the rebel belligerent, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory.⁵⁸

Trading with the Enemy.—If a citizen is found to be engaged in trading with a public enemy, his goods are liable to seizure and confiscation.⁵⁹ The exception to this rule is where the trade is carried on under a governmental license.⁶⁰

Confiscable Personal Estate.—All things come within the description of confiscable personal estate, which a man has in his own right, whether they be in action or possession.⁶¹

Debts.—In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times.⁶²

Lands under navigable waters are subject to confiscation.⁶³

When Timber Is to Be Considered as on Land.—Timber, floated into a salt-water creek, where the tide ebbs and flows, leaving the ends of the timber resting on the mud, at low water, and prevented from floating away at high water by booms, is to be considered as on land in contemplating its liability to seizure and confiscation.⁶⁴

2. BY THE UNITED STATES—*a. In General.*—An officer of the United States cannot seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done.⁶⁵ The government of the United States may seize credits and corporation stocks of public enemies, though there is no statute in the state in which the seizure is made providing a mode of seizing such property.⁶⁶

b. During the Civil War—(1) *Status of Persons as Affecting the Question of Capture.*—The principle, that personal dispositions of the individual inhabitants of enemy territory as distinguished from those of the enemy people generally, cannot, in questions of capture, be inquired into, applies in civil wars as in international.⁶⁷ Hence, all the people of any district that was in insurrection against the United States in the Civil War were regarded as enemies, except in so far as by action of the government itself that relation had been changed.⁶⁸ But this rule, as to property on land, has received very important qualifications

58. **Right of confiscation in civil war.**—*Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135. See ante, "Civil War," V, B.

59. **Trading with the enemy.**—*Mitchell v. Harmony*, 13 How. 115, 133, 14 L. Ed. 75; *Hanger v. Abbott*, 6 Wall. 532, 535, 18 L. Ed. 939.

All property acquired by trading with neutral friends, or even citizens, who remain in the enemy country after the declaration of war, is liable to confiscation. *The William Bagaley*, 5 Wall. 377, 405, 18 L. Ed. 583.

Facts stated in opinion held to render a mercantile firm guilty of trading with the enemy, and, therefore, property thus acquired by them was rightly seized. *United States v. Lapene*, 17 Wall. 601, 21 L. Ed. 693.

60. *Hanger v. Abbott*, 6 Wall. 532, 535, 18 L. Ed. 939.

61. **Confiscable personal estate.**—*Camp*
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v. Lockwood, 1 Dall. 393, 403, 1 L. Ed. 192.

62. **Debts.**—*Hanger v. Abbott*, 6 Wall. 532, 536, 18 L. Ed. 939.

63. **Lands under navigable waters.**—*Morris v. United States*, 174 U. S. 196, 230, 43 L. Ed. 946.

64. **When timber is to be considered as on land.**—*Brown v. United States*, 8 Cranch 110, 3 L. Ed. 504.

65. **Property of American citizen cannot be seized for an authorized act.**—*Mitchell v. Harmony*, 13 How. 115, 133, 14 L. Ed. 75.

66. **Seizure of credits and corporate stocks.**—*Miller v. United States*, 11 Wall. 268, 286, 297, 20 L. Ed. 135.

67. **Status of persons as affecting the question of capture.**—*Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915. See ante, "In General," VIII, D, 1.

68. *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915. See ante, "The Civil War in the United States," V, B, 2.

from usage, from the reasonings of enlightened publicists and from judicial decisions. It may now be regarded as substantially restricted to special cases dictated by the necessary operation of the war, and as excluding, in general, the seizure of the private property of specific persons for the sake of gain.⁶⁹ The commanding general may determine in what special cases its more stringent application is required by military emergencies,⁷⁰ while considerations of public policy and positive provisions of law, and the general spirit of legislation, must indicate the cases in which its application may be properly denied to the property of noncombatant enemies.⁷¹

Cotton found within the Confederate territory was a legitimate subject of capture by the national forces, though the private property of noncombatants,⁷² or of a British subject who had never come to this country.⁷³ The authority for such capture was not derived from any particular act of congress, but from the character of the property.⁷⁴

(2) *Collection of Rents by Military Commandant*.—When in 1862, at a time when there was no such substantial, complete, and permanent military occupation and control of Memphis as has been held sometimes to draw after it a full measure of protection to persons and property, and when no pledge had been given which would prevent the general commanding the forces of the United States from doing what the laws of war authorized, and his personal judgment sanctioned, as necessary for and conducive to the successful prosecution of the war, he had the right to collect rents belonging to a citizen who had gone and remained within the lines of the enemy, and hold them subject to such disposition as might thereafter be made of them by the decisions of the proper tribunals.⁷⁵

(3) *Property Subject to Capture and Confiscation under the Confiscation Acts*.—Under the act of August 6, 1861, c. 60, all private property used, or intended to be used, in aid of the insurrection, with the knowledge or consent of the owner, was made the lawful subject of capture and judicial condemnation.⁷⁶ The act extended to both real and personal property on land or on water.⁷⁷ It could, however, only apply to visible, tangible property.⁷⁸

The confiscation act of July 17, 1862,⁷⁹ applied only to the property

69. *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, 17 L. Ed. 915. See, also, *Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650.

70. *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, 17 L. Ed. 915.

71. *Mrs. Alexander's Cotton*, 2 Wall. 404, 419, 17 L. Ed. 915.

72. *Cotton*.—*Young v. United States*, 97 U. S. 39, 58, 24 L. Ed. 992; *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915; *United States v. Padelford*, 9 Wall. 531, 540, 19 L. Ed. 788; *Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650.

73. *Young v. United States*, 97 U. S. 39, 24 L. Ed. 992.

74. *Young v. United States*, 97 U. S. 39, 58, 24 L. Ed. 992.

"It being 'potentially an auxiliary' of the enemy, and constituting a means by which they hoped and expected to perpetuate their power." *Young v. United States*, 97 U. S. 39, 59, 24 L. Ed. 992. See, also, *Mrs. Alexander's Cotton*, 2 Wall. 404, 17 L. Ed. 915; *United States v. Padelford*, 9 Wall. 531, 540, 19 L. Ed. 788; *Lamar v. Browne*, 92 U. S. 187, 194, 23 L. Ed. 650.

75. *Collection of rents by military commandant*.—*Gates v. Goodloe*, 101 U. S. 612, 25 L. Ed. 895.

76. *Act of August 6, 1861*.—*Kirk v. Lynd*, 106 U. S. 315, 316, 27 L. Ed. 193; *Phoenix Bank v. Risley*, 111 U. S. 125, 129, 28 L. Ed. 374.

This act applied only to property acquired with intent to use or employ the same, or to suffer the same to be used or employed, in aiding or abetting the insurrection, or in resisting the laws. *Conrad v. Waples*, 96 U. S. 279, 285, 24 L. Ed. 721.

The guilty consent of the owner to the unlawful use was necessary to make the property a subject of lawful capture. *Kirk v. Lynd*, 106 U. S. 315, 318, 27 L. Ed. 193.

77. *Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879.

78. *Phoenix Bank v. Risley*, 111 U. S. 125, 129, 28 L. Ed. 374.

As to what interests in property seized were confiscable under the act, see *Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879.

79. 12 Stat. 589.

of persons thereafter guilty of acts of disloyalty or treason⁸⁰ and it reached only the estate of the party for whose offenses the property was seized.⁸¹ Under the act and the joint resolution of the same date,⁸² all that could be sold by virtue of a decree of condemnation and order of sale of real property was a right to the property seized, terminating with the life of the person for whose offense it had been seized.⁸³ The fee of the lands seized was withheld from confiscation exclusively for the benefit of the heirs.⁸⁴ Sales and conveyances of property made after the passage of the act, by persons coming within its purview, could only pass a title subject to be defeated, if the government should afterwards proceed for its condemnation.⁸⁵ But if the sale was made before the passage of the act, the title acquired by the purchaser was not affected by subsequent judicial proceedings for condemnation for alleged offenses of the vendor.⁸⁶

3. BY A STATE PRIOR TO ADOPTION OF FEDERAL CONSTITUTION.—The confiscation acts of several of the states, enacted prior to the adoption of the federal constitution, have been interpreted by the supreme court in relation to the property subject to confiscation under them.⁸⁷

E. Title to Property Captured—1. IN WHOM TITLE VESTS.—All captures in war vest primarily in the sovereign.⁸⁸ Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined. But if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror.⁸⁹

2. WHEN TITLE PASSES—*a. In General.*—**Movable Property.**—Unless restrained by governmental regulations, the capture of movable property on land changes the ownership of it without adjudication.⁹⁰ The title passes to the captor as soon as the capture is complete; that is to say, as soon as the property is reduced to firm possession.⁹¹

Immovable Property.—The absolute title to immovable public property owned by the enemy does not pass until the war is ended and peace restored. Then, unless provision is made to the contrary by the treaty of peace or otherwise, the ownership is changed if the conquest is complete.⁹²

b. Private Property Devoted to Use of Insurrection against United States.—In regulating the capture of private property devoted to the use of an insurrection against the authority of the United States, congress has provided for a judicial inquiry into the facts and a sentence of condemnation before title

80. Act of July 17, 1862.—*Waples v. United States*, 110 U. S. 630, 632, 28 L. Ed. 272; *Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. 721; *Osborn v. United States*, 91 U. S. 474, 477, 23 L. Ed. 388; *McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80.

"In express terms it withheld from its application the property of persons who before its passage may have offended in those respects." *Waples v. United States*, 110 U. S. 630, 631, 28 L. Ed. 272.

81. *Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. 721; *United States v. Winchester*, 99 U. S. 372, 375, 25 L. Ed. 479.

82. 12 Stat. 627.

83. *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696; *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 860.

84. *Pike v. Wassell*, 94 U. S. 711, 714, 24 L. Ed. 307; *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

85. *Conrad v. Waples*, 96 U. S. 279, 24

L. Ed. 721.

86. *Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. 721.

87. Georgia act of 1782.—*Higginson v. Mein*, 4 Cranch 415, 2 L. Ed. 664.

Maryland act of 1780.—*Smith v. Maryland*, 6 Cranch 286, 3 L. Ed. 225; *Morris v. United States*, 174 U. S. 196, 230, 231, 43 L. Ed. 946.

Pennsylvania acts of 1779 and 1781.—*Kirk v. Smith*, 9 Wheat. 241, 6 L. Ed. 81.

88. In whom title to property captured vests.—*Lyon v. Huckabee*, 16 Wall. 414, 434, 21 L. Ed. 457.

89. *Lyon v. Huckabee*, 16 Wall. 414, 434, 21 L. Ed. 457. See post, "When Title Passes," VIII, E, 2.

90. When title to movable property passes.—*Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650.

91. *Kirk v. Lynd*, 106 U. S. 315, 317, 27 L. Ed. 193.

92. When title to immovable public property passes.—*Kirk v. Lynd*, 106 U.

can pass out of the owner. When the inquiry is had, and the necessary sentence pronounced by the appropriate judicial tribunal, the title passes by reason of the capture or conquest, the lawfulness of which has been established in an adversary proceeding against the property.⁹³

c. *Property of the Confederate Government*.—At the close of the late Civil War the title to all captured property of the Confederate government became absolute in the United States.⁹⁴

F. Effect of Confiscation and Sale of Real Property—1. **UNDER THE ACT OF AUGUST 6, 1861.**—By the condemnation of real property under the act of August 6, 1861, c. 60, the fee passed, and the purchaser at the condemnation sale took an estate in fee.⁹⁵

2. **UNDER THE ACT OF JULY 17, 1862.**—The effect of confiscation under the act of July 17, 1862,⁹⁶ and the joint resolution of the same date,⁹⁷ was to divest the owner of his life estate, leaving the fee in him, but without the power of alienating it, unless his disability was removed.⁹⁸

Estate Acquired by United States and by Purchaser at Confiscation Sale.—Therefore a purchaser at a confiscation sale under the act and joint resolution, acquired only the life estate of the person as whose property the land was confiscated.⁹⁹ The interest which such person had in the property when the seizure was made vested in the United States,¹ or the purchaser at the sale, free from all intermediate conveyances or incumbrances, whether the result of the voluntary act of the owner or the action of his creditors against

S. 315, 317, 27 L. Ed. 193. See, also, *Titus v. United States*, 20 Wall. 475, 481, 22 L. Ed. 400; *Lyon v. Huckabee*, 16 Wall. 414, 434, 21 L. Ed. 457.

93. Private property devoted to use of insurrection against United States.—*Kirk v. Lynd*, 106 U. S. 315, 317, 27 L. Ed. 193. See post, "Effect of Confiscation and Sale of Real Property," VIII, F; "Proceedings for Confiscation," VIII, L.

Property seized under the confiscation act of July 17, 1862, became the property of the United States from the date of the decree of condemnation. *Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193; *The Confiscation Cases*, 20 Wall. 92, 113, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326.

94. Property of the Confederate government.—*Titus v. United States*, 20 Wall. 475, 482, 22 L. Ed. 400.

Where land was sold to the Confederate States during the rebellion, and was captured by the United States, it became, on the extinction of the Confederacy, and without further proceeding, the property of the United States, and could be properly sold by them, and such sale rendered any proceeding against the persons who owned the land prior to the sale to the Confederate States, wholly improper. *Lyon v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457.

95. Effect of condemnation and sale under act of August 6, 1861.—*Kirk v. Lynd*, 106 U. S. 315, 27 L. Ed. 193.

96. 12 Stat. 589.

97. 12 Stat. 627.

98. Confiscation only divested offender of his life estate.—*United States v. Dunnington*, 146 U. S. 338, 349, 36 L. Ed. 996, qualifying *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473 and *French v. Wade*, 102 U. S. 132, 26 L. Ed. 44; *Jenkins v. Collard*, 145 U. S. 546, 36 L. Ed. 812; *Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 33 L. Ed. 550. See, also, *Shields v. Schiff*, 124 U. S. 351, 31 L. Ed. 445; *Avegno v. Schmidt*, 113 U. S. 292, 28 L. Ed. 1009; *Pike v. Wassell*, 94 U. S. 711, 712, 24 L. Ed. 307.

99. Purchaser acquires only life estate of offender.—*Waples v. Hays*, 108 U. S. 6, 8, 27 L. Ed. 632; *Chaffraix v. Shift*, 92 U. S. 214, 23 L. Ed. 478.

The fact that the person for whose offense the land had been seized owned the estate in fee simple, and that the libel was against all the right, title, interest, and estate of such person, and that the sale and marshal's deed professed to convey as much, did not change the result. *Bigelow v. Forrest*, 9 Wall. 339, 19 L. Ed. 696. See, also, *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 860.

1. United States acquired only estate actually possessed by offender at time of seizure.—By a decree confiscating real estate under this act the United States acquired for the life of the offender, only the estate which at the time of the seizure he actually possessed, not what he may have appeared from the public records to possess, by reason of the omission of his vendees to record the act of sale to them. *Burbank v. Conrad*, 96 U. S. 291, 293, 24 L. Ed. 731.

him.² But liens³ and mortgages⁴ existing prior to the seizure were not divested. A release by the person as whose property the land was confiscated, to the purchaser at the confiscation sale, could not enlarge the estate of the latter.⁵ Nor was such a purchaser's interest enlarged by the fact that a mortgagee of the property intervened in the confiscation proceedings and was paid the proceeds of the sale; the only effect of such intervention being to give the purchaser the title to the life estate free from the lien of the mortgage.⁶ One who purchased his own interest in property, condemned under the act, acquired only such rights as another could have acquired by the purchase.⁷ A purchaser was presumed to have known that if the alleged offender possessed no estate in the premises at the time of their seizure, nothing passed to the United States by the decree or to him by his purchase.⁸

Attachment upon Property Seized.—Where property had been seized under the act, a libel of information filed against it, and a warrant of arrest and monition issued and duly served, a subsequent attachment upon the property was defeated by the decree of condemnation.⁹

Devolution of Property after Death of Owner.—The act and the explanatory resolution, make no disposition of the property confiscated, after the death of the owner, but leave it to devolve to his heirs according to the *lex rei sitæ*, and such heirs take *qua* heirs and not by donation from the government.¹⁰ The heirs may during the offender's lifetime, do whatever is necessary to protect the property from forfeiture or incumbrance.¹¹

G. Effect of Pardon or Amnesty.—Questions relating to the effect of the proclamations of pardon and amnesty, issued by the President of the United States during and after the Civil War, in relation to property seized or confiscated under the nonintercourse or confiscation laws, and to the rights of the owners whose property was thus seized and confiscated, have, in a number of cases received the interpretation of the supreme court.¹² The president's proclamations of amnesty in the year 1868 did not amount to a repeal of the confiscation act of July 17, 1862.¹³

2. Title acquired free from intermediate conveyances or incumbrances.—*Pike v. Wassell*, 94 U. S. 711, 712, 24 L. Ed. 307.

3. Liens existing prior to seizure not divested.—The Confiscation Cases, 20 Wall. 92, 114, 115, 22 L. Ed. 320.

4. Mortgages existing prior to seizure.—*Shields v. Schiff*, 124 U. S. 351, 356, 31 L. Ed. 445; *Avegno v. Schmidt*, 113 U. S. 293, 297, 28 L. Ed. 1009; *Day v. Micou*, 18 Wall. 156, 21 L. Ed. 860.

Rights of a mortgagee of property in Louisiana under a mortgage containing the pact de non alienando. *Shields v. Schiff*, 124 U. S. 351, 356, 31 L. Ed. 445; *Avegno v. Schmidt*, 113 U. S. 293, 300, 28 L. Ed. 1009.

5. Facts not enlarging purchaser's estate.—*Chaffraix v. Schiff*, 92 U. S. 214, 23 L. Ed. 478.

6. Waples v. Hays, 108 U. S. 6, 8, 27 L. Ed. 632.

7. Rights acquired by one purchasing his own interest in property condemned.—*French v. Wade*, 102 U. S. 132, 134, 26 L. Ed. 44.

8. What purchaser presumed to know.—*Waples v. United States*, 110 U. S. 630, 631, 28 L. Ed. 272; *Burbank v. Conrad*, 96 U. S. 291, 293, 24 L. Ed. 731.

9. Attachment defeated by decree of condemnation.—*Pike v. Wassell*, 94 U. S. 711, 713, 24 L. Ed. 307.

10. Devolution of property after death of owner.—*Shields v. Schiff*, 124 U. S. 351, 359, 31 L. Ed. 445; *Pike v. Wassell*, 94 U. S. 711, 712, 24 L. Ed. 307; *Wallach v. Van Riswick*, 92 U. S. 202, 23 L. Ed. 473.

11. Right of heirs to protect property.—*Pike v. Wassell*, 94 U. S. 711, 715, 24 L. Ed. 307.

12. Effect of pardon or amnesty.—*Semmes v. United States*, 91 U. S. 21, 23 L. Ed. 193; *Gay's Gold*, 13 Wall. 358, 20 L. Ed. 606; *Armstrong's Foundry*, 6 Wall. 766, 18 L. Ed. 882; The Confiscation Cases, 20 Wall. 92, 113, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326; *Illinois Cent. R. Co. v. Bosworth*, 133 U. S. 92, 103, 33 L. Ed. 550; *Jenkins v. Collard*, 145 U. S. 546, 560, 36 L. Ed. 812; *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442; *Wallach v. Van Riswick*, 92 U. S. 202, 203, 23 L. Ed. 473.

13. The Confiscation Cases, 20 Wall. 92, 93, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326.

H. Effect of Cessation of Hostilities.—The acts of July 13, and August 6, 1861, were not temporary acts, and upon the cessation of hostilities, forfeitures incurred under them did not cease to be capable of enforcement.¹⁴

By the act of Georgia of 1782, debts due a British subject, residing in Great Britain, were subjected not to confiscation, but only to sequestration, and therefore his right to recover them revived at the peace, both by the law of nations and the treaty of peace.¹⁵

I. Effect of Treaties of Peace.—See the title TREATIES, ante, p. 635.

J. Rights of Informers.—See the title INFORMERS, vol. 6, p. 1020.

K. Effect of Confiscation Act of July 17, 1862, upon Conveyances of Property.—The provision in the act of July 17, 1862, that "all sales, transfers, or conveyances" of property of persons therein designated should be null and void, only invalidated such transactions as against any proceedings taken by the United States for the condemnation of the property. They were not void as between the parties, or against any other party than the United States.¹⁶

L. Proceedings for Confiscation—1. CHARACTER AND FORM OF PROCEEDINGS.—The supreme court has interpreted the provisions of the acts of August 6, 1861, and July 17, 1862, in relation to the character and form of the proceedings for the confiscation of real estate therein provided.¹⁷

2. SEIZURE OF THE PROPERTY.¹⁸—**Manner of Seizure under the Civil War Confiscation Acts.**—The manner of seizing ordinary personal property or real estate, for the purposes of confiscation proceedings, under the acts of April 6, 1861, and July 17, 1862, was by an actual seizure and actual possession by the officer under the monition.¹⁹

Jurisdiction as Dependent upon Seizure.—See post, "Jurisdiction," VIII, L, 3.

3. JURISDICTION.—In cases of seizure upon land, resort should be had to the common-law side of the court.²⁰ The admiralty jurisdiction of the district courts of the United States does not extend to such seizures.²¹ The jurisdiction of confiscation proceedings under particular acts passed during the Civil War has been determined by the supreme court.²² Under the act of July 17,

14. Effect of cessation of hostilities.—The Reform, 3 Wall. 617, 629, 18 L. Ed. 105; *Duvall v. United States*, 154 U. S. 548, 19 L. Ed. 252.

15. *Georgia v. Brailsford*, 3 Dall. 1, 1 L. Ed. 483.

16. Effect of confiscation act of July 17, 1862, upon conveyances of property.—*Conrad v. Waples*, 96 U. S. 279, 24 L. Ed. 721; *Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976.

17. Act of August 6, 1861.—*Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879; *United States v. Bales of Cotton*, 154 U. S. 556, 18 L. Ed. 889.

Act of July 17, 1862.—Ex parte *Graham*, 10 Wall. 541, 19 L. Ed. 981.

18. Generally, as to seizures, see the title SEARCHES AND SEIZURES, vol. 10, p. 1087.

19. Manner of seizure under civil war confiscation acts.—*Phoenix Bank v. Risley*, 111 U. S. 125, 130, 28 L. Ed. 374.

Seizure of debt due person who had incurred penalty of confiscation.—*Phoenix Bank v. Risley*, 111 U. S. 125, 132, 28 L. Ed. 374.

Seizure of debt due by a municipal corporation.—See *Alexandria v. Fairfax*, 95 U. S. 774, 24 L. Ed. 583.

Seizure of stock in a railroad company.—*Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135. See, also, *Phoenix Bank v. Risley*, 111 U. S. 125, 130, 28 L. Ed. 374; *Brown v. Kennedy*, 15 Wall. 591, 599, 21 L. Ed. 193.

20. Resort should be had to common law side of court.—The Confiscation Cases, 20 Wall. 92, 110, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326.

21. Admiralty jurisdiction does not extend to seizures on land.—*United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479. See the title ADMIRALTY, vol. 1, p. 119.

Proceeding under the act of July 17, 1862, held to be a common-law proceeding, and not a proceeding on the admiralty side of the court. The Confiscation Cases, 20 Wall. 92, 110, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326.

22. Under the confiscation act of August 6, 1861, the circuit court had jurisdiction of proceedings for the condemnation of real estate or property on land. *Union Ins. Co. v. United States*, 6 Wall. 759, 18 L. Ed. 879.

1862,²³ a seizure of the property by executive order was necessary to give the court jurisdiction for its condemnation.²⁴ When under that act property intended for confiscation had been seized by the marshal, and the seizure was brought before the court by the filing of a libel for the forfeiture of the property, and was recognized and adopted by it, the property was subject to the control of the court in the hands of its officer, and it had jurisdiction of the case so far as a seizure of the res was essential to give it.²⁵ Neither the act of August 6, 1861, nor that of July 17, 1862, contemplated any proceeding, as in admiralty, where there existed no specific property or proceeds capable of seizure and capture.²⁶ The district court was without jurisdiction to pass upon the validity of a mortgage in a suit for the condemnation of the mortgaged property under the act of July 17, 1862.²⁷

4. **PARTIES**—a. *Joinder*.—The process prescribed by the confiscation acts cannot, by the union of certain claimants of land proceeded against, with the United States, otherwise than as informers, be made the means by which the conflicting titles to the land, between such persons and other claimants, shall be settled.²⁸

b. *Intervention*.—Holders of liens against real estate sold under the confiscation act of July 17th, 1862, were not permitted to intervene in any proceedings for the confiscation, as their liens were not, in any event, divested.²⁹

5. **INFORMATION**.—Confiscation proceedings under the acts of August 6, 1861, and July 17, 1862, were commenced by an information. The sufficiency of such informations in particular cases have been determined by the supreme court.³⁰

6. **WARRANT, CITATION, MONITION AND MARSHAL'S RETURN**.—The sufficiency of the warrant, citation, and monition, and the service thereof, in proceedings under the civil war confiscation acts, have, in several cases, been determined by the supreme court.³¹

The marshal's return to the warrant directing the seizure of property

The act of congress of March 3d, 1863, giving to the district court for the territory of New Mexico jurisdiction over all cases which should arise in the collection district of Paso del Norte, in the administration of the revenue laws, did not warrant proceedings against lands in El Paso, Texas, under the confiscation act of July 17th, 1862 (12 Stat. at Large, 589). *United States v. Hart*, 6 Wall. 770, 18 L. Ed. 914.

23. 12 Stat. 589.

24. **Seizure by executive order essential to jurisdiction**.—*Pike v. Wassell*, 94 U. S. 711, 712, 24 L. Ed. 307; *Brown v. Kennedy*, 15 Wall. 591, 597, 21 L. Ed. 193; *Pelham v. Rose*, 9 Wall. 103, 19 L. Ed. 602; The Confiscation Cases, 20 Wall. 92, 108, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326; *United States v. Winchester*, 99 U. S. 372, 25 L. Ed. 479. See ante, "Seizure of the Property," VIII, L, 2.

25. **When jurisdiction attaches**.—*Tyler v. Defrees*, 11 Wall. 331, 20 L. Ed. 161.

This was especially so of real estate lying within the territorial jurisdiction of the court, and which being incapable of removal would always be found to answer the orders and decrees of the court

in the progress of the cause. *Tyler v. Defrees*, 11 Wall. 331, 20 L. Ed. 161.

26. **Existence of specific property or proceeds essential**.—*Morris v. United States*, 7 Wall. 578, 19 L. Ed. 281.

27. **No jurisdiction to pass on validity of mortgage**.—*Avegno v. Schmidt*, 113 U. S. 293, 302, 28 L. Ed. 1009.

28. **Claimants to land proceeded against cannot join with United States**.—*Lyon v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457.

29. **Holders of liens not permitted to intervene**.—The Confiscation Cases, 20 Wall. 92, 114, 22 L. Ed. 320. See ante, "Under the Act of July 17, 1862," VIII, F, 2.

30. **Informations in proceedings under civil war confiscation acts**.—The Confiscation Cases, 20 Wall. 92, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326; *Morris v. United States*, 7 Wall. 578, 19 L. Ed. 281; *Lyon v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457.

31. **Sufficiency of warrant citation and monition**.—The Confiscation Cases, 20 Wall. 92, 93, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326; *Pelham v. Rose*, 9 Wall. 103, 19 L. Ed. 602.

sought to be confiscated is conclusive of the facts stated therein.³² Where in proceedings to confiscate a promissory note the marshal returned the writ of monition with his indorsement thereon that he had "arrested the property within mentioned," such return signified that he had actually taken the note into his custody and under his control.³³

Default to Monition.—In a proceeding for confiscation under the acts of August 6, 1861, and July 17, 1862, when a default has been duly entered to a monition founded on an information averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. It establishes the fact pleaded, and justifies a decree of condemnation.³⁴

7. RIGHT TO APPEAR AND DEFEND.—The owner of property, for the forfeiture of which a libel was filed under the act of July 17, 1862, was entitled to appear and to contest the charges upon which the forfeiture was claimed,³⁵ although he was at the time of filing the libel a resident within the Confederate lines, and a rebel;³⁶ and he could sue out a writ of error from the supreme court to review any final decree of the court below condemning his property.³⁷

8. PLEA.—In a confiscation proceeding under the act of August 6, 1861, a plea of the amnesty proclaimed by President Lincoln on the 8th of December, 1863, and the oath taken by claimant in pursuance thereof but which contained no averment that claimant was not within any of certain exceptions made by that proclamation, was insufficient.³⁸

9. RIGHT TO TRIAL BY JURY.—Where a seizure of property on land was made under the acts of July 13, 1861, or of August 6, 1861, or of July 17, 1862, the claimants were entitled to trial by jury, though the suit was in form a libel of information.³⁹ But a trial by jury in such cases was not necessary if there were no issues of fact to be determined.⁴⁰

10. DECREE.—So long as a decree of condemnation stands it affords conclusive evidence of a perfected title in the United States by a lawful capture, judicially ascertained and determined.⁴¹

M. The Confiscation Sale.—At a sale under the confiscation act of July 17, 1762, the marshal could not sell property, not authorized by the writ placed in his hands for execution, and could only make a valid title to the property described in the decree of condemnation.⁴²

32. Marshal's return conclusive of facts stated therein.—*Brown v. Kennedy*, 15 Wall. 591, 597, 21 L. Ed. 193.

33. Marshal's return in proceedings to confiscate promissory note.—*Pelham v. Rose*, 9 Wall. 103, 19 L. Ed. 602.

34. Effect of default to monition.—*Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135; *The Confiscation Cases*, 20 Wall. 92, 108, 22 L. Ed. 320; *Kenner v. United States*, 154 U. S. 595, 22 L. Ed. 325; *United States v. Six Lots*, 154 U. S. 596, 22 L. Ed. 326.

35. Right to appear and defend.—*McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80.

In proceedings before the district court, in a confiscation case where monition and notice were issued and published, but the appearance of the owner, for which they called, when made, was stricken out, his right to appear being denied by the court, the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his

appearance was to recall the monition and notice as to him. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

36. McVeigh v. United States, 11 Wall. 259, 20 L. Ed. 80.

37. Right to sue out writ of error.—*McVeigh v. United States*, 11 Wall. 259, 20 L. Ed. 80.

38. Plea held insufficient.—*Armstrong's Foundry*, 6 Wall. 766, 770, 18 L. Ed. 882.

39. Right to trial by jury.—*Confiscation Cases*, 7 Wall. 454, 462, 19 L. Ed. 196; *St. Louis St. Foundry*, 6 Wall. 770, 18 L. Ed. 884; *Armstrong's Foundry*, 6 Wall. 766, 18 L. Ed. 882. See the title **JURY**, vol. 7, p. 754.

40. Miller v. United States, 11 Wall. 268, 20 L. Ed. 135.

41. Effect of decree of condemnation.—*Kirk v. Lynd*, 106 U. S. 315, 318, 27 L. Ed. 193.

As to the effect of a decree of condemnation in proceedings under the act of July 17, 1862, for the condemnation of a bond and mortgage, see *Brown v. Kennedy*, 15 Wall. 591, 592, 21 L. Ed. 193.

42. What property can be sold.—*Bur-*

N. Right to Property Not Confiscated after Termination of War.—Property belonging to a subject of one belligerent found within the territory of the other belligerent at the declaration of war, although liable to be disposed of by the legislative power, is yet, until some act is passed upon the subject, still under the protection of the law, and may be claimed, after the termination of the war, if not previously confiscated.⁴³

O. The Jus Postliminii.—By the jus postliminii, things taken by the enemy are restored to their former owner upon coming again under the power of the nation of which he is a citizen or subject.⁴⁴ It attaches to property taken by the enemy with the strong hand against the will of its owner or custodian, and not to property obtained by the enemy by negotiation or purchase.⁴⁵

P. Seizure and Confiscation of Property by the Insurgent Government during the Civil War.—Where property held by parties in the insurgent states, as trustees or bailees of loyal citizens, was forcibly taken from them, they may in some instances be released from liability, their release in such cases depending upon the same principles which control in ordinary cases of violence by an unlawful combination too powerful to be successfully resisted.⁴⁶

But debts due such citizens, not being tangible things subject to seizure and removal, are not extinguished, by reason of the debtor's coerced payment of equivalent sums to an unlawful combination. They can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority.⁴⁷

A purchase of the property of a loyal citizen of the United States under a confiscation and sale made pursuant to statutes of the Confederacy, passed in aid of the rebellion, was void.⁴⁸

IX. Liability for Acts Done in Prosecution of War.

A. Liability of the Government.—See the titles MILITARY LAW, vol. 8, p. 345; UNITED STATES, ante, p. 747.

B. Liability of Individuals.—Soldiers and officers are exempt from liability for acts of legitimate warfare.⁴⁹

X. Relations between Allies.

When two nations make war a common cause, they act as one body, and the war is called a society of war. They are so clearly and intimately connected,

bank *v.* Semmes, 99 U. S. 138, 142, 25 L. Ed. 315.

A marshal's deed which included, with certain lands legally sold, a parcel not mentioned either in the information, the monition, or the decree of condemnation, under which the sale was made, passed no title to such parcel. *Burbank v. Semmes*, 99 U. S. 138, 25 L. Ed. 315.

43. Right to property not confiscated after termination of war.—*The Adventure*, 8 Cranch 221, 228, 3 L. Ed. 542.

44. The jus postliminii.—*Oakes v. United States*, 174 U. S. 778, 792, 43 L. Ed. 1169.

45. Oakes v. United States, 174 U. S. 778, 792, 43 L. Ed. 1169.

46. Seizure of property from trustees or bailees of loyal citizens.—*Williams v. Bruffy*, 96 U. S. 176, 177, 24 L. Ed. 716. See, also, *Stevens v. Griffith*, 111 U. S. 48, 51, 28 L. Ed. 348.

47. Enforced payment of debts.—*Williams v. Bruffy*, 96 U. S. 176, 177, 24 L. Ed. 716; *Stevens v. Griffith*, 111 U. S. 48, 52, 28 L. Ed. 348.

48. Purchase of property at confiscation sale, void.—*Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287.

49. Exemption from liability of soldiers and officers.—See the titles ARMY AND NAVY, vol. 2, p. 522; MILITARY LAW, vol. 8, p. 344.

Where a political revolt against the existing government of a country fails of success, if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. *Underhill v. Hernandez*, 168 U. S. 250, 253, 42 L. Ed. 456.

The concession to the Confederate army during the late Civil War of belligerent rights placed the soldiers and officers of that army, as to all matters directly connected with the mode of prosecuting the war, on the footing of those engaged in lawful war, and exempted them from liability for acts of legitimate warfare. *Ford v. Surget*, 97 U. S. 594, 605, 24 L. Ed. 1018. See the title MILITARY LAW, vol. 8, p. 344.

that the *jus postliminii* takes place among them, as among fellow subjects.⁵⁰ From the very nature of the connection between allies, their compacts and agreements with the common enemy must bind each other, when they tend to accomplish the objects of the allies.⁵¹

WAR CLAIMS.—See the titles *COURTS*, vol. 4, p. 1026; *MILITARY LAW*, vol. 8, p. 345; *UNITED STATES*, ante, p. 747.

WARD.—See the title *GUARDIAN AND WARD*, vol. 6, p. 599.

WARDENS.—As to church wardens, see the title *RELIGIOUS SOCIETIES*, vol. 10, p. 640.

WAR DEPARTMENT.—See the title *UNITED STATES*, ante, p. 747.

WAREHOUSES AND WAREHOUSEMEN.

BY FRANK L. THOMASSON.

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CROSS REFERENCES.

See the titles *CARRIERS*, vol. 3, p. 556; *CONTRACTS*, vol. 4, p. 552; *REVENUE LAWS*, vol. 10, p. 838; *SHIPS AND SHIPPING*, vol. 10, p. 1198. See, also, *ELEVATORS*, vol. 5, p. 731, and references there given.

As to the duty of carrier to store goods in warehouse upon failure of consignee to accept delivery, see the title *CARRIERS*, vol. 3, p. 601. As to the power of a warehouseman to pledge the goods in his possession as security for his private debt, see the title *FACTORS AND COMMISSION MERCHANTS*, vol. 6, p. 234. As to the right of a warehouseman to insure the goods, see the title *INSURANCE*, vol. 7, p. 111. As to the power of a state to regulate storage charges, see the title *POLICE POWER*, vol. 9, p. 541. As to the right of an assignee of a fictitious warehouse receipt to maintain an action of replevin, see the title *REPLEVIN*, vol. 10, pp. 720, 721. As to bonded warehouses, see the title *REVENUE LAWS*, vol. 10, pp. 971, 1008. As to the question of waiver of lien of shipper by deposit of goods in warehouse, see the title *SHIPS AND SHIPPING*, vol. 10, p. 1203. As to service of process on warehouseman, see the title *SUMMONS AND PROCESS*, ante, p. 299.

I. Definition and Nature.

A warehouse is a sort of public market where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in

50. Allies act as one body and *jus postliminii* applies among them.—The Resolution, 2 Dall. 1, 15, 1 L. Ed. 263. See ante, "The *Jus Postliminii*," VIII, O.

51. Compacts and agreements of allies bind each other.—The Resolution, 2 Dall. 1, 16, 1 L. Ed. 263.

interest, acts as marketmaster, weighmaster, inspector and grader of the grain.¹

II. Rights, Duties and Liabilities of Warehousemen.

A. Degree of Diligence Required.—The warehouseman owes the duty to keep his warehouse in a reasonably safe condition for the storage of goods.²

B. Duty to Insure Goods.—By statute in some states, the warehouseman may be compelled to insure the goods stored with him at his own expense.³

C. Liability for Defective Title.—A warehouseman is not a guarantor of the title of property placed in his custody,⁴ and therefore it is not necessary for him before giving a receipt to ascertain whether the title of the bailor is valid and unincumbered.⁵

D. Liability of Carrier as Warehouseman.—A carrier may, under certain circumstances, incur the liability of a warehouseman.⁶ But such liability attaches only when the goods have been received into its actual and exclusive possession and control.⁷

III. Warehouse Receipts.

A. When Issuable.—It is the duty of warehousemen not to issue receipts until they have the property actually in store, and not to deliver the property until the receipts are surrendered for cancellation.⁸

B. Negotiability.—In the absence of statutory provision warehouse receipts are not negotiable instruments,⁹ but merely import that the goods are in the hands of a certain kind of bailee.¹⁰ By statute in several states, however,

1. Definition and nature.—*Cargill Co. v. Minnesota*, 180 U. S. 452, 467, 45 L. Ed. 619.

By *Illinois Rev. Stat., c. 114, § 2*, "public warehouses of Class C shall embrace all other warehouses or places where property of any kind is stored for a consideration." These sweeping words embrace any place so used, whether owned or hired by the warehousemen, and, if so, they embrace as well a place hired of the owner of the goods as one hired of anybody else. *Union Trust Co. v. Wilson*, 198 U. S. 530, 538, 49 L. Ed. 1154.

2. Degree of diligence required.—The hazardous use of a warehouse and actual knowledge by the warehouseman of its condition will render him liable for the destruction of the property because of his negligence in and about the case of the goods. *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415, 440, 45 L. Ed. 256.

3. Duty to insure goods.—*Brass v. Stoeser*, 153 U. S. 391, 405, 38 L. Ed. 757.

4. Liability for defective title.—*Insurance Co. v. Kiger*, 103 U. S. 352, 26 L. Ed. 433.

5. Insurance Co. v. Kiger, 103 U. S. 352, 356, 357, 26 L. Ed. 433.

6. Liability of carrier as warehouseman.—*St. Louis, etc., R. Co. v. Knight*, 122 U. S. 79, 30 L. Ed. 1077.

A carrier cannot convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable

excuse, to take them into its actual custody. *Texas, etc., R. Co. v. Clayton*, 173 U. S. 348, 362, 43 L. Ed. 725. See dissenting opinion by Mr. Justice Jackson in *Constable v. National Steamship Co.*, 154 U. S. 51, 80, 38 L. Ed. 903. See the title *CARRIERS*, vol. 3, p. 609.

7. When liability attaches.—*St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. Ed. 154; *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415, 441, 45 L. Ed. 256; *St. Louis, etc., Co. v. Knight*, 122 U. S. 79, 93, 30 L. Ed. 1077.

8. When issuable.—*Insurance Co. v. Kiger*, 103 U. S. 352, 356, 26 L. Ed. 433.

Where warehousemen had the property in store when they gave the receipts, and as soon as it was taken from them by judicial process, they notified the insurance company, and upon that notice the company is now here asserting its title, this was a substantial compliance with their obligation not to deliver without a surrender of the receipts, when there was no pretense of fraud or collusion. *Insurance Co. v. Kiger*, 103 U. S. 352, 356, 26 L. Ed. 433.

9. Negotiability.—The receipts of a warehousing company are not entitled to the status of negotiable instruments, the transfer of which operates as a delivery of the property mentioned in them. *Security Warehousing Co. v. Hand*, 206 U. S. 415, 420, 51 L. Ed. 1117.

10. Imports a bailment.—*Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 49 L. Ed. 1154.

they have been given many of the incidents of negotiable paper.¹¹

C. Effect of Transfer.—The legal effect of the indorsement and delivery of warehouse documents, in consideration of the advance of money, is to transfer to the person who advances the money the legal title and constructive possession of the property; and the warehousemen from the time of this transfer become his bailees, and hold the goods for him.¹²

D. Rights of Holder.—The holder of a warehouse receipt cannot hold the assignee of a warehouseman liable on the receipt, unless it be shown that the property actually came into the assignee's possession.¹³

E. Effect of Outstanding Receipts.—The existence of warehouse receipts, given by another person, is not a sufficient reason to justify the purchasers in refusing to pay for the property which they have purchased, and in the possession of which they have not been disturbed.¹⁴

WAREHOUSE RECEIPT.—See WAREHOUSES AND WAREHOUSEMEN, ante, p. 970.

WARES.—As to “goods, wares and merchandise,” being synonymous with the words “goods and chattels, wares and merchandise,” in an act forfeiting such articles coming from the Confederate States, see GOODS, vol. 6, p. 566.

11. Louisiana.—Warehouse receipts were by the act of March 11th, 1876, made negotiable and to some extent evidence of ownership. *Insurance Co. v. Kiger*, 103 U. S. 352, 357, 26 L. Ed. 433. See the title FACTORS AND COMMISSION MERCHANTS, vol. 6, p. 234.

Missouri statute.—See *Allen v. St. Louis Bank*, 120 U. S. 20, 36, 30 L. Ed. 573. See the title BILL OF LADING, vol. 3, pp. 240, 241.

12. Effect of transfer.—*Gibson v. Stevens*, 8 How. 384, 399, 12 L. Ed. 1123; *McCullough v. Roots*, 19 How. 349, 15 L. Ed. 681.

The possession of warehouse receipts is equivalent to possession of the property. *Insurance Co. v. Kiger*, 103 U. S. 252, 356, 26 L. Ed. 433.

The transfer of a warehouse receipt is not a symbolical delivery; it is a real delivery to the same extent as if the goods had been transported to another

warehouse named by the pledgee. *Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 49 L. Ed. 1154.

The delivery of the evidences of title and the orders indorsed upon them is equivalent, in the then situation of the property, to the delivery of the property itself. *Gibson v. Stevens*, 8 How. 384, 399, 12 L. Ed. 1123.

The title of the person advancing the money is not a mere lien. The legal title, the right of property, passes to him, and the warehousemen retain nothing but an equitable interest in the surplus, if any remains after satisfying the claims of the creditor. *Gibson v. Stevens*, 8 How. 384, 400, 12 L. Ed. 1123.

13. Rights of holder.—*Jackson v. Hale*, 14 How. 525, 14 L. Ed. 526.

14. Effect of outstanding receipts.—*McCullough v. Roots*, 19 How. 349, 350, 15 L. Ed. 681.

WARRANTS.

CROSS REFERENCES.

As to arrest warrant, see the titles *ARREST*, vol. 2, p. 541; *CRIMINAL LAW*, vol. 5, p. 72; *EXTRADITION*, vol. 6, p. 220. As to negotiability of county warrants in Arkansas, see the title *BILLS, NOTES AND CHECKS*, vol. 3, p. 270. As to clerk's fee for copies of warrants, see the title *CLERKS OF COURT*, vol. 3, p. 860. As to warrants issued upon probable cause, being applicable to state process, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 140. As to treasury warrants circulating as money, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 308. As to assignee of warrant suing in federal courts, see the title *COURTS*, vol. 4, p. 970. As to coupons being transferable when attached as interest warrants to bonds, see the title *COUPONS*, vol. 4, p. 848. As to arrest of a person without a warrant, being a commencement of a prosecution, see the title *CRIMINAL LAW*, vol. 5, p. 97. As to issuance of death warrant, see the titles *CRIMINAL LAW*, vol. 5, p. 117; *DUE PROCESS OF LAW*, vol. 5, p. 550. As to admissibility of county warrants as evidence, see the title *DOCUMENTARY EVIDENCE*, vol. 5, p. 446. As to inconsistency of treasury distress warrant with the provisions of the fifth amendment of the constitution, see the title *DUE PROCESS OF LAW*, vol. 5, p. 631. As to sufficiency of warrant to maintain action of ejectment, see the title *EJECTMENT*, vol. 5, p. 703. As to estoppel to deny liability on warrants, see the titles *ESTOPPEL*, vol. 5, p. 969; *RES ADJUDICATA*, vol. 10, p. 765. As to guaranty of genuineness of county warrants, see the title *GUARANTY*, vol. 6, p. 584. As to cancellation of treasury warrants as impairing obligation of contracts, see the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 790. As to interest on warrants, see the title *INTEREST*, vol. 7, p. 222. As to warrants to confess judgment, see the title *JUDGMENTS AND DECREES*, vol. 7, pp. 653, 654. As to distress warrant for rent, see the title *LANDLORD AND TENANT*, vol. 7, p. 842. As to limitation of actions on county warrants, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 1012. As to municipal warrants, etc., see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 662. As to power to issue bonds for the purpose of finding indebtedness evidence by warrants, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 660. As to bonds received in exchange for county warrants, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, p. 690. As to issuance of drainage warrants, see the title *MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES*, vol. 8, pp. 656, 661, 663. As to payment to state in state treasury warrants, see the title *PAYMENT*, vol. 9, p. 327. As to military warrant and land certificate, see the title *PUBLIC LANDS*, vol. 10, pp. 29, 49. As to warrant for the collection of taxes, see the title *TAXATION*, ante, p. 356. As to fees of commissioners for issuing warrants, see the title *UNITED STATES COMMISSIONERS*, ante, p. 817.

Seal.—There is no settled rule at common law invalidating warrants not under seal unless the magistrate issuing the warrant had a seal of office or a seal was required by statute, and the warrant of a commissioner of the United States not having a seal of office, and not being required to affix a seal thereto, cannot be held void for its omission.¹

WARRANTS OF ATTORNEY.—Construction of warrant of attorney to confess judgment, see the title *JUDGMENTS AND DECREES*, vol. 7, p. 654.

WARRANT TO SUE AND DEFEND.—See the title *APPEARANCES*, vol. 2, p. 435.

1. *Starr v. United States*, 153 U. S. 614, 619, 38 L. Ed. 841.

Arkansas laws.—"The same result is reached under the laws of Arkansas, by § 1993, of which the requisites and form

of warrant, where the offense charged is felony, are given, the form being attested 'under hand' but not 'under seal.'" *Starr v. United States*, 153 U. S. 614, 619, 38 L. Ed. 841.

WARRANTY.

BY JOSEPH W. TIMBERLAKE.

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As to the admissibility of evidence to prove breach of warranty, see the title EVIDENCE, vol. 5, p. 1014.

I. Scope of Title.

This title is confined to a treatment of warranties in sales of personal property. As to warranty in sales of realty and covenants of warranty, see the

titles COVENANTS, vol. 5, p. 5; VENDOR AND PURCHASER, ante, p. 864. As to implied covenant of warranty in lease, see the title LANDLORD AND TENANT, vol. 7, p. 833. As to estoppel by covenant of warranty, see the title ESTOPPEL, vol. 5, p. 926. As to warranty in bill of lading, see the title BILL OF LADING, vol. 3, p. 237. As to warranty in insurance contracts, see the titles INSURANCE, vol. 7, pp. 96, 151, et seq., 171; MARINE INSURANCE, vol. 8, p. 181. As to warranty in judicial sales, see the title JUDICIAL SALES, vol. 7, p. 734. As to warranty in charter party, see the title SHIPS AND SHIPPING, vol. 10, pp. 1148, 1168, 1178. As to warranty of seaworthiness, see the titles MARINE INSURANCE, vol. 8, p. 181; SHIPS AND SHIPPING, vol. 10, pp. 1168, 1178. As to warranty on sale of vessel, see the title SHIPS AND SHIPPING, vol. 10, p. 1161. As to implied warranty on the sale and transfer of commercial paper, see the title BILLS, NOTES AND CHECKS, vol. 3, pp. 342, 343. As to implied warranty on the sale of municipal and state bonds, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 724. As to guaranty of county warrants, see the titles GUARANTY, vol. 6, p. 584; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 662. As to personal warranty, see PERSONAL WARRANTY, vol. 9, p. 396, and reference there given. As to a statement in a mercantile contract descriptive of the subject matter or of some material incident as a warranty or a condition precedent, see the title SALES, vol. 10, p. 1033. As authority of agent to make warranty, see the title PRINCIPAL AND AGENT, vol. 9, pp. 654, 655. As to authority of auctioneer to warrant, see the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 744.

II. Express Warranty.

No particular phraseology or form of words is necessary to create an express warranty.¹

1. Words necessary to create express warranty.—*Shippen v. Bowen*, 122 U. S. 575, 581, 30 L. Ed. 1172.

Any affirmation of quality or condition of the thing sold (not uttered as matter of opinion or belief) made by the seller at the time of sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser, is an express warranty. And in cases of oral contracts, on the existence of these necessary ingredients to such a warranty, it is the province of the jury to decide, upon considering all the circumstances attending the transaction. *Shippen v. Bowen*, 122 U. S. 575, 581, 30 L. Ed. 1172.

Where the contract specifies "merchantable logs" this is not to be regarded as a warranty on the part of the seller but as a clear and unmistakable description of what was bought and sold. *Leonard v. Davis*, 1 Black 476, 483, 17 L. Ed. 222.

Where parties contract for the sale of a quantity of logs, to be delivered at a future time, and the vendee binds himself to take all merchantable logs at a certain price, the vendor does not, by his assent to such contract, make warranty that all the logs he delivers shall be merchantable, but only leaves it optional with the vendee to reject such as are not. *Leonard v. Davis*, 1 Black 476, 17 L. Ed. 222.

A guarantee that the articles sold should pass inspection does not affect the character of a transaction as a sale nor convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken by the purchaser in every sale of personal property when he does not choose to take the risk upon himself. *Gibson v. Stevens*, 8 How. 384, 400, 12 L. Ed. 1123.

Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers. These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the course of trade, transferred to him the legal title and constructive possession of the property. The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession. A guarantee by the first sellers that the articles should pass inspection did not change the original sale into an executory contract. It was noth-

III. Implied Warranties.²

A. In General.—With respect to the doctrine of implied warranty, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own.³

B. Rule of Caveat Emptor—Where Seller Not Manufacturer.—In ordinary sales the buyer has an opportunity of inspecting the article sold. With respect to the general rule of caveat emptor, it has been said that no principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer, maker, nor grower of the article he sells, and therefore has no special or technical knowledge of the mode in which it was made or grown, the maxim of caveat emptor applies. The parties stand upon grounds of substantial equality.⁴ But when a dealer contracts to sell goods which he deals in, to be

ing more than the usual warranty of the soundness of the goods sold. *Gibson v. Stevens*, 8 How. 384, 12 L. Ed. 1123.

2. Implied warranties.—There is an implied warranty of genuineness upon the sale of bonds. *Utey v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54.

Telegraphic correspondence, in relation to the sale and purchase of certain bonds, considered, and held to constitute a complete contract of sale upon the condition, or with an implied warranty, that the bonds were genuine. The contract was not so modified by subsequent correspondence as to amount to a waiver on the part of the purchaser of such condition or warranty. *Utey v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54.

3. Fundamental inquiry.—*Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 28 L. Ed. 86; *Seitz v. Brewers' etc., Mach. Co.*, 141 U. S. 510, 518, 35 L. Ed. 837.

If the buyer relies, and under the circumstances had reason to rely, on the judgment of the seller, who was a manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use of which it was designed, the seller at the time being informed of the purpose to devote it to that use. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 28 L. Ed. 86.

Whenever a sale is made of property, not present, but at a remote distance, which the seller knows the purchaser has not seen, but which he buys upon the representation of the seller relying on its truth, then the representation in effect amounts to a warranty; at least, the seller is bound to make good the representation. *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42. See, also, *Tyler v. Black*, 13 How. 230, 14 L. Ed. 124.

4. Rule of caveat emptor—Opportunity for inspection.—*Barnards v. Kellogg*, 10 Wall. 383, 388, 19 L. Ed. 987; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 112, 116, 28 L. Ed. 86.

If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116, 28 L. Ed. 86.

Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. *Barnard v. Kellogg*, 10 Wall. 383, 388, 19 L. Ed. 987.

A wool broker in Boston sent to a dealer in wool in Hartford samples of foreign wool in bales which he had for sale, on commission, with the prices, and the latter offered to purchase the different lots at the prices, if equal to the samples furnished. The wool broker accepted the offer, provided the wool dealer in Hartford come to Boston and examine the wool on the day named, and then report if he would take it. The wool dealer went to Boston, and after examining certain of the bales as fully as he desired, and being offered an opportunity to examine all the remaining bales and to have them opened for his inspection (which offer he declined) purchased. The wool proved, the vendor knowing nothing of it, to have been deceitfully packed, rotten and damaged wool and tags being concealed by an outer covering of fleeces in their ordinary state. On action brought to recover damages, held, that the sale was not one by sample: and there having been no express warranty that the bales not examined should correspond with those which were, nor

applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose.⁵ Where the buyer receives and retains the goods without objection, and there is neither fraud nor warranty, he waives the right to object afterwards, and is finally concluded. The rule of *caveat emptor* applies.⁶

C. Warranty by Manufacturer.—The general rule of law with respect to implied warranties is well settled that in the absence of an express warranty, when the manufacturer of an article sells it for a particular purpose, the purchaser, making known to him at the time the purpose for which he buys it, the seller thereby impliedly warrants it merchantable and fit and proper for such known purpose and free from latent defects.⁷ But it is also the rule that where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.⁸

D. Sales by Sample.—Sales by sample carry with them a warranty that

any circumstances from which the law could imply such a warranty, that the rule of *caveat emptor* applied. *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987. See post, "Sales by Sample," III, D.

5. No opportunity for inspection.—*Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810. See, also, *Schuchardt v. Allens*, 1 Wall. 359, 368, 17 L. Ed. 642; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86.

There is an implied guarantee that machinery should be reasonably fit for the uses for which it was sold. *Van Winkle v. Crowell*, 146 U. S. 42, 49, 36 L. Ed. 880.

6. Waiver of right to object.—*Miller v. Tiffany*, 1 Wall. 298, 309, 17 L. Ed. 540.

7. Warranty by manufacturer.—*Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 115, 28 L. Ed. 86; *Seitz v. Brewers', etc., Mach. Co.*, 141 U. S. 510, 518, 35 L. Ed. 837; *De Witt v. Berry*, 134 U. S. 306, 313, 33 L. Ed. 896; *Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810.

A bridge company, having partially executed a contract for the construction of a bridge, entered into a written agreement with a person whereby the latter undertook, for a named sum and within a specified time, to complete its erection. The subcontractor agreed to assume and pay for all work done and material furnished up to that time by the company. Assuming this work to have been sufficient for the purpose for which it was designed, the subcontractor proceeded with his undertaking, but the insufficiency of the work previously done by the company was disclosed during the progress of the erection of the bridge. No statement or representation was made by the company as to the quality of the work it had done. Its insufficiency, however, was not apparent upon inspection, and could not have been discovered by the subcontractor until actually tested during

the erection of the bridge. Held, that the law implied a warranty that the work sold or transferred to the subcontractor was reasonably sufficient for the purposes for which the company knew it was designed. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86.

8. Benjamin on Sales, § 657; *Addison on Contracts*, Bk. II, ch. 7, p. 977; *De Witt v. Berry*, 134 U. S. 306, 313, 33 L. Ed. 896; *Seitz v. Brewers', etc., Mach. Co.*, 141 U. S. 510, 518, 35 L. Ed. 837. See, also, *District of Columbia v. Clephane*, 110 U. S. 212, 28 L. Ed. 122; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86.

In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance. This is not the case of an alleged defect in the process of manufacture known to the vendor but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, and proper and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed. In short, there was no express warranty that the machine would cool 150,000 cubic feet of atmosphere to 40 degrees Fahrenheit, or any other temperature, without reference to the construction of the particular brewery or other surrounding circumstances, and, if there were no actual warranty, none could be imputed. *Seitz v. Brewers', etc., Mach. Co.*, 141 U. S. 510, 519, 35 L. Ed. 837.

the article, in bulk, is of the same quality in all respects as the sample exhibited.⁹

E. Warranty of Title.—In every sale of personal property there is an implied warranty of title in the vendor.¹⁰

F. Warranty against Future Event.—In any sale of personal property there is no implied warranty by the seller that the purchaser shall enjoy it forever free from all unjust or illegal interference either by the sovereign, or the citizen, or the public enemy.¹¹

G. Louisiana Law—Warranty as to Incorporeal Right.—By the civil law, which prevails in Louisiana, warranty, whilst not of the essence, is yet of the nature of the contract of sale, and is, therefore, implied in every such contract unless there be an express stipulation to the contrary.¹²

9. Sales by sample.—The Monte Allegre, 9 Wheat. 616, 644, 6 L. Ed. 174. See ante, "Rule of Caveat Emptor—Where Seller Not Manufacturer," III, B. See, also, the title SALES, vol. 10, p. 1034.

One of the main reasons why the rule of caveat emptor does not apply in the case of a sale by sample, is because there is no opportunity for a special examination of the bulk of the commodity which the sample is shown to represent. *Barnard v. Kellogg*, 10 Wall. 383, 388, 19 L. Ed. 987.

In sales by sample the purchaser trusts entirely to his warranty; and, in general, is not referred to, nor has he an opportunity of examining the article in bulk; and at all events, is not chargeable with negligence, if he omits to make the examination, which he has it in his power to do. *The Monte Allegre*, 9 Wheat. 616, 646, 6 L. Ed. 174.

A merchant, who employs a broker to sell his goods, knows, or is presumed to know, the state and condition of the article he offers for sale; and if the nature or situation of the property is such that it cannot be conveniently examined in bulk, he has a right and it is for the convenience of trade that he should be permitted to select a portion and exhibit it as a specimen or sample of the whole, and that he should be held responsible for the truth of such representation. The broker is his special agent for this purpose and goes into the market clothed with authority to bind the principal. In such cases, if the article does not correspond with the sample, the injured purchaser knows where to look for redress; and the owner is justly chargeable with the loss, as he was bound to know the condition of his own property and to send out a fair sample, if he undertook to sell it that way. *The Monte Allegre*, 9 Wheat. 616, 646, 6 L. Ed. 174.

Facts held to have well warranted the jury in drawing the inference that it was the understanding of the vendees that they were buying under a warranty that the quality of madder in the cask was equal to that of the sample in the bottle,

and that the agent of the vendors intended to be understood as giving such a warranty. *Schuchardt v. Allens*, 1 Wall. 359, 370, 17 L. Ed. 642.

10. Warranty of title.—*Boyd v. Bopst*, 2 Dall. 92, 1 L. Ed. 302; *Randon v. Toby*, 11 How. 493, 520, 13 L. Ed. 784. See, also, *Osborn v. Nicholson*, 13 Wall. 654, 657, 20 L. Ed. 689.

As to an express warranty of title excluding an implied warranty with respect thereto, see post, "Express Warranty Excludes Implied Warranty," III, J.

In the charge to the jury, the court observed that the maxim of caveat emptor only applied to real estates; as the purchaser had the means of examining the title, within his own power. But the possession of chattels is a strong inducement to believe that the possessor is the owner; and the act of selling them is an affirmation of property. *Boyd v. Bopst*, 2 Dall. 92, 1 L. Ed. 302.

11. Warranty against future event.—*Curtis v. Innerarity*, 6 How. 146, 157, 12 L. Ed. 380. See post, "What Constitutes Breach," VI, A.

The seller is not bound to warrant the buyer against acts of mere force, violence, and casualties, nor against the act of the sovereign. "After the bargain is completed the purchaser stands to all losses." The case is one in which the maxim applies *res perit suo domino*. *Osborn v. Nicholson*, 13 Wall. 654, 658, 20 L. Ed. 689.

It has never been supposed that the vendor or vendee contemplated a warranty against the exercise of the power of eminent domain whenever the public good or convenience might require it. *Osborn v. Nicholson*, 13 Wall. 654, 658, 20 L. Ed. 689. See the title EMINENT DOMAIN, vol. 5, p. 746.

It was formerly held that there could be no warranty against the future event. It is now well settled that the law is otherwise. The buyer might have guarded against his loss by a guaranty against the event which has caused it. *Osborn v. Nicholson*, 13 Wall. 654, 658, 20 L. Ed. 689.

12. Louisiana law.—*Meyer v. Richards*,

H. Full Price as Implying Warranty.—The common law, unlike the civil law, does not imply a warranty from a full price.¹³

I. Admissibility of Custom to Imply Warranty.—Where the common law does not, on the admitted facts, imply a warranty of the good quality of an article, no custom in the sale of this article can be admitted to imply one.¹⁴

J. Express Warranty Excludes Implied Warranty.—Where there is an express warranty, that must be taken to contain the entire contract on the part of the seller.¹⁵ So, where there is an express warranty of title, no question as to an implied warranty can arise.¹⁶ And also, an express warranty of quality excludes any implied warranty that the articles sold are merchantable or fit for their intended use.¹⁷

IV. Authority of Agent to Warrant.

See the title *PRINCIPAL AND AGENT*, vol. 9, pp. 654, 655.

V. Parol Evidence to Add Warranty.

If a contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty.¹⁸

VI. Breach and Remedies.

A. What Constitutes Breach.—As to what constitutes a breach of an express or implied warranty, see note.¹⁹

163 U. S. 385, 397, 41 L. Ed. 199. See, also, *Bulkley v. Honold*, 19 How. 390, 391, 15 L. Ed. 663.

The law of Louisiana imposes on the seller the obligation of warranting the thing sold against its hidden defects. (Civ. Code, arts. 2,450, 2,451.) Hidden defects are those which could not be discovered by simple inspection. (Civ. Code, art. 2,497.) *Bulkley v. Honold*, 19 How. 390, 391, 15 L. Ed. 663.

13. Full price as implying warranty.—*Miller v. Tiffany*, 1 Wall. 298, 309, 17 L. Ed. 540.

14. Admissibility of custom to imply warranty.—*Barnard v. Kellogg*, 10 Wall. 383, 391, 19 L. Ed. 987. See the title *USAGES AND CUSTOMS*, ante, p. 831.

A custom of dealers in wool in New York and Boston that there is a warranty by the seller, implied from the fact of sale, that the wool is not falsely packed, cannot be admitted to control the general rules of law in relation to the sale of personal property. *Barnard v. Kellogg*, 10 Wall. 383, 390, 19 L. Ed. 987.

15. Express warranty excludes implied warranty.—*Osborn v. Nicholson*, 13 Wall. 654, 657, 20 L. Ed. 689.

16. Warranty of title.—*Osborn v. Nicholson*, 13 Wall. 654, 657, 20 L. Ed. 689. See ante, "Warranty of Title," III, E.

17. Warranty of quality.—*De Witt v. Berry*, 134 U. S. 306, 313, 33 L. Ed. 896.

There is no conflict between this doctrine and that which holds that goods sold by a manufacturer, in the absence of an express contract, are impliedly warranted as merchantable, or as suited to the known purpose of the buyer. *Dushane v. Benedict*, 120 U. S. 630, 636,

30 L. Ed. 810, and cases there cited. It is the existence of the express warranty, or its absence, which determines the question. In the case at bar there was such an express warranty of quality in terms. Not only that, but there was a sample delivered and accepted, as such. The law is well settled, that, under such circumstances, implied warranties do not exist. *De Witt v. Berry*, 134 U. S. 306, 313, 33 L. Ed. 896.

18. Admissibility of parol evidence to add warranty.—*De Witt v. Berry*, 134 U. S. 306, 312, 33 L. Ed. 896.

Where there is no pretense of any fraud, accident or mistake, and the written contract for the sale of a machine was in all respects unambiguous and definite, parol evidence tending to show an alleged independent collateral contract of warranty or guaranty, is inadmissible. *Seitz v. Brewers' etc., Mach. Co.*, 141 U. S. 510, 517, 35 L. Ed. 837.

19. What constitutes breach.—A warranty, express or implied, that rags sold are fit to be manufactured into paper, is broken, not only if they will not make good paper, but equally if they cannot be made into paper at all, without killing or sickening those employed in the manufacture. *Dushane v. Benedict*, 120 U. S. 630, 646, 30 L. Ed. 810.

If a warranty be true at the time it is given and at the time of passing of title, no breach can be wrought by any after event. *Osborn v. Nicholson*, 13 Wall. 654, 657, 20 L. Ed. 689.

A warranty on the sale of a slave that he is sound in body and mind, that he shall be a slave for life and that the title to him is clear and perfect, is not broken by the subsequent act of the government emancipating the slave. *Osborn*

B. Remedies²⁰—1. IN GENERAL.—It has been said that where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue: 1. He may refuse to receive the article at all.²¹ 2. He may receive it, and bring a cross action for the breach of the warranty.²² 3. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price.²³

2. ACTION TO RECOVER BACK PURCHASE MONEY.—In the case of breach of an implied warranty of title upon the sale of personal property, the buyer may sue the seller and recover the value or price paid.²⁴ So, also, the purchaser

v. Nicholson, 13 Wall. 654, 20 L. Ed. 689. See ante, "Warranty against Future Event," III, F.

If, subsequently, a lesion of the brain of the slave occurred, and permanent insanity ensued, or from subsequent disease, he became a cripple for life or died, or by the subsequent exercise of the power of eminent domain, the state appropriated his ownership and possession to herself, there can be no doubt that neither of these things would have involved any liability on the part of the seller. He was not a perpetual assurer of soundness of mind, health of body, or continuity of title. *Osborn v. Nicholson*, 13 Wall. 654, 657, 20 L. Ed. 689.

20. Remedies.—See the title SALES, vol. 10, pp. 1033, 1034, 1047, 1051, et seq.

21. Right to refuse article.—This rule was laid down in the note to *Cutter v. Powell*, in Smith's Leading Cases, the annotator declaring it to be settled by *Street v. Blay*, and *Poulton v. Lattimore*. *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847. See the title SALES, vol. 10, p. 1034.

The annotator, in the note to *Cutter v. Powell*, in Smith's Leading Cases, proceeds to say, "that it was once thought, and, indeed laid down by Lord Eldon, in *Curtis v. Hanney*, 3 Esp. 83, that he might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to *Weston v. Downes*, Doug. 23, is overruled by *Street v. Blay*, 2 B. and Adol., and *Gompertz v. Denton*, 1 C. and Mee. 205; and it is clear that, though the noncompliance with the warranty will justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price." *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847.

In *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847, the court said that the proposition stated in the text concerning the right of the purchaser to reject the article because it varied from the warranty, was an open question and a matter of dispute. The court proceeded as follows: "In *Dawson v. Collins*, 10 C. B. R. 527 (70 E. C. L. R.), the judges dissent from it. The chief justice expressed

his favor for the conclusion, 'that the buyer has no right to repudiate the article,' because it did not correspond to the warranty; and Creswell, justice, said, 'Where the rule is of an individual and specific thing, the vendee can only defend himself, altogether, against an action for not accepting it, if the thing be utterly worthless, as in *Poulton* and *Lattimore*; or, in part, by giving the breach of warranty in evidence in reduction of damages.' And this corresponds with the conclusions of this court in the case of *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595, where very similar language is used."

22. Cross action for breach of warranty.—Note to *Cutter v. Powell*, Smith's Leading Cases; *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847. See post, "Action for Breach of Warranty or False Warranty," VI, B, 4; "Breach of Warranty as Defense," VI, B, 5.

In *Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847, the court said that the second and third propositions laid down in the text were indisputable, and had received the sanction of the supreme court in *Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595, as modified by *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109.

23. Use of breach in reduction of damages.—*Lyon v. Bertram*, 20 How. 149, 154, 15 L. Ed. 847. See preceding note. See, also, post, "Breach of Warranty as Defense," VI, B, 5. See the title SALES, vol. 10, p. 1047.

24. Breach of warranty of title.—*Randon v. Toby*, 11 How. 493, 520, 13 L. Ed. 784; *Boyd v. Bopst*, 2 Dall. 92, 1 L. Ed. 302. See ante, "Warranty of Title," III, E; post, "Breach of Warranty as Defense," VI, B, 5. See the title SALES, vol. 10, p. 1051.

On such a suit for the price paid, the buyer may plead want of consideration or eviction by a better title. But where that is neither alleged nor proved, and the vendee's title to the property has never been questioned, nor has he been evicted from the possession, or threatened with eviction, he has no right to set up a defense under the implied warranty of title, or for want of consideration. *Randon v. Toby*, 11 How. 493, 520, 13 L. Ed. 784.

may recover back the money paid upon the breach of an implied warranty of genuineness upon the sale of bonds.²⁵ Under the Louisiana law, imposing on the seller the obligation of warranting the property sold against hidden defects, the buyer, in case of breach of such warranty, may retain the property, and have an action for reduction of the price by reason of the difference in value between the thing as warranted and as it was in fact.²⁶

3. **RESCISSION.**—Under the law of Louisiana imposing on the seller the obligation of warranting the thing sold against its hidden defects, if the buyer desires to rescind the contract by reason of the breach of such a warranty, he may do so by an action of redhibition.²⁷

4. **ACTION FOR BREACH OF WARRANTY OR FALSE WARRANTY**—a. *Right of Action.*—A breach of warranty is a breach of a contract, and may be sued on as such.²⁸

b. *Nature and Form of Action.*—An action upon a warranty, for a breach thereof or for a false warranty, may be either in contract or in tort.²⁹

c. *Joinder of Actions.*—As to joinder of an action in tort for breach of an express warranty with an action for deceit, see the title **ACTIONS**, vol. 1, p. 111.

d. *Necessity for Return of Property.*—It is the universal rule that when a vendee relies upon an express warranty, and sues upon it, he may recover the damages sustained by its breach without returning or tendering the property.³⁰

25. **Warranty of genuineness upon sale of bonds.**—*Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54.

26. **Warranty against hidden defects—Louisiana law.**—*Bulkley v. Honold*, 19 How. 390, 391, 15 L. Ed. 663. See ante, "In general," VI, B, 1.

In this action only such a part of the price as will indemnify the vendee for the difference between the value of the thing as warranted and the thing actually sold, together with the expenses incurred on the thing after deducting its fruits, can be recovered. (Civ. Code, arts. 2522, 2509.) *Bulkley v. Honold*, 19 How. 390, 391, 15 L. Ed. 663.

27. **Rescission.**—*Bulkley v. Honold*, 19 How. 390, 391, 15 L. Ed. 663. Generally as to rescission for breach of warranty, see ante, "In General," VI, B, 1; post, "Necessity for Return of Property," VI, B, 4, d; "Breach of Warranty as Defense," VI, B, 5. See the titles **RESCISSION**, **CANCELLATION** AND **REFORMATION**, vol. 10, p. 799; **SALES**, vol. 10, pp. 1033, 1034, 1051, et seq.

28. **Right of action.**—*Dushane v. Benedict*, 120 U. S. 630, 641, 30 L. Ed. 810; *Smeltzer v. White*, 92 U. S. 390, 395, 396, 23 L. Ed. 508; *Shippen v. Bowen*, 122 U. S. 575, 582, 30 L. Ed. 1172. See ante, "In General," VI, B, 1; post, "Nature and Form of Action," VI, B, 4, b.

29. **Nature and form of remedy.**—*Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810; *Schuchardt v. Allens*, 1 Wall. 359, 368, 17 L. Ed. 642; *Shippen v. Bowen*, 122 U. S. 575, 580, 30 L. Ed. 1172. See ante, "Right of Action," VI, B, 4, a.

The ancient remedy for a false warranty was an action sounding in tort. The remedy by assumpsit is comparatively of modern introduction. It is now

well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. *Schuchardt v. Allens*, 1 Wall. 359, 368, 17 L. Ed. 642; *Shippen v. Bowen*, 122 U. S. 575, 582, 30 L. Ed. 1172. See the title **ASSUMPSIT**, vol. 2, p. 636.

When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose, and in such a case, in Pennsylvania, as at common law, the action upon the warranty may be either in contract or in tort. *Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810; *Schuchardt v. Allens*, 1 Wall. 359, 368, 17 L. Ed. 642. See, also, *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86.

If the seller falsely represents to the buyer that the goods are of a certain quality, or fit for a certain purpose, he is liable to an action for the fraudulent representations, although they are not in a form to constitute a warranty; and in such a case the action must be in tort in the nature of an action of deceit, and must be supported by proof that he knew the representations to be false when he made them. *Dushane v. Benedict*, 120 U. S. 630, 638, 30 L. Ed. 810.

30. **Return of property not necessary.**—*Smeltzer v. White*, 92 U. S. 390, 395, 396, 23 L. Ed. 508.

In such case the vendee is not obliged to rescind the sale. *Smeltzer v. White*, 92 U. S. 390, 395, 23 L. Ed. 508. See ante, "Rescission," VI, B, 3.

Warrants issued on the county treasurer subsequently to the year 1860 by order of the board of supervisors of a county in Iowa, and duly signed by their

e. *Pleading.—Joinder of Counts.*—If the declaration be in tort for a false warranty on a sale of personalty, counts for deceit may be added to the special counts, and a recovery may be had for the false warranty or for the deceit, according to the proof. Either will sustain the action.³¹

Necessity for Averring Scienter.—In an action for a breach of warranty or a false warranty, whether the action be in assumpsit or in tort, the declaration need not aver a scienter, and if the averment be made it need not be proved.³²

f. *Measure of Damages.*—The damages recoverable for a breach of warranty include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act.³³

clerk, were not, unless sealed with the county seal, genuine and regularly issued, and the treasurer was not authorized to pay them. Where such warrants were sold by a citizen of Iowa to a citizen of another state, with a guaranty that they were "genuine and regularly issued," held, that the former thereby undertook that the warrants were not, in a suit brought against the county, subject to any defense founded upon a want of legal form in the signatures or seals; and that, the absence of the county seals being a breach of the warranty, the vendee, without returning or tendering the warrants, was entitled to recover of the vendor the damages which he had sustained by such breach. *Smeltzer v. White*, 92 U. S. 390, 23 L. Ed. 508.

31. Joinder of counts.—*Schuchardt v. Allens*, 1 Wall. 359, 369, 17 L. Ed. 642; *Shippen v. Bowen*, 122 U. S. 575, 582, 30 L. Ed. 1172. See, also, *Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810. See the titles ACTIONS, vol. 1, p. 111; FRAUD AND DECEIT, vol. 6, p. 394.

One of the considerations which led to the practice of declaring in assumpsit for a false warranty was that the money counts might be added to the special counts upon the warranty. *Schuchardt v. Allens*, 1 Wall. 359, 368, 17 L. Ed. 642.

32. Necessity for averring scienter.—*Schuchardt v. Allens*, 1 Wall. 359, 17 L. Ed. 642; *Shippen v. Bowen*, 122 U. S. 575, 582, 30 L. Ed. 1172. See the titles ASSUMPSIT, vol. 2, p. 636; FRAUD AND DECEIT, vol. 6, p. 394.

The doctrine is that when there is a warranty, that is the gist of the action, and that it is only when there is no warranty that a scienter need be alleged or proved. *Shippen v. Bowen*, 122 U. S. 575, 582, 30 L. Ed. 1172.

So where the evidence entitled the plaintiff to go to the jury upon the issue of express warranty as to the genuineness of bonds and coupons sold, it was error to instruct the jury that he could not recover unless upon allegation and proof of the scienter. *Shippen v. Bowen*, 122 U. S. 575, 582, 30 L. Ed. 1172.

33. Measure of damages.—*Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810. See post, "Recoupment and Counterclaim," VI, B, 6.

For instance, if a man sells hay or grain, for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury. *Dushane v. Benedict*, 120 U. S. 630, 636, 30 L. Ed. 810.

So if one sells an animal, warranting or representing it to be sound, which is in fact infected with disease, he is responsible for the damages resulting from a communication of the disease to the buyer's other animals; either in an action of tort for the false representation, or in an action on the warranty, either in tort, or even in contract. *Dushane v. Benedict*, 120 U. S. 630, 637, 30 L. Ed. 810.

The difference in actual value, between the article as warranted and the article as delivered, is all that can be properly recovered as damages, unless in exceptional cases of special damages. Whatever that difference, in the actual circumstances of the case, is shown to be, is the true rule and measure of damages, where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency, without regard to the contract price. *Marsh v. McPherson*, 105 U. S. 709, 717, 26 L. Ed. 1139; *Benjamin v. Hillard*, 23 How. 149, 16 L. Ed. 518.

In *Stillwell, etc., Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. Ed. 1035, the plaintiff's agreement was not for a sale of the machinery, subject to a condition that it should be satisfactory to the purchaser, but was an agreement, not only to furnish machinery of a certain description and quality, but also to set it up and put it in complete operation in the defendant's mill. The machinery was to be erected on the defendant's land and made part of his mill; and one installment of the price was to be paid on the delivery of the machinery there,

5. **BREACH OF WARRANTY AS DEFENSE.**—In an action by the vendor against the vendee for the purchase money, the vendee may defend himself by proving a breach of warranty.³⁴ Upon a sale, with a warranty of soundness, or where, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor; and the contract being thereby rescinded, it is a defense to an action for the purchase money, brought by the vendor, and will entitle the vendee to recover it back, if it has been paid.³⁵ So, if the sale be absolute, and the vendor afterwards consents, unconditionally, to take back the article, the consequences are the same.³⁶ But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it, within a reasonable time.³⁷

6. **RECOUPMENT AND COUNTERCLAIM.**—In an action for the price of goods sold, the defendant may set up a breach of warranty by way of recoupment of the sum that the plaintiff may recover.³⁸

and before the plaintiff had completed the work to the satisfaction of the defendant. The court held that in such a case it would be most unreasonable to compel the defendant, in order to entitle him to avoid paying the whole contract price, or to recover damages for the plaintiff's breach of contract, to undergo the expense of taking out the machinery, and the prolonged interruption of his business during the time requisite to obtain new machinery elsewhere, and that the rule of damages, adopted by the court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, and was the only one that would do full and exact justice to both parties and was in accordance with the decisions upon similar contracts. See, also, *Benjamin v. Hillard*, 23 How. 149, 16 L. Ed. 518; *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513; *Marsh v. McPherson*, 105 U. S. 709, 717, 26 L. Ed. 1139.

Where the description of flour as Haxall imported a warranty that it was manufactured at mills which used that brand, the purchaser was entitled to recover the amount of difference in the value of that and an inferior brand. *Lyon v. Bertram*, 20 How. 149, 153, 15 L. Ed. 847.

34. **Breach of warranty as defense.**—*Thornton v. Wynn*, 12 Wheat. 183, 6 L. Ed. 595. See ante, "In General," VI, B, 1. See the title SALES, vol. 10, p. 1047.

The rule laid down in the earlier English cases, which prescribed that where a party shall have been injured by a breach of warranty, the person so injured could not in an action against him upon the contract defend himself by alleging and proving this fact, but could obtain redress only by a cross action against the party from whom the injury shall have proceeded, has been much re-

laxed in later times. *Van Buren v. Digges*, 11 How. 461, 475, 13 L. Ed. 771; *Withers v. Greene*, 9 How. 213, 13 L. Ed. 109, referred to and reaffirmed. See ante, "In General," VI, B, 1.

35. **Warranty of soundness or option to return property.**—*Thornton v. Wynn*, 12 Wheat. 183, 193, 6 L. Ed. 595. See ante, "Action to Recover Back Purchase Money," VI, B, 2. See the title SALES, vol. 10, pp. 1033, 1034, 1051.

36. **Subsequent consent to take back property.**—*Thornton v. Wynn*, 12 Wheat. 183, 193, 6 L. Ed. 595.

This is true because in both cases the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other. *Thornton v. Wynn*, 12 Wheat. 183, 193, 6 L. Ed. 595.

37. **No subsequent agreement to take back property.**—*Thornton v. Wynn*, 12 Wheat. 183, 193, 6 L. Ed. 595; *Lyon v. Bertram*, 20 How. 149, 155, 15 L. Ed. 847. See ante, "In General," VI, B, 1.

The court held not to have erred in stating to the jury that the alleged breach of the warranty of a horse, the price of which formed part of the consideration of the note in suit if proved to the satisfaction of the jury, was not a sufficient defense in this action, to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff below, at the time of the sale. *Thornton v. Wynn*, 12 Wheat. 183, 189, 6 L. Ed. 595.

38. **Recoupment.**—*Dushane v. Benedict*, 120 U. S. 630, 637, 30 L. Ed. 810. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM, vol. 10, p. 1114.

In England, this is only allowed so far as it affects the value of the goods sold. But in the United States the courts, in order to avoid circuity of action, have gone further, and have allowed the defendant to recoup damages suffered by

WAR REVENUE ACT.—See the title *REVENUE LAWS*, vol. 10, p. 1012.

WAR RISKS.—See *MARINE*, vol. 8, p. 148. See, also, the title *MARINE INSURANCE*, vol. 8, p. 170.

WAR VESSELS.—See the title *PRIZE*, vol. 9, p. 757.

WASTE.

CROSS REFERENCES.

As to jurisdiction of court of claims in action against United States for breach of covenant against waste, see the title *COURTS*, vol. 4, p. 1025. As to waste of natural oil and gas, see the title *DUE PROCESS OF LAW*, vol. 5, p. 569. As to equity court protecting the estate of a remainderman from waste, see the title *EQUITY*, vol. 5, p. 835. As to executor's liability for waste, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 6, p. 170. As to fixtures for the removal of which will constitute waste, see the title *FIXTURES*, vol. 6, p. 300. As to injunction for digging lead ore from mines upon public lands, see the titles *INJUNCTIONS*, vol. 6, p. 1042; *MINES AND MINERALS*, vol. 8, p. 412. As to issuance of injunction to preserve property pending litigation, see the title *INJUNCTIONS*, vol. 6, p. 1035. As to lessee's duty not to commit waste, see the title *LANDLORD AND TENANT*, vol. 7, p. 834. As to waste being considered a quasi criminal offense under Louisiana laws and prescribed in one year, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 931. As to waste and remedies for, on mortgaged property, see the title *MORTGAGES AND DEEDS OF TRUST*, vol. 8, p. 476.

Where waste is not actually committed but clearly anticipated, equity will give its aid.¹

WASTE—WASTING.—See the title *REVENUE LAWS*, vol. 10, p. 893.

WATCHES AND WATCH MATERIAL.—See the title *REVENUE LAWS*, vol. 10, p. 886.

him from any fraud, breach of warranty, or negligence, of the plaintiff, growing out of and relating to the transaction in question. *Dushane v. Benedict*, 120 U. S. 630, 637, 30 L. Ed. 810.

By way of recoupment or equitable defense, which is limited to defeating the plaintiff's action, in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason of a breach of warranty, the goods were worth less than they would have been if they had been such as they were warranted to be; as well as of any evidence tending to show that the defendants suffered damages which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequences of the breach of warranty. *Dushane v. Benedict*, 120 U. S. 630, 648, 30 L. Ed. 810. See ante, "Measure of Damages," VI, B, 4, f.

Under counterclaim, seeking, as permitted by the statute of Pennsylvania,

not only to defeat the plaintiff's action, but also to recover an affirmative judgment against him, defendants can avail themselves only of a claim sounding in contract, in the nature of an action of assumpsit upon the supposed warranty. If they fail to prove a warranty, express or implied, the statute can have no application; because it extends to no claim sounding in tort only. *Dushane v. Benedict*, 120 U. S. 630, 638, 30 L. Ed. 810.

A breach of warranty is a breach of a contract, and may be sued on as such; and for that reason, and that only, has been allowed to be given in evidence by the defendant under the Pennsylvania statute, not only in an action on the same contract (in which it might be admissible by way of recoupment only, without the aid of the statute), but even in an action upon a distinct contract. *Dushane v. Benedict*, 120 U. S. 630, 641, 30 L. Ed. 810.

1. *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 566, 36 L. Ed. 537.

WATER COMPANIES AND WATERWORKS.

BY W. F. SOUDER.

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CROSS REFERENCES.

As to jurisdiction of United States courts being invoked on the ground that a law impairs a waterworks contract, see the title **COURTS**, vol. 4, pp. 910, 913. As to condemnation of waterworks system belonging to a private corporation, see the title **EMINENT DOMAIN**, vol. 5, p. 761. As to condemnation of private property for construction of public water supply, see the title **EMINENT DOMAIN**, vol. 5, pp. 768, 773. As to estoppel of a city from taking water from a stream which it allowed a water company to use for thirty years, see the title

ESTOPPEL, vol. 5, p. 959. As to necessity for notice and advertisement for sealed proposals to construct municipals waterworks, see the title MUNICIPAL CORPORATIONS, vol. 8, p. 581. As to construction of contract for erection of waterworks, see the titles MUNICIPAL CORPORATIONS, vol. 8, p. 595; WORKING CONTRACTS. As to diversion of navigable waters for public use, see the title NAVIGABLE WATERS, vol. 8, p. 845. As to waterworks companies invoking aid of statute and being bound by its provisions, see the title POLICE POWER, vol. 5, p. 523.

I. Franchise, Powers and Privileges.

A. Power of State or Municipality to Grant—1. **GENERALLY**.—The right to dig up and use the streets and alleys of a city for the purpose of placing mains and pipes for supplying the city and its inhabitants with water is a franchise belonging to the state, which the state can grant to persons or corporations upon such terms as it deems best for the public interests.¹

2. **EXCLUSIVE FRANCHISE**.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 424; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 803, 817. Where the object to be attained is of a public nature, and one for which the state can make a provision by legislative enactment, the granting of a franchise can be accompanied, with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the legislative department would best promote the public health and the public comfort, or the protection of the public and private property.²

B. Construction of Grant—Presumption as to Exclusiveness.—See, generally, the titles CONSTITUTIONAL LAW, vol. 4, p. 425; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 803, 817; MUNICIPAL CORPORATIONS, vol. 8, p. 586.

Charter Must Contain Apt Words of Exclusion.—The organization of a water company under a statute, which simply provided for the organization of water companies when its contract with the town contained no words of exclusion, but gives to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals, does not give to the water company an exclusive right to furnish the town with water.³

Where Charter Reserves Right to Charter Other Companies.—A water company cannot claim that it received the exclusive right to supply a city with water, where a proviso in a charter reserved to the state the power to charter other companies for such purpose.⁴ Particularly is this so when taken

1. **Power of state or municipality to grant**.—*St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 65, 30 L. Ed. 563; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 681, 29 L. Ed. 525; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

2. **Exclusive privileges to water companies**.—*St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 65, 30 L. Ed. 563; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 681, 29 L. Ed. 525.

3. **Charter must contain apt words of exclusion**.—*Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696, 41 L. Ed. 1165.

4. **Where charter reserves right to charter other companies**.—It was obvious that the legislature contemplated the fact that in the future other sources of supply and other companies might be necessary

in order to furnish an adequate supply for the growing city, and reserved to itself the right to make such provision as it should deem expedient therefor. It is true the companies which might be chartered were not to "interfere with the property rights of obtaining water pertaining" to the plaintiff. But manifestly "property rights" refer to rights in respect to tangible property, and thus construed the proviso forbade any interference by any new company with the plant of the plaintiff. In addition, it also forbade interference with the "rights of obtaining water pertaining" to the plaintiff, which included only rights already acquired. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 218, 46 L. Ed. 1132.

The water company therefore, took its charter with notice that it was not given the exclusive right of supplying the city with water, and it had not, at the time of the transaction mentioned in the pleading ob-

in connection with a further stipulation that the city shall not erect waterworks of its own.⁵

Municipality Not Denied in Stipulating Not to Grant Similar Privileges to Other Companies.—A stipulation in an agreement that a city would not, at any time during thirty years, grant to any person or corporation the same privileges it had given to a water company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own.⁶ While it is doubtless true that the erection of such a waterworks plant by a city will render the property of the water company less valuable and, perhaps unprofitable, yet, if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract.⁷

Prior Grant to Municipality to Construct and Maintain Works Not Repealed.—A water company does not have an exclusive right to maintain waterworks in a borough for supplying its inhabitants with water, when there had been a prior grant to the borough to construct and maintain a system of public waterworks, nor does such grant infringe any right or privilege which the water company then had under its charter.⁸

Erecting Works to Be Operated after Termination of Exclusive Privilege.—Where a city grants the sole and exclusive right to a water company for a period of fifteen years to supply the city and its inhabitants with water, the city does not break its contract with the water company by starting at once to build waterworks for its own use after the expiration of the franchise.⁹

C. Right to Mortgage Franchise, Privileges or Property.—See the title *CORPORATIONS*, vol. 4, p. 732.

Rights of Mortgagee.—Where a waterworks company is mortgaged by a

tained that which its charter before amendment purported to authorize it to obtain, to wit, an exclusive right to all the sources of supply within the county. *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 218, 46 L. Ed. 1132.

5. Stipulating that city shall not erect waterworks of its own.—An ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not create a monopoly or prevent the granting of similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect waterworks of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise. *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 15, 43 L. Ed. 341. See the title *MUNICIPAL CORPORATIONS*, vol. 8, p. 587.

6. Municipality not denied in stipulation not to grant similar privileges to other companies.—*Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 35, 50 L. Ed. 353.

In *Helena Waterworks Co. v. Helena*, 195 U. S. 383, 392, 49 L. Ed. 245, where a city established its own system of waterworks, in competition with that of a private company, the court, observing that the city had not specifically bound itself

not to construct its own plant, said: "Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the cause in *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341." See *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37, 50 L. Ed. 353.

7. Prevention of competition must be made certain in contract.—*Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 37, 50 L. Ed. 353; *Turnpike Co. v. State*, 3 Wall. 210, 213, 18 L. Ed. 180; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 81, 35 L. Ed. 622; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165.

8. Prior grant to municipality to construct and maintain works not repealed.—*Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 30 L. Ed. 1059.

Thus the exclusive privilege acquired by the company under the statute of 1874 was not impaired in value by the acts passed in 1867, granting such power to the borough, for it cannot with propriety be said that the obligation of a contract made with the state in 1874 was impaired by statutes enacted in 1867. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 30 L. Ed. 1059.

9. Erecting waterworks to be operated after termination of exclusive privilege.—*El Paso Water Co. v. El Paso*, 152 U. S. 157, 38 L. Ed. 396.

person holding a conditional agreement of sale, the lien of the mortgage passes subject to such conditions.¹⁰

D. Exemption from Taxation.—See the title *TAXATION*, ante, p. 356.

II. State and Municipal Control.

A. Generally.—See, generally, the titles *CONSTITUTIONAL LAW*, vol. 4, p. 423; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 817; *POLICE POWER*, vol. 9, pp. 494, 500, 502, 514. Notwithstanding an exclusive privilege is granted to a waterworks company, to supply a city with water, the power remains with the state, or with the municipal government of the city acting under legislative authority, to make such regulations as will secure to the public the uninterrupted use of the streets, as well as prevent the distribution of water unfit for use, and provide for such a continuous supply, in quantity, as protection to property, public and private, may require.¹¹

B. Must Be Exercised by Duly Constituted Authorities.—The regulation and control of waterworks by a state or municipal government cannot be determined by individual citizens for the constituted authorities.¹²

C. Rights and Remedies Where Company Fails to Discharge Duties Imposed by Charter or Contract.—The danger to the health and lives of the inhabitants of the city from impure water, and the continued exposure of the property in the city to destruction by fire from an inadequate supply of water, are public questions peculiarly under the care of the municipality; and it is entitled and bound to act with the highest regard for the public interests, and, at the same time, with due consideration for the rights of the other parties to the contract.¹³ Where a company fails to perform the obligations imposed upon it by its charter or by contract, as where it fails to maintain a sufficient supply of pure water for domestic purposes and for extinguishing fires, the city may be justified in putting an end to its franchise and in retaking possession of the works.¹⁴

Necessity for Submitting Question to Judicial Determination.—Al-

10. Rights of mortgagee.—*Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 33 L. Ed. 573.

11. State and municipal control in general.—*New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 681, 29 L. Ed. 525; *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 65, 30 L. Ed. 563.

12. Control must be exercised by duly constituted authorities.—Whether a state or a municipal government may not, if the public health or the public comfort so require, compel the appellee, now having the exclusive right of supplying a city and its inhabitants with water distributed through pipes laid in the streets of that municipality (or if it refuses to employ other agencies), to supply water from some river or stream other than the one used to supply water, cannot be determined by the appellant nor the individual citizens for the constituted authorities. *St. Tammany Waterworks v. New Orleans Waterworks*, 120 U. S. 64, 68, 30 L. Ed. 563.

13. Rights and remedies where company fails to discharge duties imposed by charter or contract.—*Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 179, 33 L. Ed. 573.

14. Where city justified in putting end to contract.—*Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 176, 33 L. Ed. 573; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 18, 43 L. Ed. 341.

Where water furnished by a water company for a period of about nine months, during which it works were operated, was unfit for domestic purposes, and was inadequate for the protection of the city from fire, the city giving the company ample time to comply with its contract, had a right to treat the contract as terminated and to invoke the aid of a court of equity to enforce its rescission. *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 176, 33 L. Ed. 573.

Condition precedent.—The failure of the water company to furnish water in the quantity and of the quality called for by the city ordinances was not a condition subsequent but was a condition precedent to the continuing right of the water company and its assigns to use the streets of the city and to furnish water for a period of thirty years; and when, after a reasonable time, the company and its assigns had failed to comply with the condition as to the quantity and quality of the water, the city had a right to

though a water company may fail to carry out its contract with municipality and although the water supply furnished may be inadequate for domestic, sanitary or fire purposes, and the pressure so far insufficient that in many parts of the city water cannot be carried above the first story of the building, the municipality is not justified in erecting waterworks of its own upon the theory that the company had failed to carry out its contract where such contract provides a remedy by applying to a court of competent jurisdiction to pass upon its validity.¹⁵

Rights of Third Persons; Estoppel to Rescind.—Although the purchasers of the bonds of the water company may have been influenced to purchase them by the terms of the resolution of the city to accept the waterworks and by the letters from the officers and citizens of the city introduced in evidence, the city was not thereby estopped from refusing to pay the rental for the hydrants, which, by the terms of the mortgage, was to be applied in payment of the interest on the bonds, or from having the contract canceled.¹⁶

D. Regulation of Rates and Rentals.—See post, "Regulation by State or Municipality," III, C.

E. Removal of Pipes, Relocation, Etc.—See the titles CONSTITUTIONAL LAW, vol. 4, p. 405; DUE PROCESS OF LAW, vol. 5, pp. 583, 584; POLICE POWER, vol. 9, pp. 494, 502, 514.

III. Water Rents.

A. Nature.—In California the appropriation and disposition of water is a public use, the right to collect tolls or compensation for it is a franchise subject to regulation and control in the manner prescribed by law, and such tolls and compensation cannot be fixed by the contract of the parties.¹⁷

B. Power of City to Contract for Water and Its Liability to Pay Rent.—Effect of Charter Provision Limiting Municipal Indebtedness.—A municipal corporation may contract for a supply of water and may stipulate for the payment of an annual rental for the water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter.¹⁸

performance, would be a wholly inadequate remedy in a case like the present. *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 179, 33 L. Ed. 573.

The taking possession by the city of the old water mains which it had contracted to sell to the water company, was necessary for the protection of the city from fire. The contract for the sale of the old mains was a part of the contract with the city in relation to the waterworks. The two agreements constituting one contract was merely a contract to sell, and not an executed contract of sale. *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 176, 33 L. Ed. 573.

When recaption by city lawful.—The treat the contract as terminated, and to invoke the aid of a court of equity to enforce its rescission. *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 179, 33 L. Ed. 573.

Inadequate remedy.—A suit for the specific performance of the contract, or a suit to recover damages for its non-delivery of the old water mains being conditional and made for a special purpose; and, the conditions not having been performed, no title to them passed either

to the water company or to the trustee under the mortgage, and the recaption of them by the city was lawful. *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 176, 33 L. Ed. 573.

15. Necessity for submitting question to judicial determination.—*Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 18, 43 L. Ed. 341. See the title POLICE POWER, vol. 9, p. 509.

16. City estopped to rescind.—*Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 177, 33 L. Ed. 573. See post, "Power of City to Contract for Water and Its Liability to Pay Rent," III, B. See, generally, the title ESTOPPEL, vol. 5, p. 913.

The letters of the private citizens could not affect the city; and the letters from the officers of the city could not affect its rights, because they were not written by its authority or within the scope of their powers as its officers. *Farmers', etc., Trust Co. v. Galesburg*, 133 U. S. 156, 177, 33 L. Ed. 573.

17. Nature of rents in California.—*Osborne v. San Diego Land, etc., Co.*, 178 U. S. 22, 44 L. Ed. 961.

18. Effect of charter provision limiting municipal indebtedness.—*Walla Walla*

City Liable to Pay Future Rentals, Providing Company Complies with Contract.—The obligation of the company being a continuing obligation, the liability of the city to pay in future the hydrant rents depended upon the future compliance of the water company with its contract; and in case of its failure the city would have the right to ask for the rescission of the contract.¹⁹

City Liable When Immunity from Taxation Withdrawn.—The obligation imposed by the first section of the Kentucky act of 1882 to furnish water to the city for fire protection, free of charge, did not remain after the passage of the act of 1886, which had the effect to withdraw the immunity from taxation granted by the second section of the act of 1882.²⁰

C. Regulation by State or Municipality.—See the titles CORPORATIONS, vol. 4, pp. 634, 635, 708; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, pp. 804, 818; POLICE POWER, vol. 9, p. 538.

1. **VALIDITY OF STATUTE.**—Statutes of California, providing that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, are valid.²¹

2. **POWER TO REGULATE.**—a. *In General.*—The power of regulation of water rates is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power.²²

b. *Delegation of Power.*—The power to fix the rates of compensation to be charged by water companies may be conferred by the legislature upon municipal corporations.²³

c. *By Municipality.*—A municipal corporation can be invested with power to bind itself by an irrevocable contract not to regulate water rates.²⁴

3. **REASONABLENESS OF RATES.**—a. *Judicial Interference.*—The regulation prescribed by legislative sanction concerning the collection of water rates should

City v. Walla Walla Water Co., 172 U. S. 1, 19, 43 L. Ed. 341. See the title MUNICIPAL CORPORATIONS, vol. 8, p. 590.

19. **City liable to pay future rentals providing company complies with contract.**—Farmers', etc., Trust Co. v. Galesburg, 133 U. S. 156, 177, 33 L. Ed. 573. See the title RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799.

20. **Louisville Water Co. v. Clark**, 143 U. S. 1, 16, 36 L. Ed. 55.

The effect of the withdrawal of the immunity from taxation was, therefore, to leave the water company in the position it was before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs or hydrants. Louisville Water Co. v. Clark, 143 U. S. 1, 16, 36 L. Ed. 55.

21. **Statutes of California regulating rates are valid.**—Stanislaus County v. San Joaquin, etc., Irrigation Co., 192 U. S. 201, 210, 48 L. Ed. 406; San Diego Land, etc., Co. v. National City, 174 U. S. 739, 43 L. Ed. 1154.

22. **Power to regulate in general.**—Owensboro v. Owensboro Waterworks Co., 191 U. S. 358, 370, 48 L. Ed. 217; Freeport Water Co. v. Freeport City, 180 U. S. 587, 45 L. Ed. 679; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L.

Ed. 702; City of Joplin v. Southwest Missouri Light Co., 191 U. S. 150, 48 L. Ed. 127.

23. **Delegation of power to municipal corporations.**—It is competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation to be collected for the use of water supplied to any city, county or town or to the inhabitants thereof. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use. San Diego Land, etc., Co. v. National City, 174 U. S. 739, 753, 43 L. Ed. 1154.

24. **City may exclude itself from regulating rates.**—Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 44 L. Ed. 886; Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; New Orleans Waterworks Co. v. Rivers, 115 U. S. 674, 29 L. Ed. 525; Danville Water Co. v. Danville, 180 U. S. 619, 45 L. Ed. 696; Freeport Water Co. v. Freeport City, 180 U. S. 587, 45 L. Ed. 679.

Power of city to contract as to rates

never be judicially interfered with, unless the facts very clearly present a case of the taking of private property without the due process of law.²⁵

b. *Necessity of Notice and Opportunity to Be Heard.*—Formal notice need not be given to a water company as to the precise day upon which rates will be fixed, where such notice is given by statute,²⁶ nor is an opportunity to be heard denied a water company upon the question of rates fixed by ordinance when they have been fully considered between officers of the corporation and the water company, although such officers were not allowed to be present at the final meeting of the city board when such ordinance was passed.²⁷

c. *Determination of Reasonableness of Rates.*—(1) *Mere Reduction of Rates.*—A mere reduction of water rates, while still leaving reasonably fair or just compensation for the use of the property, is not prohibited.²⁸

(2) *Amount of Outside Irrigation.*—Where the board of supervisors, who had the power to fix rates, in determining rates assumed that the amount of water

for a term of years.—Where a question is involved in a contract between a city and a municipality as to the power of a city to make an irrevocable contract for thirty years, fixing water rates, such power being claimed under the statute of Illinois of 1872, the court held that the city had no authority under the Illinois act of April 9, 1872, empowering cities or villages to contract with such companies for a supply of water for public use for a period not exceeding 30 years, and Illinois act of April 10, 1872, authorizing any person or private corporation to construct and maintain waterworks at such rate as may be fixed by ordinance and for a period not exceeding 30 years, since the power of a municipal corporation to grant exclusive privileges must be conferred by explicit terms. The clause, "for a period not exceeding 30 years," qualifies the words "construct and maintain the same," but does not qualify the words "at such rates as may be fixed by ordinance." *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679; *Danville Water Co. v. Danville*, 180 U. S. 619, 45 L. Ed. 696.

25. *Rates should not be judicially interfered with.*—*San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 754, 43 L. Ed. 1154; *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. Ed. 176; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 399, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 524, 43 L. Ed. 819. See, also, *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 614, 615, 43 L. Ed. 823. See the title **POLICE POWER**, vol. 9, p. 541.

26. *Where the statutes of California* itself give notice of the fact that ordinances or resolutions fixing water rates will be passed annually, and statutes make it the duty of the city at least thirty days prior to the 15th day of January in each year to obtain from the corporation a detailed statement, showing the names of the water rate payers, the amount paid by each during the preceding year, and "all revenue derived from all sources," and the expenditures made for supplying

water during said time, formal notice as to the precise day upon which the water rates will be fixed by ordinances need not be given to the water company. *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 752, 43 L. Ed. 1154.

27. *Opportunity to be heard.*—Where meetings for the regulation of water rates are public and not secret and the time and place for holding them are fixed by law, there is no ground to say that the corporation did not in fact have or was denied an opportunity to be heard upon the question of rates, it appearing in evidence that the subject of rates was considered in conferences between the local authorities and the officers of the corporation, although such were not allowed to be present at the final meeting of the city board when the ordinance complained of was passed. They were not entitled, of right, to be present at that particular meeting. They were heard, and there is nothing to justify the conclusion that the case of the corporation was not fully considered before the ordinance was passed. *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 753, 43 L. Ed. 1154.

28. *Reduction of water rates not prohibited.*—It is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, the court held that a law which reduces the compensation theretofore allowed to six per cent upon the present value of the property used for the public is not unconstitutional. There is nothing in the nature of confiscation about it. *Stanis-*

available for outside irrigation was enough for a little over 6,000 acres, and fixed the rates as if the company supplied this 6,000 acres, although such was not the fact, the rates were not unreasonable because the water company would only receive an income of 6 per cent on the total value of its plant if it should serve the entire 6,000 acres.²⁹

(3) *Construction of Particular Contracts*.—Where a contract concerning governmental functions claimed the regulation of water rates by a city, the court held such regulation must be strictly construed and cannot be held to have been stipulated away by doubtful or ambiguous provisions.³⁰

d. *Basis for Calculating Reasonableness of Rates*—(1) *In General*.—The proper basis of calculation of water rates is the real value of the property and the fair value in the water company of the services rendered to the public.³¹

(2) *Original Cost*.—In determining the valuation of waterworks and water companies for the purpose of ascertaining whether the rates prescribed will yield a fair return, the original cost may be considered and should have more or less importance according to circumstances.³² But the original cost is of very little value in determining the reasonableness of the rates, where such cost is inflated by improper charges to that account and by injudicious expenditures;³³ and where the waterworks have been sold, the price received in evidence is more important evidence than the original cost.³⁴

(3) *Valuation of Waterworks for Taxation*.—The valuation of a waterworks plant for the purposes of taxation may be considered by the courts in coming to a decision as to whether water rates as fixed by a board of supervisors is reasonable, especially if, as was testified, such valuation was sworn to by the officers of the company.³⁵

laus County v. San Joaquin, etc., Irrigation Co., 192 U. S. 201, 213, 48 L. Ed. 406.

29. San Diego Land, etc., Co. v. Jasper, 189 U. S. 439, 446, 47 L. Ed. 892.

30. **Contract must be strictly construed.**

—Where an ordinance grants to a water company the exclusive right and privilege for a period of 30 years, to erect and maintain a system of water works, with the use of the streets for such purpose and requiring the city to pay a certain annual rental proportional to the length of the mains, and requiring the water company on its part among other things to agree to furnish the city with an adequate supply of water, does not give a contractual right to charge the inhabitants of the city with the rates named in the ordinance for the whole period of 30 years under a provision of the ordinance "that the water company shall charge the following annual water rates to consumers of water during the existence of this franchise," as this is a regulation of the right to charge rates, not amounting to a stipulation that it will be the only instance of regulation, that the power to do so is bartered away, and that the conditions which determine and justify it would remain standing and continue to justify it through the changes of thirty years. Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. Ed. 702.

Under the Illinois statute of 1872, giving a city the power to fix water rates, the court held the granting of the power became a condition therefor of the privileges granted to water companies. Freeport Water Co. v. Freeport City, 180 U.

S. 587, 45 L. Ed. 679; Danville Water Co. v. Danville, 180 U. S. 619, 45 L. Ed. 696.

31. **Proper basis of calculation stated.**—San Diego Land, etc., Co. v. National City, 174 U. S. 739, 758, 43 L. Ed. 1154. See the title POLICE POWER, vol. 9, p. 544.

32. **Original cost of property.**—In fixing just rates the court should take into consideration the cost of the plant and of its annual operation, the depreciation of the plant, and a fair profit to the company above its charges for its services. All these matters ought to be taken into consideration and such weight be given them, when rates are being fixed, as under all the circumstances would be just to the company and to the public. Stanislaus County v. San Joaquin, etc., Irrigation Co., 192 U. S. 201, 215, 48 L. Ed. 406; San Diego Land, etc., Co. v. Jasper, 189 U. S. 439, 442, 47 L. Ed. 892.

After taking such facts into consideration, the company might still be directed to receive rates that would be nothing more than a fair and just compensation or return upon the reasonable value of the property at the time it was being used for the supplying of the water to the public. Stanislaus County v. San Joaquin, etc., Irrigation Co., 192 U. S. 201, 215, 48 L. Ed. 406.

33. San Diego Land, etc., Co. v. Jasper, 189 U. S. 439, 443, 47 L. Ed. 892.

34. **Selling price of waterworks to be considered.**—San Diego Land, etc., Co. v. Jasper, 189 U. S. 439, 443, 47 L. Ed. 892.

35. **Valuation may be considered in determining reasonableness.**—San Diego

(4) *Depreciation of Market Value and Services Rendered.*—The depreciation of the market value of a waterworks plant and the depreciation of the value of services rendered to consumers, due to a drought from which that part of the country had suffered since the passage of the ordinance which regulated water rates, may be considered by a board of supervisors in reaching a reasonable value of such rates.³⁶

(5) *Distribution Losses.*—Where the points in dispute involve the question whether the losses to the appellant arising from the distribution of water to consumers outside of the city are to be considered in fixing the rates for consumers within the city, the court held, that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants outside of the city so as to compensate the plaintiff for any such losses.³⁷

e. *Nature of Duties in Regulating Rates.*—The municipal authorities having been created a special tribunal, by the constitution and the legislation under it, to determine what, as between the public and the water company, shall be deemed a reasonable price for water, during a certain limited period, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment in such regulation.³⁸

D. Water Rents a Charge on Land.—Priority over Mortgage.—Water rents in a city having been made by a state law a charge on land, with a lien prior to all other encumbrances, in the same manner as taxes and assessments, gives them priority over mortgages on such lands, made after the passage of the law, whether water was introduced on to the lot mortgaged before or after the giving of the mortgage.^{38a}

Due Process.—The complainant had no ground of complaint that its property was taken without due process of law, as such law is not, as to mortgages created after its passage, repugnant to the fourteenth amendment of the constitution of the United States.³⁹

Charge Similar to Tax.—It may be difficult to show any substantial distinction in this regard between such a charge and that of a tax strictly so called.⁴⁰

E. Forfeiture of Estate for Nonpayment of Rent.—Where a lease of a water power provides for an abatement of rent for every failure of water, and the lessee's estate is forfeited for nonpayment of rent, before he can ask relief from a forfeiture he should at least tender the difference between the amount of rents due, and the amount which he could rightly claim by way of reduction for failure of water.⁴¹

Land, etc., *Co. v. Jasper*, 189 U. S. 439, 443, 47 L. Ed. 892.

36. Depreciation of market value considered.—*San Diego Land, etc., Co. v. Jasper*, 189 U. S. 439, 443, 47 L. Ed. 892.

37. *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, 758, 43 L. Ed. 1154.

38. Duties of those who regulate rates are judicial in their nature.—*Spring Val. Waterworks v. Schottler*, 110 U. S. 347, 356, 28 L. Ed. 173.

38a. *Provident Inst. v. Jersey City*, 113 U. S. 506, 511, 26 L. Ed. 1102.

39. Constitutionality of law.—*Provident Inst. v. Jersey City*, 113 U. S. 506, 511, 28 L. Ed. 1102. See the titles CONSTITUTIONAL LAW, vol. 4, p. 1; DUE PROCESS OF LAW, vol. 5, p. 499.

And even in cases of mortgage existing at the time of the passage of the

law, the court held it was not prepared to say that it would be repugnant to the constitution. *Provident Inst. v. Jersey City*, 113 U. S. 506, 511, 28 L. Ed. 1102.

The providing a sufficient water supply for the inhabitants of a great and growing city is one of the highest functions of municipal government, and tends greatly to enhance the value of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited. *Provident Inst. v. Jersey City*, 113 U. S. 506, 516, 28 L. Ed. 1102.

40. Charge similar to tax.—*Provident Inst. v. Jersey City*, 113 U. S. 506, 516, 28 L. Ed. 1102.

41. *Sheets v. Selden*, 7 Wall. 416, 19 L. Ed. 166.

IV. Liability of Municipal Owned Works to Sale under Execution.

The waterworks of a city are like public parks and buildings of such public utility that they are not liable to sale under execution for ordinary debts against the city.⁴² And a city may by suit in equity restrain its execution creditors from selling shares belonging to it in the water company.⁴³

WATER RIGHTS.—See the title **WATERS AND WATERCOURSES**, and references given.

42. Works not liable to sale under execution.—New Orleans *v.* Morris, 105 U. S. 600, 26 L. Ed. 1184.

43. Injunction to restrain selling shares.—New Orleans *v.* Morris, 105 U. S. 600, 26 L. Ed. 1184.

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BY CHAS. W. FOURL.

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 - 4. Rates, 1005.

CROSS REFERENCES.

See the titles ACCESSION, ACCRETION AND RELICTION, vol. 1, p. 51; APPEAL AND ERROR, vol. 1, p. 333; vol. 2, p. 1; CANALS, vol. 3, p. 546; CONSTITUTIONAL LAW, vol. 4, p. 1; COURTS, vol. 4, p. 861; DAMAGES, vol. 5, p. 157; DRAINS AND SEWERS, vol. 5, p. 492; DUE PROCESS OF LAW, vol. 5, p. 507; EMINENT DOMAIN, vol. 5, p. 746; FERRIES, vol. 6, p. 274; FISH AND FISHERIES, vol. 6, p. 291; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 758; INTERJECTIONS, vol. 6, p. 1022; JUDICIAL NOTICE, vol. 7, p. 672; MINES AND (995)

MINERALS, vol. 8, p. 364; MUNICIPAL CORPORATIONS, vol. 8, p. 546; MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, p. 650; NAVIGABLE WATERS, vol. 8, p. 805; NUISANCES, vol. 8, p. 933; PUBLIC LANDS, vol. 10, p. 1; REMOVAL OF CAUSES, vol. 10, p. 663; STATES, ante, p. 33; STREETS AND HIGHWAYS, ante, p. 259; WATER COMPANIES AND WATERWORKS, ante, p. 985.

As to public ownership of land formed by alluvial formations, see the title ACCESSION, ACCRETION, AND RELICTION, vol. 1, p. 53, note 12. As to waters and watercourses as boundaries, see the title BOUNDARIES, vol. 3, pp. 476, 483. As to contracts to draw water from canals, see the title CANALS, vol. 3, pp. 551, 552. As to use of surplus water by canal company, see the title CANALS, vol. 3, pp. 549, 551. As to requisites to constitute an irrigation district a corporation de facto, see the title CORPORATIONS, vol. 4, p. 672. As to federal courts following state court decisions relative to waters and watercourses, see the title COURTS, vol. 4, p. 1121. As to federal courts following state decisions as to constitutionality of state laws, as to irrigation, see the title COURTS, vol. 4, pp. 1066, 1080. As to draining neighbor's well by construction of public work, see the title DUE PROCESS OF LAW, vol. 5, p. 569. As to appropriation of property for irrigation purposes being public use, see the title EMINENT DOMAIN, vol. 5, p. 766. As to flooding of land by dam across water, see the title EMINENT DOMAIN, vol. 5, p. 771. As to impairment of regulations as to water rates, see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 6, p. 804. As to injunction by state to restrain another state from interference with water right, see the title INJUNCTIONS, vol. 6, p. 1042. As to lease of water power, see the title LANDLORD AND TENANT, vol. 7, p. 835, note 45. As to mechanic's lien for irrigation canal or ditch, see the title MECHANICS' LIENS, vol. 8, p. 333. As to injunction against interference with prior appropriation of waters, see the title MINES AND MINERALS, vol. 8, p. 403, note 49. As to construction of irrigation ditches and canals over public lands, see the title MINES AND MINERALS, vol. 8, pp. 402, 403. As to raising flow of water destroying water power secured by contract being infringement of contract, see the title MINES AND MINERALS, vol. 8, p. 402, note 46. As to prior appropriation of water rights in mineral lands of United States, see the title MINES AND MINERALS, vol. 8, pp. 401, 403. As to public aid to improve water power, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID, vol. 8, p. 622. As to issue of irrigation bonds by de facto irrigation district, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES, vol. 8, pp. 729, 730. As to grants to construct dams in rivers, see the title NAVIGABLE WATERS, vol. 8, pp. 845-847. As to extent and incidents of riparian ownership being governed by local law, see the title NAVIGABLE WATERS, vol. 8, p. 834. As to riparian and littoral rights, see the title NAVIGABLE WATERS, vol. 8, pp. 839, 840. As to sale of stock in irrigation company, see the title STOCK AND STOCKHOLDERS, ante, p. 201. As to conditional verdict for obstructing watercourse, see the title VERDICT, ante, p. 917. As to water works and water companies, see the title WATER COMPANIES AND WATERWORKS, ante, p. 985.

I. Surface Waters.

A. Right to Use Surface Water.—The doctrine of the common law is that the lower landowner owes no duty to the upper landowner, that each may appropriate all the surface water that falls upon his own premises.¹

B. Obstruction and Diversion—1. COMMON-LAW RULE.—The doctrine of the common law is, that there exists no natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow, and the pro-

1. **Right to use surface water.**—Walker v. New Mexico, etc., R. Co., 165 U. S. 593, 602, 41 L. Ed. 837.

prietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon, or off on to, or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion.² This rule is not changed by the fact that a railroad corporation raised an embankment for the purpose of a railroad track, nor by the fact that a culvert could have been made under the embankment sufficient to afford an outlet for all such surface water.³

2. **CIVIL-LAW RULE.**—The doctrine of the civil law is that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor.⁴

3. **RULE OF DECISION IN FEDERAL COURTS.**—The federal courts follow the decisions of the local state courts as to whether the civil or common law governs the rights of the parties.⁵

II. Subsurface and Percolating Waters.

A. Subsurface Waters.—The presence of subsurface water under the bed of a river, even though in places of considerable amount and running in the same direction, is something very different from an independent subsurface river flowing continuously from one state line through another state. It is not properly denominated a second and subsurface stream. It is rather to be regarded as merely the accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock.⁶

B. Percolating Waters—1. **INTERCEPTING WATERS.**—The English doctrine is that the owner of land may dig therein and apply all that is there found to his own purposes at his free will and pleasure; and if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action. This is sound doctrine in the ordinary case of a question between adjoining owners of land. But in a case where the injury complained of is inflicted by the construction of a public work under authority of a statute, over land upon which the public authority has acquired a right of way only, and where the statute itself provides a remedy for such injury, the law is otherwise.⁷

2. **Surface water—Common-law rule.**—*Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 604, 41 L. Ed. 837.

Particular states in which common law or civil law is in force.—The doctrine of the common law with respect to the obstruction and flow of mere surface water is not only in force in England, but in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont and Wisconsin. The rule of the civil law seems to be in force in Pennsylvania, Iowa, Illinois, California, Louisiana, and is referred to with approval in Ohio. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 603, 41 L. Ed. 837.

3. **Railroad embankment obstructing surface water.**—*Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 602, 41 L. Ed. 837.

The obstruction by a railroad embankment of the ordinary ditches and passageways which surface water will cut in a generally level district in its effort to reach some flowing stream, is not actionable at common law. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 602, 41 L. Ed. 837.

4. **Civil law rule as to surface waters.**—*Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 603, 41 L. Ed. 837.

5. **Rule of decision in federal courts.**—*Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 604, 41 L. Ed. 837.

6. **Subsurface waters.**—*Kansas v. Colorado*, 206 U. S. 46, 114, 51 L. Ed. 956.

7. **Percolating waters.**—*United States v. Alexander*, 148 U. S. 186, 192, 37 L. Ed. 415.

Construction of aqueduct causing well to become dry.—Under the act of con-

2. POLLUTION.—To pollute or foul the water of a well is an actionable injury.⁸

III. Watercourses.

A. In General.—By the common law, all waters are divided into public waters and private waters. In the former the proprietorship is in the sovereign; in the latter, in the individual proprietor.⁹

B. Ownership of Bed of Stream.—As to general principles relative to ownership of bed of streams and the rule in various states, see the title *NAVIGABLE WATERS*, vol. 8, pp. 828, 838.

C. Right to Use Water.—1. *IN GENERAL.*—Each riparian owner on the same stream has an equality of right to the use of the water, as it naturally flows, in quality, and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes.¹⁰ The riparian owner has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere* in the language of the law.¹¹ The question as to what is a just and reasonable use is often a difficult question. But each case depends upon its own particular circumstances, giving due consideration to the size of the stream. It is largely a question of degree.¹² But a state may change this common-law rule as to every stream within its dominions and permit the appropriation of the flowing waters for such purposes as it deems

gress of July 15, 1882, to increase the water supply of the city of Washington (22 Stat. 168, c. 294) allowing damages for property damaged as well as taken, where a tunnel was constructed which caused plaintiff's well to become dry, it was held the owners of the property suffered a direct injury within the terms of the statute and were entitled to compensation therefore. *United States v. Alexander*, 148 U. S. 186, 37 L. Ed. 415.

8. **Pollution of well.**—*United States v. Alexander*, 148 U. S. 186, 192, 37 L. Ed. 415.

9. **Waters divided into public and private waters.**—*Hardin v. Jordan*, 140 U. S. 371, 395, 35 L. Ed. 428.

10. **Right to use water.**—*Atchison v. Peterson*, 20 Wall. 507, 511, 22 L. Ed. 414.

Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. *United States v. Rio Grande, etc.*, *Irrigation Co.*, 174 U. S. 690, 702, 43 L. Ed. 1136; *Howard v. Ingersoll*, 13 How. 381, 426, 14 L. Ed. 189.

Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar a riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to

others. *Howard v. Ingersoll*, 13 How. 381, 426, 14 L. Ed. 189.

The right to the use of the running water is *publici juris*, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 23, 28 L. Ed. 889; *Howard v. Ingersoll*, 13 How. 381, 426, 14 L. Ed. 189; *Kansas v. Colorado*, 206 U. S. 46, 103, 51 L. Ed. 956.

11. **Riparian owner has no title in the water.**—*United States v. Rio Grande, etc.*, *Irrigation Co.*, 174 U. S. 690, 702, 43 L. Ed. 1136; *Howard v. Ingersoll*, 13 How. 381, 426, 14 L. Ed. 189.

12. **Depends upon size of watercourse.**—What is a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agriculture or for manufacturing purposes, would cause no sensible or practicable diminution of the benefit, to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms, would be of great and manifest injury to those below, who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case and not in the former. It is, therefore, to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes. *Kansas v.*

wise,¹³ yet two limitations must be recognized: First, that in the absence of specific authority from congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.¹⁴

2. **DOMESTIC USE.**—The general rule is that every riparian proprietor has a right to a reasonable use of the water for his own benefit, for domestic use, and for manufacturing and agricultural purposes.¹⁵

3. **AGRICULTURAL PURPOSES.**—The riparian proprietor is also entitled to a reasonable use of the water for agricultural purposes.¹⁶

4. **MANUFACTURING PURPOSES.**—Every riparian proprietor is entitled to a reasonable use of the waters for manufacturing purposes,¹⁷ such is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills.¹⁸

5. **MINING.**—See the title **MINES AND MINERALS**, vol. 8, p. 364.

6. **IRRIGATION.**—See post, "Irrigation," IV.

D. Obstruction and Diversion.—1. **IN GENERAL.**—The unquestioned rule of the common law is that every riparian owner is entitled to the continued natural flow of the stream,¹⁹ as a natural incident to, or one of the elements of his estate, and it cannot be lawfully diverted against his consent,²⁰ so that it will cease to be a running stream, or used unreasonably in its passage, and thereby deprive a lower proprietor of a quality of his property deemed in law incidental and beneficial.²¹ The riparian owner cannot give the stream another

Colorado, 206 U. S. 46, 103, 51 L. Ed. 956.

13. **Right of state to change common-law rules.**—United States *v.* Rio Grande, etc., Irrigation Co., 174 U. S. 690, 702, 43 L. Ed. 1136.

14. **Limitations upon right of state to change common-law rules.**—United States *v.* Rio Grande, etc., Irrigation Co., 174 U. S. 690, 703, 43 L. Ed. 1136.

15. **Domestic use.**—Kansas *v.* Colorado, 206 U. S. 46, 103, 51 L. Ed. 956; Howard *v.* Ingersoll, 13 How. 381, 426, 14 L. Ed. 189; Atchison *v.* Peterson, 20 Wall. 507, 511, 22 L. Ed. 414.

Right of city to use for municipal needs.—The right of the city of Los Angeles to take from the Los Angeles River all of the waters of the river to the extent of its reasonable domestic and municipal needs was based on the Spanish and Mexican law, and not on the charters of the city of Los Angeles. Hooker *v.* Los Angeles, 188 U. S. 314, 319, 47 L. Ed. 487.

16. **Agricultural purposes.**—Kansas *v.* Colorado, 206 U. S. 46, 103, 51 L. Ed. 956; Howard *v.* Ingersoll, 13 How. 381, 426, 14 L. Ed. 189; Atchison *v.* Peterson, 20 Wall. 507, 511, 22 L. Ed. 414.

17. **Manufacturing purposes.**—Kansas *v.* Colorado, 206 U. S. 46, 103, 51 L. Ed. 956; Howard *v.* Ingersoll, 13 How. 381, 426, 14 L. Ed. 189; Atchison *v.* Peterson, 20 Wall. 507, 511, 22 L. Ed. 414.

18. **Water may be used for power to drive mills.**—Head *v.* Amoskeag Mfg. Co.,

113 U. S. 9, 23, 28 L. Ed. 889. See ante, "In General," III, C, 1.

19. **Obstruction and diversion.**—United States *v.* Rio Grande, etc., Irrigation Co., 174 U. S. 690, 702, 43 L. Ed. 1136.

20. **Stream cannot be diverted without riparian owner's consent.**—Sturr *v.* Beck, 133 U. S. 541, 547, 33 L. Ed. 761.

According to the common law there could not be any such diversion or use of the water by one owner as would work material detriment to any other owner below him, nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. Atchison *v.* Peterson, 20 Wall. 507, 511, 22 L. Ed. 414.

21. **Water cannot be used unreasonably.**—Kansas *v.* Colorado, 206 U. S. 46, 104, 51 L. Ed. 956.

This rule necessarily flows from the principle that the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors. Each is bound so to use his common right, as not essentially to prevent or interfere with an equally beneficial enjoyment of the common right, by all the proprietors. Kansas *v.* Colorado, 206 U. S. 46, 104, 51 L. Ed. 956.

Overflowing meadow.—Where case was brought for obstructing a watercourse, by which the plaintiff's meadow was watered, and plaintiff proved his right to the course, and his counsel executed and filed a writing, by which they bound him to release any damages that the jury

direction; he must return it to its ordinary channel when it leaves his estate.²² But this right to the use of flowing water is not an absolute and exclusive right to all the water flowing past the land, so that any obstruction would give a cause of action; but it is a right to the flow and enjoyment of the water, subject to a similar right in all the proprietors, to the reasonable enjoyment of the same gift of Providence. It is, therefore, only for an obstruction and deprivation of this common benefit, or for an unreasonable and unauthorized use of it, that an action will lie.²³ If water be dammed up by one riparian proprietor and it spreads over the lands of others, they can at common law bring successive actions against him for the injury so done them, or even have the dam abated.²⁴

2. **REMEDIES.**—A suit for an injunction against the diversion of water, in nature and substance, belongs to the equity side of the court.²⁵

IV. Irrigation.

A. In General.—The use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements

might give, if defendant should execute a deed, securing to plaintiff the enjoyment of the water, the court advised the jury, on this condition, to find the full value of the meadow in damages. Anonymous, 4 Dall. 147, 1 L. Ed. 778.

22. Must return water to ordinary channel.—United States v. Rio Grande, etc., Irrigation Co., 174 U. S. 690, 702, 43 L. Ed. 1136; Howard v. Ingersoll, 13 How. 381, 426, 14 L. Ed. 189.

Every one has a right to use the water passing through his land, as he pleases, provided, he does not injure his neighbor's mill; and if, after using the water, he returns it to its ancient channel. Beissell v. Sholl, 4 Dall. 211, 1 L. Ed. 804.

23. Action does not lie for every obstruction or diversion.—Kansas v. Colorado, 206 U. S. 46, 104, 51 L. Ed. 956.

24. Successive actions at common law for obstruction by dam.—Head v. Amoskeag Mfg. Co., 113 U. S. 9, 23, 28 L. Ed. 889.

Purpose of mill acts.—Before the mill acts, therefore, it was often impossible for a riparian proprietor to use the water power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water power of the stream, provided he does not interfere with an earlier exercise by another of a like right or with any right of the public; and to substitute, for the common-law remedies of repeated actions for damages and prostration of the dam, a new form of remedy, by which any one whose land is flowed can have assessed, once for all, either in a gross sum or by way of annual damages, adequate compensation for the injury. Head v. Amoskeag Mfg. Co., 113 U. S. 9, 23, 28 L. Ed. 889.

Riparian owner owning land on one side only.—But if a riparian proprietor owns the land on one side only of a

stream, his right to the land and to the use of the water, whether used as power to operate mills and machinery or merely as a fishery, extends only to the middle thread of the stream, as at common law, and is subject to the same conditions and regulations as when the ownership included the whole soil over which the water of the stream flows. Holyoke Co. v. Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

Riparian proprietors, if they own both banks of the watercourse and the whole soil over which the water of the stream flows, may erect dams extending from bank to bank to create power to operate mills and machinery, subject to the implied condition that they shall so use their own right as not to injure the concomitant right of another riparian owner, and to such regulations as the legislature of the state shall prescribe. Holyoke Co. v. Lyman, 15 Wall. 500, 506, 21 L. Ed. 133.

25. Remedies.—Hornbuckle v. Stafford, 111 U. S. 389, 392, 28 L. Ed. 468, citing Basey v. Gallagher, 20 Wall. 670, 22 L. Ed. 452. See, generally, the title INJUNCTIONS, vol. 6, p. 1022.

Laches as precluding "injunction."—Where an action was brought by a riparian owner against a city for the diversion and appropriation of water, for the construction of a dam, and the city was engaged in this work for two years and had nearly completed the dam, during which time negotiations were conducted between the riparian owners and the city as to the amount of compensation for the injuries the riparian owners would sustain, and an injunction was asked for to restrain the completion of the dam, the court entered a decree, providing for the ascertainment of damages which the plaintiffs would suffer for the construction of the dam and appropriation of the water, and fixed a time within which the city was required to pay such

have been subserved, is one of the common-law rights of a riparian proprietor.²⁶

B. Extent of Right.—The use of water by a riparian proprietor for irrigation purposes must be reasonable under all the circumstances, and the right must be exercised with due regard to the equal right of every other riparian owner along the course of the stream.²⁷ Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the watercourse, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably.²⁸ But a diminution of the flow of water over riparian land, caused by its use for irrigation purposes by upper riparian proprietors, occasions no injury for which damages may be allowed, unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy.²⁹ And if one state recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state. And this is especially true when the waters are, except from domestic purposes, practically useful only for purposes of irrigation.³⁰

C. How Much Land Each Proprietor May Irrigate.—“In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate, the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land.”³¹

D. Doctrine of Prior Appropriation—1. **IN GENERAL.**—In the Pacific States and territories the rules applicable to riparian owners have been found to be ill-suited to the conditions existing in these western states, and the right to water by prior appropriation for the purpose of mining, irrigation and other beneficial purposes has sprung up.³² This right, though existing without any

sum, and provided that upon the failure to make such payment an injunction should issue; and on the other hand that upon payment a decree should be entered in favor of the city. *New York City v. Pine*, 185 U. S. 93, 108, 46 L. Ed. 820. See, generally, the title *LACHES*, vol. 7, p. 790.

Right of state court to enjoin use of surplus water of United States canal.—The courts of a state may legitimately take cognizance of controversies between the riparian owners, concerning the use and apportionment of the waters flowing in the nonnavigable parts of the stream; they cannot interfere by mandatory injunction or otherwise with the control of the surplus water power incidentally created by a dam and canal owned and operated by the United States on Fox River. *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 173 U. S. 179, 190, 43 L. Ed. 658.

26. Right to irrigate a common-law right.—*Kansas v. Colorado*, 206 U. S. 46, 102, 51 L. Ed. 956.

It is conceded as a necessity of agricultural pursuits to dig ditches and turn out the water of some stream to irrigate the same. *Basey v. Gallagher*, 20 Wall. 670, 685, 22 L. Ed. 452.

27. Use must be reasonable.—*Kansas v. Colorado*, 206 U. S. 46, 102, 51 L. Ed. 956.

28. Whole stream cannot be diverted.—*Kansas v. Colorado*, 206 U. S. 46, 104, 51 L. Ed. 956.

29. Kansas v. Colorado, 206 U. S. 46, 103, 51 L. Ed. 956.

30. Rule as between states as to irrigation of land.—*Kansas v. Colorado*, 206 U. S. 46, 104, 51 L. Ed. 956.

31. How much land each proprietor may irrigate.—*Kansas v. Colorado*, 206 U. S. 46, 103, 51 L. Ed. 956.

32. Doctrine of prior appropriation.—*Clark v. Nash*, 198 U. S. 361, 370, 49 L. Ed. 1085; *Atchison v. Peterson*, 20 Wall. 507, 514, 22 L. Ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 683, 22 L. Ed. 452.

For further treatment, see the title *MINES AND MINERALS*, vol. 8, pp. 401, 402.

In the Pacific States a right to running waters on the public lands of the United States for purposes of irrigation may be acquired by prior appropriation, as against parties not having the title of the government. The right, exercised within reasonable limits, having reference to the condition of the country, and the necessities of the community, is entitled to

statutory provision relative thereto, has been recognized by statutes and constitutional provisions in most of these states.³³ Congress has likewise recognized this right on the public lands of the United States.³⁴

2. **RESTRICTIONS UPON RIGHTS.**—The right to water by prior appropriation is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; it is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it con-

protection. This rule obtains in Montana, and is sanctioned by its legislation. *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452.

Reason for change of riparian rules.—The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the west that they are in the states of the east. These rights have been altered by many of the western states, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the east, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. The federal supreme court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated. *Clark v. Nash*, 198 U. S. 361, 370, 49 L. Ed. 1085. See, also, *United States v. Rio Grande, etc.*, *Irrigation Co.*, 174 U. S. 690, 704, 43 L. Ed. 1136.

Appropriation for "any beneficial purpose."—Throughout the Pacific States the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour mills and saw mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. *Basey v. Gallagher*, 20 Wall. 670, 683, 22 L. Ed. 452.

33. **Right existed without statutory authority.**—*Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Clark v. Nash*, 198 U. S. 361, 370, 49 L. Ed. 1085; *Sturr v. Beck*, 133 U. S. 541, 550, 33 L. Ed. 761.

Originated in custom.—Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the western states an adoption or recognition of the common law, it was early developed in their history that the mining industry

in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those states, by custom and by state legislation, a different rule—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. *United States v. Rio Grande, etc.*, *Irrigation Co.*, 174 U. S. 690, 704, 43 L. Ed. 1136.

34. **Congress recognized doctrine.**—**Rev. Stat., § 2339.**—*Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240; *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790; *Sturr v. Beck*, 133 U. S. 541, 550, 33 L. Ed. 761.

Dakota.—It is a local custom in Dakota that one has the right to divert, appropriate and use the waters of flowing streams for purposes of irrigation when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto. *Sturr v. Beck*, 133 U. S. 541, 552, 33 L. Ed. 761.

Acts of congress recognize legislation of territory as well as state.—By the act of July 26, 1866, c. 262, § 9, 14 Stat. 253; *Rev. Stat.*, § 2339, congress recognized, as respects the public domain, "so far as the United States are concerned, the validity of the local customs, law and decisions of courts in respect to the appropriation of water." By the act of March 3, 1877, c. 107, 19 Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." That the purpose of congress was to recognize as well the legislation of a territory as of a state with respect to the regulation of the use

fer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.³⁵

3. **WHAT CONSTITUTES PRIOR APPROPRIATION.**—Lawful occupancy of land, across which a stream flows, under settlement and entry, is a prior appropriation which cannot be defeated by the location of a water right on public land between the time of entry of homestead and the issuance of the patent.³⁶ But water must be applied to some beneficial use to constitute an appropriation.³⁷ One who enters public land and lays a pipe line there, under a claim of ownership, is a prior appropriator as against a subsequent bona fide purchaser of a forfeited land grant.³⁸

4. **WHAT WATERS MAY BE APPROPRIATED.**—Percolating waters cozing through the soil in an undefined and unknown channel are not the subject of appropriation under § 1, Rev. Stat., 1887, of Arizona.³⁹

E. Irrigation Corporations—1. **IN GENERAL.**—Irrigation corporations generally are recognized in the legislation of congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of ir-

of public waters is evidenced by the act of March 3, 1891, c. 561, 26 Stat. 1095. *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 553, 47 L. Ed. 588.

35. **Restriction upon right.**—*Atchison v. Peterson*, 20 Wall. 507, 514, 22 L. Ed. 414.

For further treatment, see the title **MINES AND MINERALS**, vol. 8, pp. 402, 403.

36. **Occupancy and settlement as prior appropriation.**—*Sturr v. Beck*, 133 U. S. 541, 552, 33 L. Ed. 761.

One who makes a homestead entry across which a watercourse flows, obtains a vested right to have the creek flow in its natural channel by virtue of his homestead entry and upon the issuance of his patent it takes effect as against a party locating water rights after the entry but before issuance of patent by relation as of the date of entry, and cuts off intervening rights. *Sturr v. Beck*, 133 U. S. 541, 547, 33 L. Ed. 761.

37. **Water must be applied to public use to constitute appropriation.**—*Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 18, 41 L. Ed. 327.

No right or title to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon. *Bear Lake, etc., Irrigation Co. v. Garland*, 164 U. S. 1, 18, 41 L. Ed. 327.

38. **Prior appropriation against purchase of forfeited land grant.**—One who enters the land and lays a pipe line there, under a claim of ownership of the water right, is protected by § 9 of the act of July 26, 1866, 14 Stat. 251, which declares that, "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and

the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed," as against a subsequent bona fide purchaser of a forfeited land grant whose claim to the land rests upon the act of congress of March 3, 1887, 24 Stat. 556, entitled "An act to provide for the adjustment of land grants made by congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes"—the main purpose of which act was to relieve bona fide purchasers from railway companies of forfeited lands, by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. *San Jose Land, etc., Co. v. San Jose Ranch Co.*, 189 U. S. 177, 183, 47 L. Ed. 765.

As to when injunction will issue by prior appropriator to restrain interference with rights, see the title **MINES AND MINERALS**, vol. 8, p. 403, note 49.

39. **Arizona—Percolating waters cannot be appropriated.**—Section 1, of the Arizona Revised Statutes of 1887, providing, "All rivers, creeks and streams of running water in the territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided," and also providing that "all the inhabitants of this territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek or stream of running water," does not apply to "percolating water oozing through the soil beneath the surface in an undefined and unknown channel." Of course this excludes the idea of a "river, creek or stream of running water." *Howard v. Perrin*, 200 U. S. 71, 75, 50 L. Ed. 374.

rigable land.⁴⁰ A territorial act providing for the formation of irrigation companies and regulating the rights thereof is not invalid, because it assumed to dispose of the public waters, the property not of the territory or of private individuals, but of the United States, without its consent.⁴¹

2. PRIVATE CORPORATIONS.—The act of congress of 1877 does not forbid a territorial legislature from empowering a private corporation to become the intermediary for furnishing water to irrigate the land of third parties.⁴²

3. IRRIGATION DISTRICTS—*a. In General.*—In California, irrigation districts are public municipal corporations.⁴³ To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation.⁴⁴ An act providing for the formation of irrigation districts by a board of supervisors is not open to the objection that it delegates to the board of supervisors the incorporation of public corporations.⁴⁵

40. *Irrigation corporations.*—*Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 556, 47 L. Ed. 588.

41. *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 552, 47 L. Ed. 588.

42. *Private corporation may be medium of furnishing irrigation.*—The proviso in the desert land act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights, is not an expression of the will of congress that all public waters within its control or the control of a legislative body of its creation, must be directly appropriated by the owners of land upon which a beneficial use of water is to be made, and that consequently a territorial legislature cannot lawfully empower a corporation, to become an intermediary for furnishing water to irrigate the lands of third parties. As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public, *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 163, 41 L. Ed. 369, and appellee is therefore a public agency, whose right to divert water and whose continued existence is dependent upon the application by it within a reasonable time of such diverted water to a beneficial use. *Gutierrez v. Albuquerque Land, etc., Co.*, 188 U. S. 545, 555, 47 L. Ed. 588.

43. *Irrigation districts public municipal corporations.*—*Tulare Irrigation District v. Shepard*, 185 U. S. 1, 13, 46 L. Ed. 773; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 174, 41 L. Ed. 369; *Stanislaus County v. San Joaquin, etc., Irrigation Co.*, 192 U. S. 201, 210, 48 L. Ed. 406.

As to necessity for hearing where legislature has not decided the questions of benefits, see the title SPECIAL ASSESSMENTS, ante, p. 9, note 37.

44. *Irrigation is a public purpose.*—It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 161, 41 L. Ed. 369.

45. *Acts providing for formation of district by supervisors.*—An act providing for the formation of irrigation district by the board of supervisors is not open to the objection "that it is delegating to others a legislative right, that of the incorporating of public corporations, inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that any act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law. We do not think there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the pow-

b. *What Land May Be Included within District.*—Acts providing for the formation of irrigation districts are not invalid because not restricting same to arid lands,⁴⁶ as the legislature has general power over the subject of providing for the irrigation of certain kinds of lands.⁴⁷ But though the questions of limitation as to what lands are subject to irrigation are somewhat legislative in their nature, they are subject to the scrutiny and judgment of the courts to the extent that it must appear that the use intended is a public use, as that expression has been defined relatively to irrigation legislation.⁴⁸ But land which can properly be included in an irrigation district must be susceptible of one mode of irrigation from a common source and by the same system of works and it must be of such a character that it will be benefited by irrigation by the system to be adopted.⁴⁹

c. *Validity of Special Assessments.*—An act providing for assessments for the formation of irrigation districts is not unconstitutional because the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement.⁵⁰ Likewise the adoption of an ad valorem method of assessing land is not a violation of the federal constitution.⁵¹

d. *Officers—Directors.*—The directors of an irrigation district occupy no position antagonistic to the district. They are the agents and the district is the principal.⁵²

4. *RATES.*—Under the California statute of 1885, which gives the regulation of rates of irrigation-companies to the board of supervisors, until the power is

ers mentioned and described in the act." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 178, 41 L. Ed. 369.

46. *District may include other than arid land.*—*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 166, 41 L. Ed. 369.

California—All lands may be included which may be benefited.—The California irrigation law of March 7, 1887, is construed to mean that the board may include in the boundaries of the district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 165, 41 L. Ed. 369.

As to inclusion of land in district not capable of being benefited by irrigation, see the title *EMINENT DOMAIN*, vol. 5, p. 766, note 77.

Furnishing irrigation to land other than arid land may still be public improvement.—If the land which can, to a certain extent, be beneficially used without artificial irrigation, may yet be so much improved by it that it will be thereby and for its original use substantially benefited, and, in addition to the former use, though not in exclusion of it, if it can then be put to other and more remunerative uses, the furnishing of artificial irrigation to that kind of land is, in

a legal sense, a public improvement, and the use of the water a public use. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 167, 41 L. Ed. 369.

47. *Legislature has control of irrigation.*—*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 166, 41 L. Ed. 369.

48. *Limitations upon power of state.*—*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 166, 41 L. Ed. 369.

49. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 167, 41 L. Ed. 369.

50. *Validity of special assessments.*—*Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 176, 41 L. Ed. 369.

51. *Validity of ad valorem method of assessing lands.*—The adoption of an ad valorem method of assessing the lands is not to be held a violation of the federal constitution. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which the federal supreme court ought to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 176, 41 L. Ed. 369.

52. *Directors of irrigation district.*—*Tregea v. Modesto Irrigation District*, 164 U. S. 179, 186, 41 L. Ed. 395.

exercised the right to fix the rates rests with the irrigation company.⁵³ It is not for the court to determine the reasonableness of rates established by an irrigation company. If unreasonable, and the consumers are for that reason dissatisfied therewith, resort must first be had to the body designated by the law to fix proper rates.⁵⁴ But if rates established by the proper authorities are unreasonable they can only be annulled. In no case will the court fix them.⁵⁵

WATERS OF THE UNITED STATES.—As to navigable waters of the United States as used in contradistinction to navigable waters of the states, see the title **NAVIGABLE WATERS**, vol. 8, p. 809.

WAYS.—See the title **PRIVATE WAYS**, vol. 9, p. 733.

WEAPONS.

CROSS REFERENCES.

As to assault upon high seas with dangerous weapon as an offense against the United States, see the title **ASSAULT AND BATTERY**, vol. 2, p. 547. As to right to keep and bear arms, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 489. As to killing by use of weapon in the protection of property as constituting manslaughter, see the title **HOMICIDE**, vol. 6, p. 701.

Definition.—A deadly weapon is a weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes as a deadly weapon.¹

WEARING APPAREL.—See the titles **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 6, p. 866; **REVENUE LAWS**, vol. 10, pp. 892, 898.

WEBBING.—See the title **REVENUE LAWS**, vol. 10, p. 893. See, also, **UNION ELASTIC WEBBING**, ante, p. 746.

WEEK.—"A week is a definite period of time, commencing on Sunday and ending on Saturday."²

53. Rates—California.—*Osborne v. San Diego Land, etc., Co.*, 178 U. S. 22, 37, 44 L. Ed. 961.

54. Court does not determine reasonableness of rates.—*Osborne v. San Diego Land, etc., Co.*, 178 U. S. 22, 40, 44 L. Ed. 961.

55. Court will annul only, not fix rates.—*Osborne v. San Diego Land, etc., Co.*, 178 U. S. 22, 40, 44 L. Ed. 961. See the title **WATER COMPANIES AND WATERWORKS**, ante, p. 985.

1. Definition.—*Acers v. United States*, 164 U. S. 388, 391, 41 L. Ed. 481.

Example.—When one uses a stone of such size and strikes a blow on the skull so severe as to fracture it, a jury ought to find that the stone was a deadly weapon.

Acers v. United States, 164 U. S. 388, 391, 41 L. Ed. 481.

2. Week.—*Ronkendorff v. Taylor*, 4 Pet. 349, 361, 7 L. Ed. 882; *Leach v. Burr*, 188 U. S. 510, 512, 47 L. Ed. 567.

Once a week.—As to publication of advertisements or notices "once a week," for designated periods of time, see **FOR**, vol. 6, p. 302; **ONCE**, vol. 8, p. 1001.

Publication of notice "twice a week."—A statute requiring notice by publication at least "twice a week" is sufficiently complied with when it is published twice within seven days. *Leach v. Burr*, 188 U. S. 510, 47 L. Ed. 567. See the title **SUMMONS AND PROCESS**, ante, p. 299.

WEIGHTS AND MEASURES.

CROSS REFERENCES.

As to measurement of distances, see the title **BOUNDARIES**, vol. 3, p. 466. As to the power of congress to regulate the weight and value of gold and silver coinage, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 304. As to Louisiana statute providing for inspection and measurement of coal and coke boats, being in conflict with the commercial power of congress, see the title **INSPECTION LAWS**, vol. 7, p. 18. As to power of congress to prescribe the weight of mail matter and postage charges, see the title **POSTAL LAWS**, vol. 9, p. 554. As to estimate of Mexican league and vara by use in California, see the title **PUBLIC LANDS**, vol. 10, p. 295.

An indictment will lie against a public officer who falsely weighs commodities whereby injury is done the public.¹

WELL.—As to a condition in a cashier's bond to "well and truly execute the duties of the office," see the title **BANKS AND BANKING**, vol. 3, p. 99. See, also, note 2.

WEST END.—See note 3.

WEST POINT.—See the title **ARMY AND NAVY**, vol. 2, p. 494.

WEST VIRGINIA.—See the titles **BOUNDARIES**, vol. 3, p. 499; **JUDICIAL NOTICE**, vol. 7, p. 695.

1. *Respublica v. Powell*, 1 Dall. 47, 1 L. Ed. 31.

2. **A well of water** is property recognized by the law, any injury to which is redressible by law. To pollute or foul the water of a **well** is an actionable injury. *United States v. Alexander*, 148 U. S. 186, 191, 37 L. Ed. 415.

3. **Call for west end of lot in a survey.**—Where an advertisement of sale of certain property described it as "be-

ginning at the northeast corner of said square and running thence south 44 feet; thence west to the **west end** of the lot; thence, in a northerly direction with the west line thereof, to the north line of said lot; thence with said north line to the place of beginning;" the court said that it was inclined to think that by "**west end** of the lot" was meant "west line of the lot." *Mackall v. Richards*, 112 U. S. 369, 374, 28 L. Ed. 737.

WHARVES AND WHARFINGERS.

BY CHAS. W. FOURL.

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CROSS REFERENCES.

See the titles ADMIRALTY, vol. 1, p. 119; APPEAL AND ERROR, vol. 1, p. 333, vol. 2, p. 1; BRIDGES, vol. 3, p. 516; COLLISION, vol. 3, p. 870; CONSTITUTIONAL LAW, vol. 4, p. 1; DEDICATION, vol. 5, p. 235; DEEDS, vol. 5, p. 245; EMINENT DOMAIN, vol. 5, p. 746; ESTOPPEL, vol. 5, p. 913; EXECUTIONS, vol. 6, p. 84; INTERSTATE AND FOREIGN COMMERCE, vol. 7, p. 269; MUNICIPAL CORPORATIONS, vol. 8, p. 546; STREETS AND HIGHWAYS, ante, p. 259; TRESPASS, ante, p. 649.

As to claims for wharfage being within admiralty jurisdiction, see the title ADMIRALTY, vol. 1, p. 140. As to dedication of quays and wharves, see the title DEDICATION, vol. 5, p. 237. As to ship causing destruction of wharf by fire, see the title ADMIRALTY, vol. 1, p. 145. As to lessee of wharf being estopped to deny forfeiture of lease, see the title ESTOPPEL, vol. 5, p. 978, note 72. As to distinction between wharfage and tonnage duties, see the title INTERSTATE AND FOREIGN COMMERCE, vol. 7, pp. 430, 431. As to regulation of wharfage

charges, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 429, 433. As to wharfage charges based on tonnage of vessel being proper, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 432. As to state passing law forbidding vessels to land under penalty, at any place other than public wharf, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 429. As to municipal wharf held for public uses being subject to execution for debts, see the title *MUNICIPAL CORPORATIONS*, vol. 8, p. 600, note 70. As to right to construct and maintain wharves on navigable waters, see the title *NAVIGABLE WATERS*, vol. 8, pp. 839, 844. As to indictment for erecting wharf on public property, see the title *NUISANCES*, vol. 8, p. 942. As to wharf being nuisance, see the title *NUISANCES*, vol. 8, p. 936. As to municipality declaring wharf a nuisance, see the title *NUISANCES*, vol. 8, p. 946.

I. Necessity and Purposes of Wharves.

Piers or wharves are a necessary incident to every well-regulated port, without which commerce and navigation would be subjected to great inconvenience, and be exposed to vexatious delay and constant peril.¹

II. Kinds of Wharves.

A. In General.—Wharves may be either public or private, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage.²

B. Public Wharves.—The fact that a wharf was erected by a railroad under authority from the city, at the foot of a public street of the city, does not make the wharf public or affect the right of the railroad to select its own vessels to continue from that wharf the transportation of its goods.³

C. Private Wharves.—A wharf may be a private one, and its owner may permit those only to have access to it that it may choose. A private wharf may exist on the shores of a navigable river or lake, or in a harbor of a city from which access is obtained directly to the sea.⁴

D. What Determines Whether Wharf Is Public or Private.—Whether wharves are public or private depends upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.⁵

1. Necessity and purpose of wharves.—*Ex parte Easton*, 95 U. S. 68, 73, 24 L. Ed. 373.

Indispensable to all forms of watercraft.—Such accommodations are indispensable for ships and vessels and watercraft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. Erections of the kind are constructed to enable ships, vessels, and all sorts of watercraft to lie in port in safety, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers. *Ex parte Easton*, 95 U. S. 68, 73, 24 L. Ed. 373.

2. Kinds of wharves.—*Dutton v. Strong*, 1 Black 23, 32, 17 L. Ed. 29.

3. Railroad erecting private wharf at foot of public street.—*Louisville, etc., R. Co. v. West Coast, etc., Co.*, 198 U. S. 483, 494, 49 L. Ed. 1135.

4. Private wharf.—*Louisville, etc., R.*

Co. v. West Coast, etc., Co., 198 U. S. 483, 498, 49 L. Ed. 1135; *Dutton v. Strong*, 1 Black 23, 32, 17 L. Ed. 29.

Because access open, wharf not public.—From the very nature of wharf property, the access must be kept open for convenience of the owner and his customers; but the property does not thereby become public instead of private. No length of time, during which property is so used, can deprive an owner of his title, nor give to the community a right to enjoin or abate the owner's fences over it as a nuisance, on the ground that they have acquired a legal easement in it. *Irwin v. Dixon*, 9 How. 10, 33, 13 L. Ed. 25.

5. Considerations determining whether wharf is public or private.—*Dutton v. Strong*, 1 Black 23, 33, 17 L. Ed. 29, cited in *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 686, 27 L. Ed. 1070.

III. Erection of Wharves.

A. Right of Riparian Owner to Erect.—See the title *NAVIGABLE WATERS*, vol. 8, pp. 840, 845.

B. Right of Municipality to Erect.—In all incorporated towns or cities located on navigable waters, there is in their charters, or in some general statute of the state, either express or implied power for the establishment and regulation of wharves. This may be done by the legislature of the state or by authority expressly or impliedly delegated to the local municipal government. In all such cases there is exercised a control over the location, erection, and use of such wharves or landings, which will prevent their being made obstructions to navigation and standing menaces of danger.⁶

C. Right of State to Erect.—See the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 429.

IV. Regulation of Wharves.

A. By Congress.—As to regulation of wharves by congress, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 337.

B. By State.—As to power of state to regulate wharves, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, p. 429.

V. Deeds or Leases of Wharves.

A grant of the right "of using a wharf built" not attached as an incident to any estate, passing by a grant in gross, is necessarily limited in its duration by the existence of the structure with which it is connected.⁷ It does not confer any general right of wharfage, or any right to the land covered by the wharf.⁸

VI. Wharfage.

A. Definition.—Wharfage is a charge or rent for the temporary use of a wharf.⁹

B. Right to Collect Wharfage.—Compensation for wharfage may be claimed upon an express or an implied contract, according to the circumstances. Where a price is agreed upon for the use of the wharf, the contract furnishes the measure of compensation; and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred.¹⁰

6. Right of municipality to erect wharf.—*Atlee v. Packet Co.*, 21 Wall. 389, 393, 22 L. Ed. 619.

Building wharf in street—Compensation of adjacent owners.—The state may authorize a city to widen and improve a street to any extent on the river side, by filling in below high water, and building wharves and levees for the public accommodation without compensating the adjacent owners. *Barney v. Keokuk*, 94 U. S. 324, 339, 24 L. Ed. 224.

Packet depot in street as adjunct to wharf.—A city may authorize the erection of a packet depot on the bank of a river, as it is a necessary adjunct to the steamboat landing, and the use of the wharf and levee for the purposes of navigation where the packet depot does not occupy any portion of the original street. *Barney v. Keokuk*, 94 U. S. 324, 342, 24 L. Ed. 224.

7. Grant of right to use wharf.—*Linthicum v. Ray*, 9 Wall. 241, 243, 19 L. Ed. 657. See post, "Right to Collect Wharfage," VI, B.

8. Grant of "use of wharf built" does not confer right of wharfage.—*Linthicum v. Ray*, 9 Wall. 241, 243, 19 L. Ed. 657. See post, "Right to Collect Wharfage," VI, B.

9. Wharfage—Definition.—*Transportation Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. Ed. 584.

Water craft of all kinds necessarily lie at a wharf when loading and unloading; and Mr. Benedict says, that the pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and that it is the subject of admiralty jurisdiction. *Ex parte Easton*, 95 U. S. 68, 76, 24 L. Ed. 373.

10. Wharfage may be collected on either express or implied contract.—*Ex parte Easton*, 95 U. S. 68, 73, 24 L. Ed. 373. For further treatment, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 429-433.

Character of vessel has no effect on liability for wharfage.—Neither canal boats nor barges ordinarily have sails or steam power, but they usually have tow lines:

C. Regulation of Charges.—See footnote.¹¹

D. Legislative Control.—Whatever powers a municipality rightfully enjoys over the subject of wharfage is derived from the legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually acquired in the course of administration. The sole ground of the right of the city to collect wharfage at all is that it is a reasonable compensation, which it is allowed by law to charge for the actual use of structures provided at its expense for the convenience of vessels engaged in the navigation of the river.¹²

E. Lien for Wharfage.—The contract for wharfage is a maritime contract, for which, if the vessel or water craft is a foreign one, or belongs to a port of a state other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf,¹³ which may be enforced by a proceeding in rem, or by a resort to a libel in personam against the owner of such vessel or water craft.¹⁴

and it clearly cannot make any difference, as to their liability for wharfage, whether they are propelled by steam or sails of their own, or by tugs, or horse or mule power, if it appears that the boat or barge actually occupied a berth at the wharf or slip at the commencement or close of the trip as a resting place, or for the purpose of loading or unloading cargo, or receiving or for landing passengers. *Ex parte Easton*, 95 U. S. 68, 74, 24 L. Ed. 373.

Lease of wharf—War as interfering with collection of wharfage.—A. leased a wharf from a city on the Mississippi before the rebellion for a certain term, the city binding itself for indemnity if his "right to collect wharfage was suspended for any period by the intervention of third parties." Held, that the diminution of trade on the river caused by the rebellion did not suspend his right to collect; and that he had no claim for indemnity under his contract on account of such diminution. *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121.

Quarantine embargo affecting collection of wharfage.—The same lease provided "that in case the right to collect wharfage or rents should be defeated permanently through the instrumentality or with the aid of the mayor and council of the city," the property should revert, held, that the right was not defeated within the meaning of the clause by an ordinance which the complainant had himself caused to be passed; nor by a "tax" which the city had reserved a right to lay, as distinguished from a wharfage charge; nor by quarantine embargo laid with the complainant's consent. *Marshall v. Vicksburg*, 15 Wall. 146, 21 L. Ed. 121.

11. As to power of state to regulate wharfage, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 432, 433. As to wharfage as distinguished from tonnage duties, see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 430, 433. As to

necessity for reasonableness, etc., see the title *INTERSTATE AND FOREIGN COMMERCE*, vol. 7, pp. 429, 433.

12. **Legislative control over wharfage.**—*Railroad Co. v. Ellerman*, 105 U. S. 166, 172, 26 L. Ed. 1015, citing *Cannon v. New Orleans*, 20 Wall. 577, 22 L. Ed. 417.

Grant to railroad as infringement of grant to municipality.—Where the city of New Orleans was authorized by the legislature of the state to construct wharves within the city limits and to collect wharfage therefor, but subsequently the legislature granted to the railroad company the right to enclose and occupy for its purposes and uses a certain portion of the levee, batture and wharf which had been erected thereon, held no right of the state was infringed by granting this privilege to the railroad company. *Railroad Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015. See, generally, the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 6, p. 758.

In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, a municipal corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the state, the agency of the corporation then ceasing. 2 Dillon, *Mun. Corp.*, §§ 445, 446. *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197.

13. **Lien for wharfage.**—*Ex parte Easton*, 95 U. S. 68, 75, 24 L. Ed. 373.

14. **Manner of enforcement of lien.**—

VII. Rights and Liabilities of Wharfingers.

A. Right to Compensation for Damages to Wharf.—See post, "Evidence," VIII, B.

B. Liabilities of Wharfingers—1. FOR DAMAGES TO VESSELS—*a. In General.*—Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and if there is any dangerous obstruction to remove it, or to give due notice of its existence to vessels about to use the berths. At the same time the master is bound to use ordinary care and cannot carelessly run into danger.¹⁵ A wharfinger is not liable for damages for sinking of a vessel by an obstruction in the bottom of the wharf, where the agent of the vessel was acquainted with the danger.¹⁶

b. For Casting Off Vessels.—The owner of a private wharf is not liable for damages for casting off a vessel wrongfully attached to his wharf, where its presence, if allowed to continue, would endanger or destroy the wharf, and even the peril of the vessel imposes no obligation upon the wharf owner to allow the vessel to remain.¹⁷

2. FOR PERSONAL INJURIES—*a. In General.*—The general rule is that when an injury has been sustained by the negligent manner in which a wharf or other work is constructed or protected, the principal is liable for the acts and negligence of the agent in the course of the employment, although he did not authorize or know of the acts complained of. When the actor ceases to be a servant or agent and is, himself, the master, he alone is responsible.¹⁸ But, until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass, cannot be made a trespasser for so passing; although the wharf or platform is no longer used for the purpose of passage.¹⁹

b. Questions of Law and Fact.—The question whether the place where a party whose foot was injured stood on the wharf was reasonably safe is a question to be determined by the jury, depending on common knowledge and observation, and requiring no special training or experience to decide, and upon

Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373.

Claim for wharfage good against world.—A claim for wharfage is good against all the world whether the object of the voyage is lawful or unlawful. The St. Jago de Cuba, 9 Wheat. 409, 418, 6 L. Ed. 122.

15. Wharfinger does not guarantee safety of vessels.—Smith v. Burnett, 173 U. S. 430, 433, 43 L. Ed. 756, citing Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co., 23 How. 209, 16 L. Ed. 433.

16. Panama R. Co. v. Napier Shipping Co., 166 U. S. 280, 288, 41 L. Ed. 1004.

17. Casting off vessel.—Dutton v. Strong, 1 Black 23, 34, 17 L. Ed. 29.

Where a vessel is wrongfully attached to a pier; and it became obvious that the necessary effect of the trespass, if suffered to be continued, would be to endanger and injure, or perhaps destroy the pier, the peril of the vessel imposed no obligations upon the defendants to allow her to remain, and take the hazard that their own property would be sacrificed in the effort to save the property of wrongdoers. On the contrary, they had a clear right to interpose, and disengage

the vessel from the pier to which she had been wrongfully attached, as the only means in their power to relieve their property from the impending danger. They had never consented to incur that danger, and were not in fault on account of the insufficiency of the pier to hold the vessel, because it had not been erected or designed as a mooring place for vessels in rough weather, and it was the fault of the plaintiff or their agent that the vessel was placed in that situation. Dutton v. Strong, 1 Black 23, 34, 17 L. Ed. 29.

License to use private wharf.—Where the master of a vessel attached the vessel to a private wharf without any authority from the owner, express or implied, and he had no business to transact with the wharf owner, and he was not going to the wharf for freight, all pretense of a license fails. Dutton v. Strong, 1 Black 23, 32, 17 L. Ed. 29.

18. Liability for personal injuries.—Railroad Company v. Hanning, 15 Wall. 649, 21 L. Ed. 220. See, generally, the title PRINCIPAL AND AGENT, vol. 9, p. 683.

19. When trespassing on public wharf.

which, therefore, no opinions of expert witnesses is admissible.²⁰

VIII. Actions.

A. In General.—The possession of a wharf by the defendant under color and with claim of title is sufficient to put the plaintiff, in an action on the case for obstructing him in its use, upon proof of a better title to the wharf, or, of an equal right with the defendant to its use.²¹

B. Evidence.—If a steamboat on a calm day and in smooth water is thrown with such force against a wharf properly built, so as to tear up some of the planks of the flooring, this is prima facie evidence of negligence on the part of the vessel's agents in making the landing, unless upon the whole evidence in the case this prima facie evidence is rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done is prima facie, and, if unexplained, sufficient evidence of negligence on their part, and the jury may properly be so instructed.²² If it was dangerous to make a rear landing with another boat at that time at the wharf when neither the pilot or captain was in the pilot house during the making of said landing, this is prima facie evidence of negligence on the part of the vessel's agents and justifies the jury in so finding, unless such evidence is rebutted by the whole evidence in the cause.²³

WHATSOEVER.—See note 1.

WHEN.—The adverb when not only denotes time,² but it is also used to describe a condition³ or occurrence rendering a particular act necessary.⁴

WHERE.—As to adverbs of time, such as where, there, after, from, etc., in a devise of remainder, being construed to relate merely to the time of enjoyment of the estate, and not to the time of vesting in interest, see FROM, vol. 6, p. 535.

WHICH.—See note 5.

—Railroad Co. v. Hanning, 15 Wall. 649, 21 L. Ed. 220.

20. Questions of law and fact.—Inland, etc., Coasting Co. v. Tolson, 139 U. S. 551, 560, 35 L. Ed. 270.

21. Actions.—Linthicum v. Ray, 9 Wall. 241, 19 L. Ed. 657.

22. Damage prima facie negligence.—Inland, etc., Coasting Co. v. Tolson, 139 U. S. 551, 554, 35 L. Ed. 270.

23. Inland, etc., Coasting Co. v. Tolson, 139 U. S. 551, 555, 35 L. Ed. 270.

1. Whatsoever.—A requirement that "all deeds of trust and mortgages whatsoever" be acknowledged includes chattel mortgages. See Hodgson v. Butts, 3 Cranch 139, 156, 2 L. Ed. 391. See the title ACKNOWLEDGMENTS, vol. 1, p. 80.

2. When designating time of enjoyment of estate.—Where a testator devises to his son "when he arrives at the age of twenty-one years," certain lands, "to hold to him, his heirs and assigns forever," and the use and profits in the meantime to his wife, for the maintenance and education of all his children, this was an immediate gift and a vested devise to his son, though he was not to have the possession until he became of age. Kerlin v. Bull, 1 Dall. 175, 177, 1 L. Ed. 88.

3. Court martials for militia when necessary.—See NECESSARY—NECESSITY—NECESSARILY, vol. 8, p. 870.

4. When designating cause, not time.—The word when in the provision in act of December 31, 1792, "that when any ship" shall be sold "in every such case, the said ship" "shall be registered anew," does not designate the precise time when the particular act must be performed, but describes the occurrence which renders the performance of the particular act necessary. United States v. Willings, 4 Cranch 48, 54, 2 L. Ed. 546. See, also, the title SHIPS AND SHIP-PING, vol. 10, p. 1148.

5. Which.—In the act of July 29, 1813, providing that before receiving certain bounties the owners of fishing vessels shall "produce to the collection the original agreement which may have been made with the fisherman, and also a certified copy of the days of sailing and returning, to the truth of which he shall swear before the collector," the relative pronoun which, though capable of referring to either the last paper or both, was held to refer to both papers and, therefore, to require an oath to the verity of both. United States v. Nickerson, 17 How. 204, 209, 15 L. Ed. 219. See the title BOUNTIES, vol. 3, p. 512.

WHILE.—As to refreshing witness's memory, by memoranda made while a transaction was fresh in his memory, see the title **WITNESSES**.

WHISTLE.—As to duty to sound whistle, see the title **CROSSINGS**, vol. 5, p. 150.

WHITE HARD ENAMEL.—See the title **REVENUE LAWS**, vol. 10, p. 886.

WHITE LEAD.—See the title **REVENUE LAWS**, vol. 10, p. 887.

WHITE PERSONS.—As to a provision that the United States shall pay for depredations committed by white persons, not including those committed by negroes, see the title **COURTS**, vol. 4, p. 1039. See, also, the title **CIVIL RIGHTS**, vol. 3, p. 814.

WHOLESALE DEALER.—As to selling goods on commission in excess of a certain amount rendering one a "wholesale dealer" within the meaning of an internal revenue act, see the title **BROKERS**, vol. 3, p. 532.

WHOLLY DESTROYED.—See **TOTAL LOSS**, ante, p. 610.

WHOM.—See note 1.

WHOM IT MAY CONCERN.—As to the phrase "for or on account of whom it may concern," as used in an insurance policy, see the titles **INSURANCE**, vol. 7, p. 132; **MARINE INSURANCE**, vol. 8, p. 158.

WIDOW.—See the title **DOWER**, vol. 5, p. 487. As to right to bring action for wrongful death, see the title **DEATH BY WRONGFUL ACT**, vol. 5, p. 201. As to pensions to, see the title **PENSIONS**, vol. 9, p. 373.

WILLFUL.—In common parlance, willful is used in the sense of intentional, as distinguished from accidental or involuntary. Whatever one does intentionally, he does willfully.²

1. **Whom.**—In an act providing for sale of taxes of unimproved lots in Washington for nonpayment of taxes on publication of notice stating, among other things, the name of the person or persons "to whom the same may have been assessed," the words "to whom the same may have been assessed" meant none other than the actual owner. *City of Washington v. Pratt*, 8 Wheat. 681, 684, 5 L. Ed. 714.

2. **Willful.**—*Holy Trinity Church v. United States*, 143 U. S. 457, 460, 36 L. Ed. 226.

Willfully.—"Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word willfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' *Crim. Law*, vol. 1, § 428." *Felton v. United States*, 96 U. S.

699, 702, 24 L. Ed. 875; *Potter v. United States*, 155 U. S. 438, 445, 39 L. Ed. 214; *Spurr v. United States*, 174 U. S. 728, 734, 43 L. Ed. 1150.

Willful misapplication of national bank-funds.—See the title **BANKS AND BANKING**, vol. 2, p. 108.

Knowingly and willfully obstructing or retarding passage of mail.—See the title **POSTAL LAWS**, vol. 9, p. 579.

Willful and malicious injury.—As to a judgment obtained by husband for criminal conversation with wife being one for willful and malicious injury to the person or property of another, within the meaning of the bankrupt laws, see the title **BANKRUPTCY**, vol. 2, p. 861.

Unlawfully, willfully and knowingly as applied to an act or thing done, see the title **CRIMINAL LAW**, vol. 5, p. 63.

Unlawful detention a willful holding over of lands under Missouri statute notwithstanding good faith.—See *Lehnen v. Dickson*, 148 U. S. 71, 79, 37 L. Ed. 373. See the title **FORCIBLE ENTRY AND DETAINER**, vol. 6, p. 304.

WILLS.

BY BEIRNE STEDMAN.

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As to right of an alien to devise property and to take by devise, see the title ALIENS, vol. 1, pp. 225, 234. That the term ancient documents includes wills, see the title ANCIENT DOCUMENTS, vol. 1, p. 313. As to admissibility in evidence of an old will never proved up according to law, see the title ANCIENT DOCUMENTS, vol. 1, p. 314. As to reviewability of probate proceedings of the supreme court of the District of Columbia, see the title APPEAL AND ERROR, vol. 1, p. 500. That a judgment of supreme court of the District of Columbia affirming order of probate is final and appealable, see the title APPEAL AND ERROR, vol. 1, p. 957. That a claim under a will cannot be set up for the first time in the supreme court of the United States, see the title APPEAL AND ERROR, vol. 2, p. 118. As to whether an objection that a devise is void because of the alienage of the devisee can be first taken in the supreme court, see the title APPEAL AND ERROR, vol. 2, p. 118. As to power of an association to take a bequest in trust as a society when not incorporated at time of testator's death, see the title ASSOCIATIONS, vol. 2, p. 634. As to effect of will acknowledging legitimacy of one child as evidence of such fact, see the title BASTARDY, vol. 3, p. 206. That a trial by jury of an issue as to the capacity of a testator is a case,

see CASE, vol. 3, pp. 644, 645. That proceedings to revoke a will is a case, see CASE, vol. 3, pp. 644, 645. As to charitable devises and bequests, see the title CHARITIES, vol. 3, p. 675. As to right of colleges and universities to take property by bequest or devise, see the title COLLEGES AND UNIVERSITIES, vol. 3, p. 869. As to what laws govern wills, see the title CONFLICT OF LAWS, vol. 3, p. 1067, et seq. As to jurisdiction of circuit courts of the United States to annul and set aside probate of wills, see the title COURTS, vol. 4, p. 904. As to binding effect of state decisions upon federal courts as to the execution of wills, the validity of decree setting aside wills, and the construction of wills, see the title COURTS, vol. 4, pp. 1121, 1122. As to admissibility in evidence of declarations of testators, see the title DECLARATIONS AND ADMISSIONS, vol. 5, pp. 220, 221. That dedication of private property to public use may be made by will, see the title DEDICATION, vol. 5, p. 241. As to taking of depositions before judge of a probate court, see the title DEPOSITIONS, vol. 5, p. 324. As to barring dower by will, see the title DOWER, vol. 5, pp. 490, 491. As to estoppel of widow from claiming dower by electing to take under will, see the title DOWER, vol. 5, p. 491. That devisees are bound by an estoppel against their testator, see the title ESTOPPEL, vol. 5, p. 934. As to widow's conduct as operating an estoppel to her enforcing her claim for dower, see the title ESTOPPEL, vol. 5, p. 956. As to long acquiescence in a construction of a will as working estoppel, see the title ESTOPPEL, vol. 5, p. 998. As to personal representatives and the administration of estates, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119. That the assent of an executor must be obtained before a legatee can take possession of a legacy, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 163. As to operation and conclusiveness of foreign adjudications as to probate of will, see the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS, vol. 6, p. 358. That wills are capable of being forged, see the title FORGERY AND COUNTERFEITING, vol. 6, p. 381. That a court of equity will not interfere between a donee of land, by deed, and a devisee under a will of the donor, in a case where there is no fraud, see the title GIFTS, vol. 6, p. 565. As to adverse possession as affecting right to devise, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION, vol. 7, p. 978. As to marshaling assets and securities in administration, see the title MARSHALING ASSETS AND SECURITIES, vol. 8, p. 264, et seq. As to recovery for services rendered merely in expectation of a legacy without any contract, express or implied, see the title MASTER AND SERVANT, vol. 8, p. 278. As to right of executor to maintain action for infringement of letters-patent of testator, see the title PATENTS, vol. 9, pp. 288, 289. As to admissibility of statement in will acknowledging child to be legitimate, see the title PEDIGREE, vol. 9, p. 356. As to competency of partner to provide by will for the continuance of partnership, see the title PARTNERSHIP, vol. 9, pp. 111, 112. As to the rule against perpetuities as affecting devises or bequests, see the title PERPETUITIES, vol. 9, p. 392. As to statements by testator to counsel respecting execution of will as being privileged, see the title PRIVILEGED COMMUNICATIONS, vol. 9, p. 941. As to effect of failure of testator to assert ownership to large tract of land in will, see the title PUBLIC LANDS, vol. 10, p. 354. As to the creation of estates in remainders, reversions and executory interests by wills, see the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS, vol. 10, p. 642. As to removal of a contest to have a will probated, see the title REMOVAL OF CAUSES, vol. 10, p. 682. As to binding effect of a judgment against personal representative on devisees, see the title RES ADJUDICATA, vol. 10, p. 753. That the principle as to the conclusiveness of a judgment in subsequent controversies between the parties is applicable to adjudications as to the construction of wills, see the title RES ADJUDICATA, vol. 10, p. 769. That doctrine of res adjudicata is applicable to decisions of probate, orphans' or surrogate's courts, see the title RES ADJUDICATA, vol. 10, p. 777. As to manumission of slave by will, see the title SLAVERY AND INVOLUNTARY SERVITUDE, vol. 10, p. 1211. That a written

instrument, though inefficacious as a will, from a want of compliance with statutory requisitions, may yet operate as a declaration of a trust, see the title TRUSTS AND TRUSTEES, ante, p. 676. That no technical language is necessary to the creation of a trust by will, see the title TRUSTS AND TRUSTEES, ante, p. 676.

I. Definition and General Consideration.

Definition.—A will is defined to be “the legal declaration of a man’s intentions which he wills to be performed after his death.”¹

First Mode of Conveyance.—The disposition of property by will, was certainly the first mode of conveyance used among men. The convenience of the thing having rendered it universal, custom, at length, became a law for its support.²

At common law a devise of land was regarded in the same light as a conveyance.³

II. Testamentary Power.

A. Nature and Source.—Statutes of wills are enabling acts,⁴ and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands.⁵

The several states possess the power to regulate the extent to which a testamentary disposition of real property within their respective limits may be exercised by its owners.⁶

B. In Regard to Property.—1. IN GENERAL.—A testator in whom was the legal title to lands, which he had sold by a written contract, can transfer by his will both such title and the notes given for the purchase of them, and the devisee will stand towards the purchaser in the same position that the testator did.⁷

1. **Definition of will.**—2 Bl. Com. 499; *Smith v. Bell*, 6 Pet. 68, 75, quoted with approval in *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138; *Hardenbergh v. Ray*, 151 U. S. 112, 126, 38 L. Ed. 93; *Home for Incurables v. Noble*, 172 U. S. 383, 391, 43 L. Ed. 486; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851.

2. **First mode of conveyance.**—*Lewis v. Maris*, 1 Dall. 278, 285, 1 L. Ed. 136.

3. **Regarded as a conveyance at common law.**—*Hardenbergh v. Ray*, 151 U. S. 112, 120, 38 L. Ed. 93.

4. **Testamentary power.**—*United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192.

5. **No general power to devise lands at common law.**—*United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192.

“It is well settled that by the common law lands were not devisable, except in particular places where custom authorized it. This disability of the common law was partially removed by the statute of 32 Henry 8, c. 1, which authorized persons having title to land to dispose thereof by will, and was construed as restricting the right of devising lands, to such an interest only as the testator had at the time of the execution of the will.” *Hardenbergh v. Ray*, 151 U. S. 112, 119, 38 L. Ed. 93.

The statute of 32 Hen. VIII, c. 1 (which is merely explained by the 34 and 35 of the same reign), enabled a man, by his will in writing, to dispose of all his socage lands, and two-thirds of his lands held in capite; which, by the subse-

quent operation of the 12 Car. II, c. 24, extends to all his real estate. *Lewis v. Maris*, 1 Dall. 278, 286, 1 L. Ed. 136.

In New York.—The English statute of Wills became a part of the law of New York upon the adoption of her constitution in 1777; and, with some modifications in its language, remains so at this day. Every person must, therefore, devise his lands in that state within the limitations of the statute or he cannot devise them at all. *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192.

6. **Power of states to regulate testamentary disposition of real property.**—*United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192.

“Without undertaking to go beyond what has already been decided by this court in *Mager v. Grima*, 8 How. 490, 12 L. Ed. 1168, in *Scholey v. Rew*, 23 Wall. 331, 23 L. Ed. 99, and in *United States v. Perkins*, 163 U. S. 625, 41 L. Ed. 287, and in the other cases heretofore cited, we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property, to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right, as legatee, devisee or heir, to receive the property of his testator or ancestor, are rights derived from and regulated by the state.” *Plummer v. Coler*, 178 U. S. 115, 137, 44 L. Ed. 998.

7. **In regard to property.**—*Atwood v. Weems*, 99 U. S. 183, 25 L. Ed. 471.

2. **AFTER-ACQUIRED PROPERTY.**—See post, "After-Acquired Property," VIII, J, 4.

3. **PROPERTY ADVERSELY HELD.**—Under the New York statute of wills a right of entry to lands adversely held, as well as an estate in the actual seisin and possession of the devisor, has been held devisable; and an estate that would descend to the heirs is transmissible equally by will.⁸

C. In Regard to Beneficiaries.—Children.—See post, "Construed in Favor of Heirs," VIII, B, 7.

By the Spanish law the testator cannot disinherit a child without naming the child, and the reasons for doing so.⁹

Disinheritance of Heir.—See post, "Construed in Favor of Heirs," VIII, B, 7.

Charities.—See the title CHARITIES, vol. 3, pp. 675, 683, et seq.

D. To Emancipate Slaves.—By the laws of Maryland, in 1824, any person might, by last will and testament, declare his slave to be free after any given period of service, or at any particular age, or upon the performance of any condition, or in the event of any contingency.¹⁰

III. Testamentary Capacity.

A. Instances of Incapacity.—1. COVERTURE.—The reason of a wife's being disabled to make a will, is, from her being under the power of the husband, not from want of judgment, as in the case of an infant or idiot.¹¹

Power to Dispose of Personalty.—See footnote.¹²

Power to Dispose of Realty.—See footnote.¹³

2. **INFANCY OR IDIOCY.**—See ante, "Coverture," III, A, 1.

3. **ALIENAGE.**—See the title ALIENS, vol. 1, pp. 225, 234.

8. **Property adversely held.**—*Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 128, 7 L. Ed. 617.

C. B., by her last will and testament, devised "all her estate, real and personal, wheresoever and whatsoever, in law or equity, in possession, reversion, remainder or expectancy, under her executors and to the survivor of them, his heirs and assigns forever," upon certain designated trusts. Under the statute of wills of the state of New York (1 N. Y. Rev. Laws 264), all the rights of the testator to real estate, held adversely, at the time of the decease of the testator, passed to the devisees, by this will. *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 100, 127, 7 L. Ed. 617.

9. **Disinheritance of child.**—*Meegan v. Boyle*, 19 How. 130, 149, 15 L. Ed. 577.

10. **Power to emancipate slaves.**—*Williams v. Ash*, 1 How. 1, 13, 11 L. Ed. 25, quoted in *Potter v. Couch*, 141 U. S. 296, 316, 35 L. Ed. 721. See the title SLAVERY AND INVOLUNTARY SERVITUDE, vol. 10, p. 1211.

11. **Coverture.**—*Barnes v. Irwin*, 2 Dall. 199, 202, 1 L. Ed. 348.

12. **Personalty.**—In Pennsylvania a feme covert, by virtue of an agreement between her and her husband, before marriage, may dispose of her personal estate by will or testament. *Barnes v. Irwin*, 2 Dall. 199, 201, 1 L. Ed. 348.

13. **Realty.**—In Pennsylvania a married woman could not devise her real estate. By the statute of the 34 and 35 Hen. VIII, § 14, it was expressly enacted, "that wills made of any manors, lands, tenements or other hereditaments, by any woman covert, shall not be taken to be good or effectual in law." *Barnes v. Irwin*, 2 Dall. 199, 201, 1 L. Ed. 348.

But a feme covert, seised of a real estate in fee, can, in consequence of a power contained in articles, executed between the husband and her, before their marriage (the legal estate not having been conveyed to trustees), give away such estate by will, or any instrument in nature of a will, during the coverture. *Barnes v. Irwin*, 2 Dall. 199, 201, 1 L. Ed. 348.

District of Columbia.—Section 728 of the Revised Statutes of District of Columbia, which provides that "any married woman may convey, devise and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried," is not limited by the act of 1869 from which it was taken, and under which the right of a married woman to dispose of her property as if she were a feme sole did not apply to property acquired by gift or conveyance from her husband. *Hamilton v. Rathbone*, 175 U. S. 414, 417, 418, 44 L. Ed. 219.

4. **NONJUROR.**—The act of Pennsylvania of 1777 rendered a nonjuror incapable of devising land.¹⁴

5. **INSANITY.**—A person may be insane to the extent of being dangerous if set at liberty, and yet may have sufficient mental capacity to make a will.¹⁵

B. Under Confiscation Act.—The voluntary residence of a person within the Confederate lines during the Civil War did not incapacitate him, under the confiscation act of July 17th, 1862, from making a last will and testament, further, if at all, than as against the United States.¹⁶

C. Evidence of Capacity or Incapacity.—Burden of Proof.—Upon questions of mental capacity of a testator submitted to a jury, the burden of proof, in the District of Columbia, is on the caveators.¹⁷

Admissibility.—See footnote.¹⁸

Sufficiency.—See footnote.¹⁹

Presumptions.—See footnote.²⁰

IV. Formal Requisites.

A. Written Wills Generally.—1. **CONFLICT OF LAWS.**—See the title **CONFLICT OF LAWS**, vol. 3, p. 1067, et seq.

14. **Nonjuror.**—*Moore v. Few*, 1 Dall. 170, 1 L. Ed. 86.

15. **Insanity.**—*Keely v. Moore*, 196 U. S. 38, 46, 49 L. Ed. 376.

16. **Under confiscation act.**—*Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976. See, generally, the title **WAR**, ante, p. 941.

17. **Burden of proof.**—*Leach v. Burr*, 188 U. S. 510, 515, 47 L. Ed. 567. And see *Keely v. Moore*, 196 U. S. 38, 46, 49 L. Ed. 376.

18. **Admissibility.**—The application of a relative for the admission of testator to an insane asylum, and the certificate of two physicians as to his insanity were properly excluded, not only because they were unsworn testimony, but because they were given in a different proceeding and upon a different issue. *Keely v. Moore*, 196 U. S. 38, 46, 49 L. Ed. 376.

In *Raub v. Carpenter*, 187 U. S. 159, 161, 47 L. Ed. 119, the question as to the mental capacity of a testator was in issue. H., a physician and a grand-nephew of deceased, testified as to his knowledge of the health, etc., of testator. He was then asked the following questions: "Doctor, have you formed any opinion from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, and from all you know about him yourself, what his condition of mind was?" It was held that that portion of the question which called for an opinion from the witness from "all you know about him yourself" was objectionable.

As to admissibility of declaration of testator where the issue involves testamentary capacity or undue influence, see the title **DECLARATIONS AND ADMISSIONS**, vol. 5, p. 214.

As to admissibility of declarations of one of several legatees upon issue of testator's competency, see the title **DECLARATIONS AND ADMISSIONS**, vol. 5, p. 218.

19. **Sufficiency.**—In *Keely v. Moore*, 196 U. S. 38, 45, 49 L. Ed. 376, it was held

that the evidence of testator's insanity was quite unsatisfactory. It appeared that during the early winter of 1885 he was seized with an acute mania, and was committed to a private insane asylum, upon the certificate of two physicians, and at the request of a cousin. He remained in the asylum about six weeks, and on February 1, 1886, somewhat more than three weeks before he executed his will, was discharged as probably cured, and was given a formal order of discharge on June 26, 1886. Two who were present at the execution of the will, and C. all testified to the mental capacity of the testator at that time.

In *Leach v. Burr*, 188 U. S. 510, 513, 47 L. Ed. 567, the substantial question was whether the court erred in taking the case from the jury and directing a verdict sustaining the will. The question submitted for consideration was whether the testator was at the time of executing the will "of sound mind, capable of executing a valid deed or contract." The testator was seventy-three years old, white, childless, unmarried, his nearest relatives being cousins, the plaintiffs in error. He was a man positive in his opinions, not easily influenced, of strong religious convictions and much attached to his church. The devisee was a young colored man, named Lucas, with whom alone he had kept house for ten or a dozen years, such relation commencing at his invitation and continuing by his wish. For some years Lucas had the general management of the business. From the testimony but one conclusion could be drawn, and that in favor of the mental soundness of the testator at the time he made the will. The trial court did not err in directing a verdict sustaining the will, as upon questions of this kind submitted to a jury the burden of proof, in the District of Columbia, is on the caveators, and they in the present case failed to sustain the burden.

20. **Presumption as to continuance of**

2. **WRITING.**—As a general rule wills must be in writing with the exception of certain nuncupative wills.²¹

3. **EXECUTION**—a. *Signing by Testator.*—By statutory provision it is required that the will be signed by the testator.²²

b. *Sealing.*—In **Pennsylvania** it was held in an early case that it was not necessary that a will, devising real estate therein, should be under seal.²³

c. *Attestation*—(1) *Necessity for.*—The several different states have their own statutes in regard to the witnessing of wills, and with certain exceptions all wills must be witnessed.²⁴

insanity.—In addition to the proof of testator's commitment to an asylum, and of his undoubted insanity prior and for some time subsequent thereto, there was slight evidence of insane acts a short time before he made his will, though there was no opinion expressed by any one that he was incapable of making a valid deed or contract. The whole testimony regarding his insanity was duly submitted to the jury, who were instructed that if they found his insanity to be permanent in its nature and character, the presumptions were that it would continue, and the burden was upon the defendant to satisfy the jury by a preponderance of testimony that he was at the time of executing the will of sound mind. Held, there was no error in this instruction. *Keely v. Moore*, 196 U. S. 38, 46, 49 L. Ed. 376.

Presumption of diseased mind.—When a sober, prudent, reflecting and moral man, between seventy and eighty years of age, mingles with profligate people, to whom he devotes himself, and becomes suddenly intemperate, immoral, and childishly whimsical and indiscreet, so that his nearest friends think it necessary to put it out of his power to ruin himself, it is a strong circumstance tending to show a diseased mind. *Harding v. Handy*, 11 Wheat. 103, 124, 6 L. Ed. 429.

"Some of the witnesses speak of the deceased as having low and filthy habits; of her being so imperfectly clad as at times to expose immodestly portions of her person; of her eating with her fingers, and having vermin on her body. Some of them testify to her believing in dreams, and her imagining she could see ghosts and spirits around her room, and her claiming to talk with them; to her being incoherent in her conversation, passing suddenly and without cause from one subject to another; to her using vulgar and profane language; to her making immodest gestures; to her talking strangely, and making singular motions and gestures in her neighbors' houses and in the streets. Other witnesses testify to further peculiarities of life, manner, and conduct; but none of the peculiarities mentioned, considered singly, show a want of capacity to transact business. Instances will readily occur to every one where some of them have been exhibited by persons possessing good judgment in the

management and disposition of property. But when all the peculiarities mentioned, of life, conduct, and language, are found in the same person, they create a strong impression that his mind is not entirely sound; and all transactions relating to his property will be narrowly scanned by a court of equity, whenever brought under its cognizance." *Allore v. Jewell*, 94 U. S. 506, 508, 24 L. Ed. 260.

21. **Necessity for writing.**—*Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663.

Maryland and District of Columbia.—The fifth section of the act of 29 Chas. II, ch. 3, which had been adopted in Maryland in 1798, was in force in the District of Columbia in 1886. It provided that all devises of any lands and tenements, devisable by law, should be in writing. *Keely v. Moore*, 196 U. S. 38, 41, 49 L. Ed. 376.

Under the statutes of Utah a will or codicil to "pass the estate of the devisor" must be in writing. *Coulam v. Doull*, 133 U. S. 216, 225, 33 L. Ed. 596.

By the Roman law.—*Lewis v. Maris*, 1 Dall. 278, 286, 1 L. Ed. 136.

22. **Signing by testator.**—*Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663. See *Keely v. Moore*, 196 U. S. 38, 41, 49 L. Ed. 376.

23. **Sealing.**—*Hight v. Wilson*, 1 Dall. 94, 1 L. Ed. 51.

24. **Necessity for attestation.**—*Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663.

In Pennsylvania it was held in an early case that it was not necessary that a will devising real estate should be subscribed by the witnesses. *Hight v. Wilson*, 1 Dall. 94, 1 L. Ed. 51.

A will, not written by the testator, nor subscribed by him, but put into writing by his direction, and proved to be so only by the person who drew it, is not a good will and is not admissible to probate, under the Pennsylvania act of 1705, requiring two witnesses in proof of every testamentary writing. *Lewis v. Maris*, 1 Dall. 278, 1 L. Ed. 136.

Under act 29 Chas. II, adopted in Maryland and District of Columbia.—*Keely v. Moore*, 196 U. S. 38, 41, 49 L. Ed. 376.

By the law of Maryland and the District of Columbia, in accordance with what was the law of England until the statute of 1 Vict., c. 26, a will of personal

(2) *Object of Attestation*.—The object of an attestation is to certify that the will was acknowledged in the presence of the witness and that the signature was genuine.²⁵

(3) *Number of Witnesses*.—As a general rule two or more witnesses are required to sign a will.²⁶

(4) *Sufficiency of Attestation*.—The general rule is that witnesses must intend to attest the will as witnesses.²⁷

Attestation in Official Capacity.—See footnote.²⁸

Under Spanish Law.—See footnote.²⁹

4. **PROOF OF EXECUTION**—a. *In General*.—The statutes of all the states have very careful and stringent provisions in relation to the making of wills, and the due proof of their execution.³⁰

Copy of Will.—Under a law of Kentucky, the copy of a will with two

property need not be attested by subscribing witnesses. *Campbell v. Porter*, 162 U. S. 478, 484, 40 L. Ed. 1044, citing *McIntire v. McIntire*, 162 U. S. 383, 40 L. Ed. 1009.

25. **Object of attestation**.—*Keely v. Moore*, 196 U. S. 38, 45, 49 L. Ed. 376.

26. **Number of witnesses**.—Under a law of Kentucky, and the decision of their courts upon it, a will with two witnesses is sufficient to pass real estate. *Davis v. Mason*, 1 Pet. 503, 508, 7 L. Ed. 239.

The Pennsylvania act of 1705 required two witnesses in proof of every testamentary writing. *Lewis v. Maris*, 1 Dall. 278, 1 L. Ed. 136.

The act of 29 Charles II, ch. 3, which was adopted in Maryland in 1798, and carried into the District of Columbia, as § 4, ch. 70, of the compiled statutes of 1894, provided that: "All devises and bequests of any lands or tenements * * * shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." *Keely v. Moore*, 196 U. S. 38, 41, 49 L. Ed. 376.

By the civil and ecclesiastical law wills must be witnessed by two or more witnesses. *Lewis v. Maris*, 1 Dall. 278, 286, 1 L. Ed. 136.

By the Roman law. — *Lewis v. Maris*, 1 Dall. 278, 286, 1 L. Ed. 136.

By Spanish law—Evidence of requisite number of witnesses.—It was proper in the court to allow evidence to go to the jury of a custom in California as to the manner of making wills, requiring two witnesses instead of seven, as required by the Spanish law, and to instruct them that the evidence was competent; and that if the custom was so prevailing and notorious that the tacit assent to it of the authorities may be presumed, it will operate to repeal the prior law. *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

27. **Sufficiency of attestation**.—*Keely v. Moore*, 196 U. S. 38, 44, 49 L. Ed. 376.

28. **Attestation in official capacity**.—Where a *sindico* attested the execution of a Mexican will, the description of himself which he affixed to his signature did

not detract from the efficacy of the attestation. *Adams v. Norris*, 23 How. 353, 367, 16 L. Ed. 539, cited in *Keely v. Moore*, 196 U. S. 38, 43, 49 L. Ed. 376.

Same—By vice consul.—Where a will was witnessed in the usual form by two witnesses, who attached their signatures in the presence of and at the request of the testator, and in the presence of each other, and on the day after the execution of the will testator went to the office of his solicitor who wrote a certificate of acknowledgment in the margin of the second and last page of the will, which was signed by C., the vice consul, as vice consul, it was held that the will was sufficiently attested. *Keely v. Moore*, 196 U. S. 38, 40, 49 L. Ed. 376.

29. **By the Spanish law** it seems that it is not necessary that the witnesses to a testament should comprehend the language in which it is written, but the witnesses should understand the language of the testator. *Adams v. Norris*, 23 How. 353, 367, 16 L. Ed. 539.

It was proper in the court to instruct the jury that the testator and witnesses to a Mexican will should alike hear and understand the testament, and that, under these conditions, its publication as the will of the testator should be made. *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

An objection to the admission of a Mexican codicil, because it did not appear on the face of the instrument that the witnesses were present during the whole time of the execution of the will, and heard and understood the dispositions it contained, was not well founded. *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

The Spanish law did not require that it should appear on the face of the instrument itself that all the formalities necessary to give effect to a will previous to the signature of the testator and the witnesses had been complied with. *Adams v. Norris*, 23 How. 353, 363, 16 L. Ed. 539.

30. **Proof of execution**.—*Throckmorton v. Holt*, 180 U. S. 552, 580, 45 L. Ed. 663.

witnesses, duly proved and recorded in another state, is good evidence of the execution of the will.³¹

b. *Declarations of Testator*.—As to admissibility of declarations of testator as suppletory proof relating to a codicil, see the title DECLARATIONS AND AD-MISSIONS, vol. 5, p. 221.

c. *Witnesses*.—**Subscribing Witnesses**.—In **Pennsylvania** it was held in an early case that it was not necessary that all the subscribing witnesses should prove the execution of a will devising real estate.³²

Other Witnesses.—In **Pennsylvania** it was held in an early case that a will was provable by other than the subscribing witnesses.³³

B. Nuncupative Wills.—See ante, "Writing," IV, A, 2; post, "In Cases of Nuncupative Wills," V, E.

V. Validity.

A. Conflict of Laws.—See the title CONFLICT OF LAWS, vol. 3, p. 1067, et seq.

B. Testamentary Intent.—See footnote.³⁴

C. Certainty.—It is undoubtedly the rule, in respect to the testamentary disposition of property, real and personal, that uncertainty either as to the subject or object of a devise will be fatal to its validity.³⁵ But courts are always reluctant to hold a bequest void for uncertainty, and they only do it when actually compelled to do so by the language used.³⁶

Cy Pres Doctrine.—See the title CHARITIES, vol. 3, p. 695.

Certainty of Beneficiaries—Gift to Charities.—See the title CHARITIES, vol. 3, pp. 684, 685.

D. Undue Influence.—See the title UNDUE INFLUENCE, ante, p. 743.

E. In Cases of Nuncupative Wills.—In Kentucky, in 1801, a nuncupative will was not sufficient to pass landed estate, but it was good as to the personal estate.³⁷

F. Determination of Question of Validity.—See footnote.³⁸

VI. Revocation and Revival.

A. Revocation—1. BY ACT OF TESTATOR—*a. In General*.—The right to

31. **Copy of will**.—Davis v. Mason, 1 Pet. 503, 508, 7 L. Ed. 239.

32. **Subscribing witnesses**.—In **Pennsylvania**.—Hight v. Wilson, 1 Dall. 94, 1 L. Ed. 51.

33. **Other witnesses**.—Hight v. Wilson, 1 Dall. 94, 1 L. Ed. 51.

34. **Testamentary intent**.—See post, "Courts Not Inclined to Regard Wills as Conditional," VIII, B, 15.

Writing held to have no testamentary obligation.—A writing bearing even date with a paper having the form of and purporting to be the last will and testament of the party, and disposing clearly and absolutely of all his estate—which writing refers to the paper as the party's "will" and speaks of itself as "a letter" written for the information and government of the executors, so far only as they see fit to carry out the testator's present views and wishes—has no testamentary obligation, even though it direct the persons to whom it is written to allow such and such persons to have specific benefits named in specific items of property. Lucas v. Brooks, 18 Wall. 436, 21 L. Ed. 779.

35. **Certainty**.—Gilmer v. Stone, 120 U. S. 586, 588, 30 L. Ed. 734.

36. **Speer v. Colbert**, 200 U. S. 130, 146, 50 L. Ed. 403; **Inglis v. Sailor's Snug Harbour**, 3 Pet. 99, 7 L. Ed. 617; **Home for Incurables v. Noble**, 172 U. S. 383, 43 L. Ed. 486.

"It is strenuously argued that unless it be found that the codicil takes away from one of the beneficiaries named in the will the whole or a portion of what the will gives, by language as clear and as free from ambiguity as that contained in the will, the codicil is void for uncertainty, and the provisions of the will remain unaffected. This broad proposition is unsound, and the authority by which it is apparently supported has been explained or qualified." **Home for Incurables v. Noble**, 172 U. S. 383, 389, 43 L. Ed. 486.

37. **Nuncupative wills**.—Hunter v. Bryant, 2 Wheat. 32, 36, 4 L. Ed. 177.

38. **Determination of question of validity**.—The manner in which a decedent acquires his estate is wholly immaterial upon the issue as to whether a paper in question is or is not valid as his last will and testament. **Ormsby v. Webb**, 134 U. S. 47, 65, 33 L. Ed. 805.

The binding force and legal operation

revoke a will exists now in every nation, though the exercise of it is differently regulated.³⁹ Nor can one bind himself in a testament not to make another.⁴⁰

Express or Implied Revocation.—A will may be revoked by an express revocation, or by certain acts, which of themselves infer, or from which the law infers, a revocation.⁴¹

b. *Revocatory Intent.*—To effect a revocation, there must be an act and an intention to revoke.⁴²

c. *Oral Revocation.*—See footnote.⁴³

d. *By Subsequent Will or Codicil.*—Where a second will is made, containing an express clause of revocation, the preceding will, though not formally canceled, is revoked.⁴⁴ The mere act of making a second testament is a revocation of a preceding testament, in relation to personal estate; the law throwing the personal estate on the executor as a trustee.⁴⁵

of a codicil are to be determined by the law, as it existed when the codicil was made. *Adams v. Norris*, 23 How. 353, 367, 16 L. Ed. 539.

Evidence.—Declarations of testator.—See the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 220.

The mode in which a codicil should be submitted to the court and jury, and the effect to be given to the testimony that accompanied it, depend upon the law of the forum at the time of the trial. *Adams v. Norris*, 23 How. 353, 367, 16 L. Ed. 539.

39. **Right of revocation.**—*Ennis v. Smith*, 14 How. 400, 419, 14 L. Ed. 472.

In England, the manner of revocation is prescribed by the 6th and 22d sections of the statute of frauds. *Ennis v. Smith*, 14 How. 400, 419, 14 L. Ed. 472.

In Spain, Holland and France.—See *Ennis v. Smith*, 14 How. 400, 419, 14 L. Ed. 472.

40. *Ennis v. Smith*, 14 How. 400, 419, 14 L. Ed. 472.

41. **Will may be expressly or impliedly revoked.**—*Ennis v. Smith*, 14 How. 400, 419, 14 L. Ed. 472.

42. **Necessity for revocatory intent.**—*Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. Ed. 663.

"It was observed in *Johnston v. Johnston*, 1 Phillimore Rep. 447, 497, that a will once regularly made, the presumption of law is strong in its favor; the intention to revoke must be plain and without doubt." *Throckmorton v. Holt*, 180 U. S. 552, 584, 45 L. Ed. 663.

"As is stated by James, Lord Justice, in *Cheese v. Lovejoy*, L. R. 2 P. D. 251, in speaking of the evidence of revocation: 'It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below, "all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two."' " *Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. Ed. 663.

43. **Oral revocation.**—"Before the stat-

ute of 29 Car. II, c. 3, wills, in England, might be revoked by any express words, without writing; and so it was in Pennsylvania, until altered by positive law; but in England, since that statute, and in Pennsylvania, since the act of assembly of the 4th of Anne, 'concerning the probates of written and nuncupative wills, and for confirming devises of lands,' wills of lands must be revoked by writing, accompanied with solemnities similar to those necessary for making the wills." *Lawson v. Morrison*, 2 Dall. 286, 288, 1 L. Ed. 384.

In Pennsylvania, later wills of lands, or a writing, revoking a former will, must be proved by two or more credible witnesses; and no testament, or will in writing, for personal estate, can be revoked by words, except the same be committed to writing and read to the testator, and allowed by him, and proved by two witnesses at least. *Lawson v. Morrison*, 2 Dall. 286, 288, 1 L. Ed. 384.

44. **Revocation by subsequent will.**—*Boudinot v. Bradford*, 2 Dall. 266, 268, 1 L. Ed. 375.

There is no way to defeat a good subsisting will but by proving it was revoked by another will, subsisting at the death of the testatrix, or that she canceled the later will, so revoking all former ones, with a mind to die intestate. *Lawson v. Morrison*, 2 Dall. 286, 289, 1 L. Ed. 384.

45. *Boudinot v. Bradford*, 2 Dall. 266, 267, 1 L. Ed. 375.

By codicil.—Testatrix provided in her will that the trustee under such will should pay five thousand dollars to the hospital of the University of Pennsylvania, to be used for a certain purpose, and bequeathed and devised all the "residue and remainder of my said estate of whatever kind" to the Home for Incurables, at Fordham, New York city, in the state of New York for a certain purpose. On the same day she made a codicil which provided: "I hereby revoke and annul the bequest therein (her will) made by me to the Home for Incurables at Fordham, New York city, in the state of New York, and I hereby give and bequeath the

e. *By Destruction or Cancellation.*—Revocation is accomplished by canceling, obliterating or destroying the will,⁴⁶ with revocatory intent.^{46a}

f. *Presumptions of Revocation.*—After proof that a will had been duly executed and was in the possession of the testator, the failure to find it after his death would be presumptive evidence that the testator had destroyed with an intention to revoke it.⁴⁷ But where the will is found, not among the papers of the testator at his former residence, but it comes through the mail to the register of wills more than a year after the decease of testator, the presumption of revocation cannot attach from the failure to find a will once shown to have existed.⁴⁸ All presumptive revocations may be encountered by evidence, and rebutted by other circumstances.⁴⁹

g. *Proof of Revocation.*—Where the production of the will creates no presumption of revocation, it is necessary to prove that the act of mutilation was performed by the testator or by his direction, and with an intention to revoke.⁵⁰ Neither the act of revocation nor the intent to revoke can be inferred from evidence of declarations of a testator apart from the act and with no proof

five thousand dollars (heretofore in my will bequeathed to said Home for Incurables) to my friend E.," on account of her kindness to testatrix and her son. It was held that the effect of the codicil was to revoke the bequest of five thousand dollars, made by the will in favor of the hospital of the University of Pennsylvania, and to substitute therefor the legatee named in the codicil. *Home for Incurables v. Noble*, 172 U. S. 383, 400, 43 L. Ed. 486.

B., after sundry specific devises and bequests, devised and bequeathed all his lands and other real estate in certain counties in Maryland, and also in Florida, and his house and lot in Santa Croix, and all the real estate he might have elsewhere, to his wife, her heirs and assigns, in trust. After making his will, he sold all of the lands, particularly mentioned in the residuary clause of the will above stated, except some lands lying in one county. At the time of making the codicil, hereafter mentioned, he held some of the proceeds of these sales in bonds and other securities, and with the residue had purchased other property. He afterwards made a codicil, by which he devised his summer residence, in B. county, to his wife, and also the securities he held for the lands sold in C. county, and directed all the property he had acquired after the date of his will to be sold, and the proceeds to be equally divided between his wife and her sister M. Then followed a residuary clause in the following words: "Lastly, my pew in St. Paul's Church and all my other property, real or personal, and all money in bank belonging to me at the time of my decease, I give, devise and bequeath unto my said wife Elizabeth and her heirs forever; and I ratify and confirm my said last will in everything except where the same is hereby revoked and altered as aforesaid." The residuary clause in this codicil is inconsistent with that in the will, and consequently revokes it. But the devise of the

property, specifically mentioned in the will, is not revoked by the clause in the codicil. *Bosley v. Bosley*, 14 How. 390, 14 L. Ed. 468.

46. Revocation by destruction or cancellation.—*Lawson v. Morrison*, 2 Dall. 286, 288, 1 L. Ed. 384.

46a. Revocatory intent.—See ante, "Revocatory Intent," VI, A, 1, b.

47. Presumption of revocation.—*Throckmorton v. Holt*, 180 U. S. 552, 582, 45 L. Ed. 663.

48. Throckmorton v. Holt, 180 U. S. 552, 582, 45 L. Ed. 663.

Where a will appeared, when it came to the hands of the register of wills, through the mail more than a year after testator's death, to have been mutilated, torn and burned around its edges, and counsel conceded that its appearance was such that if it had been found among the papers or repositories of the deceased, a presumption would have arisen in favor of its revocation, it was held that no presumption of revocation by the testator, or under his direction, arose from the appearance of this will when first received by the register of wills. *Throckmorton v. Holt*, 180 U. S. 552, 581, 583, 45 L. Ed. 663.

49. Lawson v. Morrison, 2 Dall. 286, 288, 1 L. Ed. 384. See *Throckmorton v. Holt*, 180 U. S. 552, 582, 45 L. Ed. 663.

50. Proof of revocation.—*Throckmorton v. Holt*, 180 U. S. 552, 585, 45 L. Ed. 663.

"This case establishes the point that no presumption of revocation arose upon the facts herein by reason of the appearance of the paper, and after execution is proved by evidence of the handwriting the onus rests upon the individual claiming that the paper was revoked by the testator, to prove the fact. There must be some evidence of an act by the deceased, or under his direction, which would be sufficient to show the fact, or the instrument must have been found among the papers of the deceased, mutilated and torn or otherwise

that the testator ever performed an act of a revocatory nature.⁵¹ Such declarations are inadmissible in evidence unless they constitute a part of the *res gestæ*.⁵²

Declarations of Testator.—See the title DECLARATIONS AND ADMISSIONS, vol. 5, p. 221.

h. Questions for Jury.—Whether one made a second will, and afterwards canceled it, are matters of fact to be substantially and satisfactorily proved to the jury.⁵³

2. BY MARRIAGE AND BIRTH OF CHILD.—A will is revoked by subsequent marriage and birth of child.⁵⁴

3. BY ALTERATION OF ESTATE.—The same interest which the testator had when he made his will should continue to be the same interest, and remain unaltered to his death, and the least alteration in that interest is a revocation.⁵⁵

defaced, and under such circumstances that the fact of revocation might be presumed." *Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. Ed. 663.

51. *Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. Ed. 663.

52. *Throckmorton v. Holt*, 180 U. S. 552, 586, 45 L. Ed. 663.

"Declarations made by a testator at the time of mutilation or cancellation, going to show the intent with which the act is done, are of course admissible, being parts of the *res gestæ*. But as the production of the will under the circumstances proved in this case created no presumption of revocation, it was necessary to prove that the act of mutilation was performed by the testator or by his direction, and with an intention to revoke, and we think that his declarations, not being part of the *res gestæ*, cannot be permitted for the purpose of asking the jury to infer therefrom that the testator not only performed or directed the act of mutilation but did so with the intent to revoke the instrument." *Throckmorton v. Holt*, 180 U. S. 552, 585, 45 L. Ed. 663.

53. **Questions for jury.**—*Boudinot v. Bradford*, 2 Dall. 266, 267, 1 L. Ed. 375.

54. **By marriage and birth of child.**—*Lawson v. Morrison*, 2 Dall. 286, 288, 1 L. Ed. 384.

"Mr. Jarman lays it down that marriage and the birth of a child, conjointly, revoked a man's will, whether of personal or real estate, these circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not have intended a disposition of property previously made to continue unchanged. But this effect is not produced where there is a provision made for both wife and children by the will itself. *Kenebel v. Scafton*, 2 East 530; or by a previous settlement providing for both. 1 Jarman on Wills, 4th Eng. Ed.; 5th Am. Ed. 123, 125." *Coulam v. Doull*, 133 U. S. 216, 229, 33 L. Ed. 596.

In the cases of *Marston v. Roe*, 8 Ad. & El. 14, it was held that, "where an unmarried man, without children by a

former marriage, devises all the estate he has at the time of making his will, and leaves no provision for any child of a future marriage, the law annexes to such will the tacit condition that if he afterwards marries, and has a child born of such marriage, the will shall be revoked;" and that "evidence not amounting to proof of publication cannot be received in a court of law, to show that the testator intended that his will should stand good, notwithstanding his subsequent marriage and the birth of issue; because these events operate as a revocation by force of a rule of law, and independent of the testator." *Coulam v. Doull*, 133 U. S. 216, 229, 33 L. Ed. 596.

The reason upon which the doctrine of revocation rests is the change in the testator's situation. *Coulam v. Doull*, 133 U. S. 216, 230, 33 L. Ed. 596.

55. **By alteration of estate.**—*Bosley v. Bosley*, 14 How. 390, 395, 14 L. Ed. 468.

The will of a testator takes effect only upon his death. Until the concurrence of that event, the devisee therein named has no title to or interest in the property devised and where testator in his life time consummated a contract for the sale of such property by executing a deed of the property, this would work an absolute revocation of the devise as to such property. *Bissell v. Heyward*, 96 U. S. 580, 586, 24 L. Ed. 678.

After the execution of the codicil, the testator agreed to lease some land for a term of ninety-nine years, renewable forever, a ground rent being reserved upon the same. The lessee was to pay cash for a part, and the residue of the purchase money was to remain on interest, as ground rent, which the lessee could extinguish at any time by the payment of the principal sum. This property was a part of that which was specifically mentioned in the will, and not revoked by the clause in the codicil. But the conduct of the testator, in making this agreement, so altered the condition of the property that it amounted to a revocation of the devise, and manifests an intention on his part, when taken in connection with other circumstances of the

4. BY PROBATE OF LATER WILL.—The probate of a will of a later date necessarily and by the mere fact of its probate annuls a prior will, so far as the provisions of the two are inconsistent, and so far as the estate was not legally administered under the earlier will.⁵⁶

5. PRESUMPTION OF EXECUTION ON ISSUE OF REVOCATION.—Upon the issue of revocation the fact of the execution of the will is to be assumed, for in the nature of things one cannot revoke a will which he never made.⁵⁷

B. Revival.—It has been often determined that a will, revoked by a subsequent will but not canceled, was re-established by the cancellation of the subsequent will.⁵⁸

Evidence.—See footnote.⁵⁹

VII. Probate and Contest.

A. Necessity for Probate—1. OF WILL OF PERSONALTY.—By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belonged to the ecclesiastical courts; and before any testamentary paper of personalty could be admitted in evidence as a muniment of title, it had to be probated in those courts.⁶⁰

2. OF WILL OF REAL ESTATE.—At common law, it was not necessary that a will of lands be probated in order to be admissible in evidence.⁶¹ The pro-

case, to give it to his wife under the residuary clause in the codicil. *Bosley v. Bosley*, 14 How. 390, 391, 14 L. Ed. 468.

A valid agreement or covenant to convey, which equity will specially enforce, will operate in equity as a revocation of a previous devise of land. *Bosley v. Bosley*, 14 How. 390, 395, 14 L. Ed. 468.

Making a deed in fee, or a lease for years to the same devisee, to commence after the testator's death, has always been considered as a revocation, because contrary to, or inconsistent with the will, and evidencing an alteration of intention. *Lawson v. Morrison*, 2 Dall. 286, 288, 1 L. Ed. 384.

56. Probate as annulling prior will.—*Gaines v. New Orleans*, 6 Wall. 642, 18 L. Ed. 950, affirmed in *Gaines v. Lizardi*, 154 U. S., appx., 555, 18 L. Ed. 967.

57. Presumption of execution on issue of revocation.—*Throckmorton v. Holt*, 180 U. S. 552, 581, 45 L. Ed. 663.

58. Revival.—*Lawson v. Morrison*, 2 Dall. 286, 289, 1 L. Ed. 384; *Boudinot v. Bradford*, 2 Dall. 266, 268, 1 L. Ed. 375.

59. Evidence.—Where a second will is canceled, under circumstances that manifest an intention either to revive, or not to revive, the preceding will, those circumstances must be proved. *Boudinot v. Bradford*, 2 Dall. 266, 268, 1 L. Ed. 375.

Whether, by canceling a second will, the deceased meant to revive the former instrument, or to die intestate, may be ascertained by the testimony of witnesses. *Boudinot v. Bradford*, 2 Dall. 266, 267, 1 L. Ed. 375.

"The evidence, indeed, will not go directly to destroy an existing will, but merely to show, in effect, that the deceased did not intend again to make, or re-establish, a will, which he had once actually destroyed. The same point arose

in *Lawson v. Morrison*, 2 Dall. 286, 1 L. Ed. 384, and was decided in the same way." *Boudinot v. Bradford*, 2 Dall. 266, 267, 1 L. Ed. 375.

60. Will of personalty only need probate at common law.—*Armstrong v. Lear*, 12 Wheat. 169, 175, 6 L. Ed. 589, cited in *Tarver v. Tarver*, 9 Pet. 174, 178, 9 L. Ed. 91.

Probate not necessary where validity of will only in question.—But where the inquiry is, whether a certain instrument is a valid will or not, and the complainant sets out a copy of that instrument, for the purpose of showing that it was not a valid subsisting will, because it appeared upon its face to be conditional, and then shows that such condition or contingency had never appeared, the defendant is not the actor, seeking to enforce any right under the will, and he is not under obligation to produce any probate. *Tarver v. Tarver*, 9 Pet. 174, 178, 9 L. Ed. 91.

Tennessee—Gift causa mortis.—A will of personalty, in Tennessee, does not take effect until probated. Therefore the indorsement and delivery of a certificate of deposit, if void as a gift mortis causa, is not good as a will of personalty under the laws of Tennessee. *Basket v. Hassell*, 108 U. S. 267, 269, 27 L. Ed. 719.

Maryland and District of Columbia.—This principle of the common law is in force in Maryland and the District of Columbia; and the probate of wills of personalty belonged exclusively to the proper orphans' court, exercising ecclesiastical jurisdiction. *Armstrong v. Lear*, 12 Wheat. 169, 175, 6 L. Ed. 589.

61. Will of lands needed no probate at common law.—*Darby v. Mayer*, 10 Wheat. 465, 468, 6 L. Ed. 367.

Maryland.—This was also the rule in

bate of a will of personalty and real estate was evidence of the validity of the will only so far as the personal property was concerned. As an instrument conveying real property the probate was not evidence of its execution. That had to be shown by a production of the instrument itself and proof by the subscribing witnesses; or, if they were not living, by proof of their handwriting.⁶² But, in most of the states of the Union, this rule is now obsolete, and a will of real property must be admitted to probate in some one of their courts before it can be admitted in evidence as a muniment of title elsewhere.⁶³

Maryland, under the statute of 1798. *Darby v. Mayer*, 10 Wheat. 465, 468, 6 L. Ed. 367; *Robertson v. Pickrell*, 109 U. S. 608, 610, 27 L. Ed. 1049. But the legislature of Maryland, by the supplemental statute of 1831, c. 315, § 1, authorized the orphans' courts to take the probate of "any will, testament or codicil, whether the same has relation to real or personal estate, or to both real and personal estate," in the same manner as, under the original statute, they might of wills disposing of personal estate. *Campbell v. Porter*, 162 U. S. 478, 486, 40 L. Ed. 1044.

In this country, from a time anterior to the adoption of the constitution, all probate and testamentary matters have been confided either to separate courts of probate, under different denominations, or a special jurisdiction over them having been vested in courts having jurisdiction over other subjects. For reasons growing out of our policy, the probate jurisdiction was extended, but with varying effect in different states, over wills of land, as well as of personal chattels; preserving, however, in some form, the rights and remedies of heirs at law to contest their validity. *Ellis v. Davis*, 109 U. S. 485, 495, 27 L. Ed. 1006.

As to probate of will being essential preliminary to sale of property, see the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 148.

Probate of will executed before organization of state.—The probate of a will of lands of a testator who died before the organization of the state government in California is not necessary and is valid without probate, the state statute having failed to require wills executed before its passage to be probated, and actually intending to exclude them from the operation of the statute altogether, leaving their validity to rest upon the laws under which they were made. *Adams v. Norris*, 23 How. 353, 362, 16 L. Ed. 539.

Manner of proof of will of real estate at common law.—At common law the ordinary's probate was no evidence of the execution of the will, in ejectment. Where the will itself was in existence, and could be produced, it was necessary to produce it; when the will was lost, or could not be procured to be produced in evidence, secondary evidence was nec-

essarily resorted to, according to the nature of the case. But whatever proof was made, was required to be made before the court that tried the cause; the proof before the ordinary being *ex parte*, and the heir at law having had no opportunity to cross-examine the witnesses; neither were the same solemnities required to admit the will to probate, as were indispensable to give it validity as a devise of real estate. At first, it was a question of controversy between the common-law and ecclesiastical courts, whether a will, containing a devise of lands, should not be precluded from probate, although containing a bequest of personalty also. And the question was one of serious import, since the common-law courts required the production of the original, whereas the consequence of probate was that the original should be consigned to the archives of the court that proved it. This was at length compromised, and the practice introduced of delivering out of the will, when necessary, upon security to return it. *Darby v. Mayer*, 10 Wheat. 465, 467, 6 L. Ed. 367.

62. Probate of will of personalty and realty.—*Robertson v. Pickrell*, 109 U. S. 608, 610, 27 L. Ed. 1049, cited in *Campbell v. Porter*, 162 U. S. 478, 485, 40 L. Ed. 1044.

63. In most states will of realty must now be probated.—*Robertson v. Pickrell*, 109 U. S. 608, 610, 27 L. Ed. 1049; *Case of Broderick's Will*, 21 Wall. 503, 515, 22 L. Ed. 599; *Wilkinson v. Leland*, 2 Pet. 627, 655, 7 L. Ed. 542; *Gaines v. Chew*, 2 How. 619, 644, 11 L. Ed. 402; *Campbell v. Porter*, 162 U. S. 478, 486, 40 L. Ed. 1044.

By the laws of Rhode Island, the probate of a will in the proper probate court, is understood to be an indispensable preliminary to establish the right of the devisee, and then his title relates back to the death of the testator. *Wilkinson v. Leland*, 2 Pet. 627, 655, 7 L. Ed. 542.

In California the jurisdiction of the probate court is the same in regard to wills of real estate as to wills of personal estate, both classes requiring probate, and the probate of each having the same validity and effect. This is the case in several, perhaps the greater number, of the United States. *Case of Broderick's Will*, 21 Wall. 503, 515, 22 L. Ed. 599.

B. Jurisdiction—1. OF PARTICULAR COURTS.—a. *Federal Courts*.—The federal courts have no original probate jurisdiction.⁶⁴

b. *State Courts*.—See the title COURTS, vol. 4, pp. 1152, 1153.

c. *Territorial Courts*.—See the title COURTS, vol. 4, p. 1158.

d. *Supreme Court of District of Columbia*.—See the title COURTS, vol. 4, pp. 1165, 1166.

2. DOMICILE AS AFFECTING JURISDICTION.—Where a patentee dies, the surrogate of the place where the decedent was domiciled properly has jurisdiction to take probate of his will and issue letters testamentary.⁶⁵

3. NATURE AND EXTENT OF JURISDICTION.—A court of probate has inherent power, without specific statutory authority, to grant administration limited to the defense of a particular suit.⁶⁶

C. Notice of Probate.—The failure to give notice of the probate of a will as required by law and the taking of the property into the possession of the probate court, does not operate as a deprivation of property where notwithstanding the admission to probate, the law gives to those persons interested full right to assail both the existence of the will and its probate, which right was not lost by the failure to give notice of the preliminary probate.⁶⁷

D. Proof of Wills—1. NECESSITY FOR.—Title to land under a will does not pass until the will is proved in accordance with the laws of the state where the land is situated.⁶⁸

2. MANNER OF PROOF.—a. *By Subscribing Witnesses*—*Number of Witnesses*.—It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it.⁶⁹

b. *By Secondary Evidence*.—If all the witnesses to a will are dead, evidence of their signatures and that of the testator is admissible, and also of a decla-

In Louisiana, the court of probate has exclusive jurisdiction in the proof of wills, and its jurisdiction is not limited like the ecclesiastical court in England, to wills which dispose of personal property. *Gaines v. Chew*, 2 How. 619, 644, 11 L. Ed. 402.

64. Federal courts have no probate jurisdiction.—*Gaines v. Fuentes*, 92 U. S. 10, 21, 23 L. Ed. 524; *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006; *McDonnell v. Jordan*, 178 U. S. 229, 44 L. Ed. 1048; *Farrell v. O'Brien*, 199 U. S. 89, 110, 50 L. Ed. 101; *Case of Broderick's Will*, 21 How. 503, 22 L. Ed. 599; *Fou-vergne v. New Orleans*, 18 How. 470, 471, 15 L. Ed. 399; *Byers v. McAuley*, 149 U. S. 608, 619, 37 L. Ed. 867; *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273.

Reason of rule.—The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is offered, or of other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states, of which the federal courts have concurrent jurisdiction with the state courts under the judiciary act; but whenever a controversy

in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between parties. *Gaines v. Fuentes*, 92 U. S. 10, 22, 23 L. Ed. 524.

As to jurisdiction of circuit courts of the United States over matters of pure probate, see the title COURTS, vol. 4, p. 903.

65. Probate jurisdiction as affected by domicile.—*Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566.

66. Nature and extent of jurisdiction.—*McArthur v. Scott*, 113 U. S. 340, 341, 28 L. Ed. 1015.

67. Notice of probate.—*Farrell v. O'Brien*, 199 U. S. 89, 118, 50 L. Ed. 101. See, generally, the title DUE PROCESS OF LAW, vol. 5, p. 499.

68. Proof of wills.—*McCormick v. Sullivan*, 10 Wheat. 192, 202, 6 L. Ed. 300.

By the Spanish law, a will was required to be proved by the attesting witnesses within one month after the decease of the testator; and, when proved, it was required to be recorded. *Meegan v. Boyle*, 19 How. 130, 149, 15 L. Ed. 577.

69. Evidence of one witness sufficient to prove will.—*Davis v. Mason*, 1 Pet. 503, 509, 7 L. Ed. 239.

ration by him that he had made a will with a similar devise.⁷⁰ Under the Kentucky law, a will with two witnesses is sufficient to pass real estate, and a copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will.⁷¹

E. Operation and Effect of Probate—1. **IN GENERAL**.—The probate of a will when recorded is notice to all persons whether claiming under or adversely to the will,⁷² unless the will is not recordable under the laws of the state.⁷³ But the probate of a will concerning real estate in a state other than where the land is situated is not constructive notice of any claims arising under the will.⁷⁴ The registration of a will has relation backwards; and it is wholly immaterial whether the registration was made before or after the commencement of a suit.⁷⁵

2. **PROBATE OF SUBSEQUENT WILL AS ANNULLING PRIOR PROBATE**.—When a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, the former becomes inoperative, and the latter is that under which the estate is to be administered, without any formal declaration by the court that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate.⁷⁶

3. **CONCLUSIVENESS**.—The general rule is that the probate of a will duly received to probate by a court of competent jurisdiction, is conclusive of the validity and contents of the will until revoked,⁷⁷ and is not subject, except on

70. Evidence of signature of deceased witnesses as proof of will.—*Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

71. Copy of will as evidence of execution.—*Davis v. Mason*, 1 Pet. 503, 508, 7 L. Ed. 239.

72. Probate as notice.—*McArthur v. Scott*, 113 U. S. 340, 405, 28 L. Ed. 1015.

73. Lewis v. Barnhart, 145 U. S. 56, 79, 36 L. Ed. 621.

Illinois.—"It is clear from these statutes that the will of Romeo Lewis or an authenticated copy thereof, proven according to the laws of Ohio, if accompanied with a certificate of the proper officers that the will was duly executed and proven, agreeably to the laws and usages of that state, could, at any time after it took effect, have been recorded in Illinois, and thereby become good and available in that state in like manner as wills there made and executed; and that from at least the passage of the act of 1857 it would have become, after the filing of the same for record, and in respect to the real estate devised by it, notice as in the cases of deeds conveying real estate. But it is equally clear that the copy of the testator's will filed and recorded in 1866, in the office of the recorder of Woodford county, was not authenticated or certified so as to entitle it to record under the above statutes in Illinois. * * * It results that the recording in Illinois, in 1866, of what purported to be the will of Romeo Lewis was without legal effect, and was not, in law, notice that the lands in dispute were part of those referred to in that will." *Lewis v. Barnhart*, 145 U. S. 56, 78, 79, 36 L. Ed. 621.

74. Probate of will of real estate in

place other than where located.—*McCormick v. Sullivan*, 10 Wheat. 192, 204, 6 L. Ed. 300. See the title **VENDOR AND PURCHASER**, ante, p. 864.

75. Registration of a will relates backwards.—*Poole v. Fleeger*, 11 Pet. 185, 9 L. Ed. 680.

As to probate in one state establishing proper execution of will in another state, see the title **POWERS**, vol. 9, p. 600, note 75.

76. Probate of will as annulling prior probate.—*Gaines v. Hennen*, 24 How. 553, 566, 16 L. Ed. 770, explaining *Gaines v. Chew*, 2 How. 619, 647, 11 L. Ed. 402.

There can be no valid probate of a subsequent will while a previous probate is unrevoked. *Gaines v. Chew*, 2 How. 619, 647, 11 L. Ed. 402.

77. Probate conclusive until revoked.—*Gaines v. New Orleans*, 6 Wall. 642, 18 L. Ed. 950, affirmed in *Gaines v. Lizardi*, 154 U. S., appx., 555, 18 L. Ed. 967; *Case of Broderick's Will*, 21 Wall. 503, 514, 22 L. Ed. 599; *McArthur v. Scott*, 113 U. S. 340, 386, 28 L. Ed. 1015.

As to collateral attack of order appointing executor, see the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 130, note 36.

Admission to probate does not preclude direct attack on will.—The admission of a will to probate does not exclude any one who may desire to contest the will from doing it in a direct proceeding, or from using any means of defense by way of answer or exception, whenever the probate is used as a muniment of title. *Gaines v. Hennen*, 24 How. 553, 558, 16 L. Ed. 770.

Louisiana.—Where a will was established in New Orleans, in 1792, by order

an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground.⁷⁸ In these states formal modes are prescribed of contesting the validity of the instrument as a will, and of the regularity and legality of the probate, by suits regularly instituted solely for that purpose, and inter partes, but such proceedings are generally regarded as the exercise of probate jurisdiction, even if administered in courts other than that of original probate, but the judgment, as in other cases inter partes, binds only parties and privies.⁷⁹ But in some of the older states, as in England, where the common-law rule prevails the probate of a will has no effect upon devises of real estate therein,⁸⁰ and is conclusive as to personality only.⁸¹

F. Costs.—Costs in probate cases generally rest in the discretion of the court, and are often not allowed even to the prevailing party.⁸²

G. Probate of Will as Constituting a "Suit."—Although the granting of probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit.⁸³

H. Probate of Lost or Destroyed Wills—1. **IN GENERAL.**—If a will, duly executed and not revoked, is lost, destroyed, or mislaid, either in the lifetime of the testator, without his knowledge, or after his death, it may be ad-

claimed or withheld, that its validity may be inquired into. *Gaines v. Hennen*, 24 How. 553, 597, 16 L. Ed. 770.

78. Probate can only be set aside by appeal.—Case of Broderick's Will, 21 Wall. 503, 514, 22 L. Ed. 599.

A will, admitted to probate and record by a court of competent jurisdiction, is a muniment of title for all receiving property under it; and, until the order admitting it to probate is, by some appropriate proceeding, set aside or reversed, stands in the way of those who may have resisted the probate. In every sense, it is a final adjudication. *Ormsby v. Webb*, 134 U. S. 47, 58, 33 L. Ed. 805.

New Mexico.—Under the provisions of the "laws of Velarde," which, under the provisions of Kearny code, 1846, remained in force in the territory of New Mexico until modified by statute, the practice and procedure of the probate courts were matters of statutory regulation; the probate judge has jurisdiction to admit wills to probate by receiving the evidence of the witnesses; and his judgment was valid and, although reviewable on appeal, was conclusive unless appealed from and reversed. *Bent v. Thompson*, 138 U. S. 114, 123, 34 L. Ed. 902.

79. Appeals allowed where probate conclusive.—*Ellis v. Davis*, 109 U. S. 485, 495, 27 L. Ed. 1006.

Louisiana.—The supreme court of Louisiana declared that the decree of a probate court ordering a will to be executed does not amount to a judgment binding on those who are not concerned in it, and that when the will is offered as the title in virtue of which property is

claimed or withheld, that its validity may be inquired into. *Gaines v. Hennen*, 24 How. 553, 597, 16 L. Ed. 770.

80. At common law probate of will of real estate not conclusive.—Case of Broderick's Will, 21 Wall. 503, 515, 22 L. Ed. 599.

In those states where the probate, although conclusive while in force as to personality and for the purposes of administration merely, is only prima facie evidence where the will is relied on as a muniment of title to real estate, its validity may become a question to be tried whenever and wherever a litigation arises concerning real property, the title to which is affected by it, just as in England, in actions of ejectment between the heir and the devisee, or those claiming through them. *Ellis v. Davis*, 109 U. S. 485, 496, 27 L. Ed. 1006.

81. Common law—Probate conclusive as to personality only.—*Ellis v. Davis*, 109 U. S. 485, 495, 27 L. Ed. 1006; *Darby v. Mayer*, 10 Wheat. 465, 6 L. Ed. 367, cited in *Campbell v. Porter*, 162 U. S. 478, 484, 40 L. Ed. 1044. See ante, "Necessity for Probate," VII, A.

82. Costs.—*McArthur v. Scott*, 113 U. S. 340, 400, 28 L. Ed. 1015. See, generally, the title COSTS, vol. 4, p. 802.

83. Upshur County v. Rich, 135 U. S. 467, 476, 34 L. Ed. 196.

"As observed by Mr. Justice Matthews, speaking for the court in *Ellis v. Davis*, 109 U. S. 485, 27 L. Ed. 1006: 'Jurisdiction as to wills, and their probate as such, is neither included in, nor excepted out of, the grant of judicial power to the courts of the United States. So far as it is ex parte and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes

mitted to probate upon satisfactory proof being given of its having been so lost, destroyed, or mislaid, and also of its contents.⁸⁴

2. EVIDENCE.—a. *Proof of Loss or Destruction*.—To entitle a party to give parol evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found, if in existence.⁸⁵

b. *Proof of Contents*.—Where a portion of a will was destroyed and several witnesses, who not only had heard it read aloud, but had also read it themselves, testified that they recollected that the torn off part had in it certain memoranda as to glasses, but did not remember if such torn portion embraced anything else, but where such witnesses were willing and friendly witnesses for the contestant and desirous of stating everything favorable to his claim and where from the nature and extent of their knowledge they must necessarily have recollected facts if existed which would have revoked or modified the will, an implication arises, where such facts were not remembered, that they did not exist.⁸⁶

1. Probate of Foreign Wills.—1. NECESSITY FOR PROBATE.—a. *Of Will of Personalty*.—A testamentary paper, executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy of this country, until it has received probate here, in the court having the peculiar jurisdiction of the probate of wills and other testamentary matters.⁸⁷

b. *Of Will of Real Estate*.—See the title CONFLICT OF LAWS, vol. 3, pp 1067, 1068.

2. EFFECT OF FOREIGN PROBATE.—A probate in one state of the will of a person who died domiciled in another state is valid until set aside in the first state court, though the order of the surrogate in the state of the testator's domicile has been reversed in the supreme court of that state, on which the probate in the first state was founded.⁸⁸

3. ADMISSION AND RECORD OF FOREIGN PROBATE.—By the laws of some states, a copy of a will proved in one state, and with its probate and letters duly authenticated under the act of congress for the authentication of records to be used in other states, may, after certain formalities gone through, be recorded in the courts of such other states, where the testator had property. And when so recorded, certified copies of such county court records are evi-

necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.' Similar views were expressed by Mr. Justice Miller in *Hess v. Reynolds*, 113 U. S. 73, 28 L. Ed. 927, which was the case of a creditor instituting proceedings in a probate court against the estate of his deceased debtor, and then removing them into the circuit court of the United States." *Upshur County v. Rich*, 135 U. S. 467, 476, 34 L. Ed. 196. See *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524.

84. *Lost or destroyed will may be probated*.—*Gaines v. Hennen*, 24 How. 553, 562, 16 L. Ed. 770.

Equity jurisdiction.—Although by the general law, as well as the local law of Louisiana, a will must be proved before a title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer, touching a will alleged to be spoli-

ated. And it is a matter for grave consideration, whether it cannot go further and set up the lost will. *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402.

85. *Proof of search and inquiry*.—*Gaines v. Hennen*, 24 How. 553, 562, 16 L. Ed. 770.

86. *Proof of contents*.—*McIntire v. McIntire*, 162 U. S. 383, 397, 40 L. Ed. 1019.

87. *Probate of foreign will of personalty*.—*Armstrong v. Lear*, 12 Wheat. 169, 6 L. Ed. 589.

88. *Effect of foreign probate*.—*Foulke v. Zimmerman*, 14 Wall. 113, 20 L. Ed. 785.

A purchase from the devisee of such will of real estate in Louisiana, while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will, to which he is not a party. *Foulke v. Zimmerman*, 14 Wall. 113, 20 L. Ed. 785.

dence, being so under the general laws of the state.⁸⁹ An exemplification of a will, made in England, and certified generally to have been proved, approved and registered in the prerogative court of Canterbury, under the seal of that court, may be read in evidence.⁹⁰

4. **PLEADING**—a. *Necessity for Pleading of Foreign Law*.—If the validity and effect of a foreign will is to be put in issue, the law of such country at the time of its execution should be pleaded and established as a matter of fact.⁹¹

b. *Nondential of Facts as Curing Defective Petition*.—Where parties claiming certain lands fail to allege in their bill that the will had been duly proved and recorded, the defendants do not admit such facts by not denying them in their answer, as the defect in title appears on the face of the bill.⁹²

J. Setting Aside Probate—1. **JURISDICTION**—a. *Of Probate Courts*—(1) *In General*.—Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills; though they may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved, when it was not known to the court that the testator had revoked it.⁹³

(2) *Grounds for Setting Aside*.—The mere fact that the proof may have established that after the death of the testator alterations were made which did not materially change the will, and which were not of such a nature as to justify the presumption that the testator had revoked the will, in whole or in part, would not authorize the probate of the will to be set aside.⁹⁴

b. *Courts of Equity*—(1) *In General*.—It is undoubtedly the general rule, established both in England and this country, that a court of equity, independent of statutes, will not entertain jurisdiction of a bill to set aside a will or the probate thereof,⁹⁵ on the ground of fraud, mistake, or forgery; this being

See the title **VENDOR AND PURCHASER**, ante, p. 864.

89. Admission and record of foreign probate.—*Secrist v. Green*, 3 Wall. 744, 18 L. Ed. 153; *Campbell v. Porter*, 162 U. S. 478, 486, 40 L. Ed. 1044.

Illinois.—Under the laws of Illinois a will probated in another state in conformity to the laws thereof is as available in proof in Illinois as if probated there. *Long v. Patton*, 154 U. S., appx., 573, 574, 19 L. Ed. 881, followed in *Underhill v. Patton*, 154 U. S., appx., 575, 19 L. Ed. 882.

New York.—In an action of ejectment brought in Michigan a certified copy of a will from the office of the register of deeds, the will itself being duly approved and allowed in New York, is admissible in evidence to show the will as probated in Michigan, there being a recital in the record of the judgment of the court admitting the will to probate, certifying that it had been fully proved by the "examination of the proofs and allegations of the petitioner," and that it was duly admitted to record. *Culbertson v. Witbeck Co.*, 127 U. S. 326, 32 L. Ed. 134.

Ohio.—Under the statute of Ohio, which permits wills made in other states concerning property in that state, to be proved and recorded in the court of the county where the property lies, it must appear that the requisitions of the statute have been pursued, in order to give

the will the same validity and effect as if made within the state. *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161.

90. Foreign probate as evidence.—*Lewis v. Stammers*, 1 Dall. 2, 1 L. Ed. 11.

91. When law of foreign country should be pleaded.—*Armstrong v. Lear*, 8 Pet. 52, 72, 8 L. Ed. 863. See, generally, the title **PLEADING**, vol. 9, p. 418.

92. Failure to deny probate in answer as admitting probate.—*Kerr v. Moon*, 9 Wheat. 565, 572, 6 L. Ed. 161.

93. Power of probate court to annul will.—*Gaines v. Hennen*, 24 How. 553, 567, 16 L. Ed. 770.

New Mexico territory.—By §§ 1446-1449 of the compiled laws of the territory of New Mexico, the probate judge has no power to declare a will void. *Bent v. Thompson*, 138 U. S. 114, 124, 34 L. Ed. 902.

Will collaterally before court.—As between the heir at law and the devisee, where claim is set up to real estate, the proper remedy in Louisiana is to be found in a court of law where the will is collaterally before the court, and the district court and not the probate court has jurisdiction. *Gaines v. Chew*, 2 How. 619, 648, 11 L. Ed. 402.

94. Alteration as ground for setting aside will.—*McIntire v. McIntire*, 162 U. S. 383, 391, 40 L. Ed. 1009. See post, "In General," VII, J. 1, b. (1).

95. Jurisdiction of equity.—Case of *Broderick's Will*, 21 Wall. 503, 509, 22 L.

within the exclusive jurisdiction of the courts of probate.⁹⁶ This is an exception to the rule that in cases of fraud, equity has a concurrent jurisdiction with courts of law.⁹⁷

(2) *Statutory Rule*.—In some states jurisdiction is vested in the state courts of equity by statute to set aside a will, and when so vested, the federal courts, sitting in the states, where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.⁹⁸

Ed. 599; *Gaines v. Fuentes*, 92 U. S. 10, 21, 23 L. Ed. 524; *Farrell v. O'Brien*, 199 U. S. 89, 104, 50 L. Ed. 101.

An original bill cannot be sustained in the federal courts for the purpose of setting aside a probate, where the state law provides for an appeal from the court of probate. *Tarver v. Tarver*, 9 Pet. 174, 180, 9 L. Ed. 91.

96. Fraud, mistake and forgery as grounds in equity.—Case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Gaines v. Chew*, 2 How. 619, 11 L. Ed. 402; *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91; *Simmons v. Saul*, 138 U. S. 439, 459, 34 L. Ed. 1054.

Executor not chargeable with trust in equity where probate court could afford relief.—The Case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599, was a bill in equity brought by the alleged heirs at law of B. to set aside and annul the probate of his will in the probate court of California, and to recover the property belonging to his estate, or to have the purchasers at the executor's sale thereof, and those deriving title from them, charged as trustees for the benefit of complainants. The bill alleged that the will was forged; that the grant of letters testamentary and the orders for the sale of the property were obtained by fraud, all of which proceedings, as well as the death of the decedent, were unknown to the complainants until within three years before the filing of the bill. A demurrer to the bill was overruled and the case was appealed to this court. It was held, that a court of equity will not entertain jurisdiction to set aside the probate of a will, on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate court; and that it will not give relief by charging the purchasers at the executor's sale, under the orders of the probate court, and those deriving title from them, as trustees, in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief, in whole or in part. *Simmons v. Saul*, 138 U. S. 439, 459, 34 L. Ed. 1054, cited with approval.

97. Equity has no concurrent jurisdiction in fraud as ground for setting aside will.—*Gaines v. Chew*, 2 How. 619, 645, 11 L. Ed. 402.

Equity gives relief in certain cases.—But where the courts of probate have not jurisdiction, or where the period for

its further exercise has expired and no laches are attributable to the injured party, courts of equity will, without disturbing the operation of the will, interpose to give relief to parties injured by a fraudulent or forged will against those who are in possession of the defendant's estate of its proceeds, mala fide, or without consideration. Case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599.

Laches—Excuse for delay.—Such relief, however, will not be granted to parties who are in laches, as where from ignorance of the testator's death they made no effort to obtain relief until eight or nine years after the probate of his will. Ignorance of a fraud committed, which is the ordinary excuse for delay, does not apply in such a case, especially when it is alleged that the circumstances of the fraud were publicly and generally known at the domicile of the testator shortly after his death. Case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599. See, generally, the title LACHES, vol. 7, p. 790.

Sending issue into law court.—The circuit court of the United States in an equity suit, in which the validity of a will is collaterally brought before the court, may send out an issue devisavit vel non to be tried by law. *Gaines v. Chew*, 2 How. 619, 650, 11 L. Ed. 402.

98. Statutory rule.—Case of *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Gaines v. Fuentes*, 92 U. S. 10, 21, 23 L. Ed. 524.

A circuit court of the United States has no jurisdiction even though there was a diversity of citizenship to admit a will to probate, or to declare the nonexistence of a will, and the consequent nullity of the probate, where the remedy afforded by the state laws to secure the probate or the revocation of the probate of a will were proceedings of a purely probate character, and not an action or suit inter partes. *Farrell v. O'Brien*, 199 U. S. 89, 116, 50 L. Ed. 101.

Ohio.—Under the statute of Ohio of February 18, 1831, "The original probate on the testimony of the attesting witnesses, under § 7, is analogous to the probate in England in common form. The subsequent proceeding by bill in equity, under § 20, to contest the validity of the will, is analogous to the probate in solemn form by the executor upon being cited in by the next of kin; and the jurisdiction exercised by the court and jury is virtually that of a court of probate. Both stages of the proceedings

c. *Courts of Law*.—See ante, "Conclusiveness," VII, E, 3.

2. **CONCLUSIVENESS OF JUDGMENT**.—A decree annulling the probate of a will is not merely irregular and erroneous, but absolutely void, as against persons interested in the will and not parties to the decree, and is no bar to the assertion of their rights under the will.⁹⁹

3. **LIMITATION OF ACTIONS**.—Under the laws of the territory of New Mexico, in 1867, a judgment of a probate court in that territory admitting a will to probate could not be annulled by the same court in a proceeding instituted by an heir more than twenty years after the original judgment was rendered and more than four years after the heir became of age.¹

extend to the real estate as well as to the personal property, differing in this respect from the former English probates. Upon the subsequent contest, as upon the original probate, the only issue is will or no will, and the court has not the powers of a court of construction, and has no authority to pass upon the question whether the devises in the will are void for remoteness." *McArthur v. Scott*, 113 U. S. 340, 384, 386, 28 L. Ed. 1015.

99. **Decree annulling probate not conclusive as to persons not parties**.—*McArthur v. Scott*, 113 U. S. 340, 404, 28 L. Ed. 1015.

A citizen of Ohio devised land in that state to his three executors in fee, in trust, to pay the income to his children and grandchildren until the youngest grandchild who should live to be twenty-one years of age should arrive at that age and then to convey the remainder to his grandchildren in equal shares; and provided that if any executor should die, resign, or refuse to act, a new executor, to act with the others, should be appointed by the court of probate. The will was admitted to probate, upon the testimony of the attesting witnesses, under the statute of Ohio of February 18, 1831, and three executors were appointed and acted as such. Two of them afterwards resigned and their resignation was accepted by the court of probate. A bill in equity to set aside the will and annul probate was then filed, under the statute, by one of the children against the other children and all the grandchildren then in being, alleging that they were the only persons specified or interested in the will, and were the only heirs and personal representatives of the deceased; those grandchildren being infants, one of the children was appointed guardian ad litem of each; the third executor, who was one of the children made defendants in their own right, and who was not made a party executor or trustee, and did not answer as such, resigned, and the resignation was accepted by the court of probate, pending that suit, and no other executor, trustee, or administrator with the will annexed was made a party; it was found by a jury that the instrument admitted to probate was not the testator's will, and a

decree was entered setting aside the will and annulling the probate. Partition was afterwards decreed among the heirs and they conveyed portions of the lands set off to them to purchasers for value and without actual notice of any adverse title. Held, that the decree annulling the probate was absolutely void as against grandchildren afterwards born, and that they were entitled to recover their shares under the will against the heirs and purchasers, and might, if the parties were citizens of different states bring their suit in the circuit court of the United States. *McArthur v. Scott*, 113 U. S. 340, 28 L. Ed. 1015.

More than two years after the probate of a will devising lands, proceedings were instituted in a county court of Texas, having the proper jurisdiction, to have the will declared null and void. The same was declared null, void, and of no effect, and was set aside. It was held that the decree of nullity was valid, and that all the necessary parties were before the court when it was rendered. *Miller v. Texas, etc., R. Co.*, 132 U. S. 662, 669, 670, 671, 33 L. Ed. 487.

Executors and trustees as necessary parties.—Executors and trustees, appointed by a testator to perform the trusts of the will and to protect the interests of his beneficiaries, are as necessary parties to a proceeding to annul a probate, as the heirs at law are to a suit to establish the validity of a will. *McArthur v. Scott*, 113 U. S. 340, 404, 28 L. Ed. 1015. See, generally, the title **PARTIES**, vol. 9, p. 34.

1. **Limitation of actions—New Mexico**.—*Bent v. Thompson*, 138 U. S. 114, 120, 34 L. Ed. 902.

The limitations of the statute of January 23, 1880, of New Mexico, which provided that actions "founded upon accounts and unwritten contracts, those brought for injuries to property, or for the conversion of personal property, or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years," applied to proceedings in a probate court. It was held that the present suit was an action to annul a former judgment of the probate court; such was the character of the judgment declaring the former

VIII. Construction and Operation.

A. Conflict of Laws.—See the title *CONFLICT OF LAWS*, vol. 3, pp. 1068, 1070.

B. General Rules of Construction—1. *INTENTION THE CARDINAL RULE.*—The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail, if consistent with the rules of law.² If the intention of the testator be in contradiction to some established

probate to be null and void. *Bent v. Thompson*, 138 U. S. 114, 124, 34 L. Ed. 902.

2. Intention the cardinal rule.—*Young Women's Christian Home v. French*, 187 U. S. 401, 411, 47 L. Ed. 233; *Busby v. Busby*, 1 Dall. 226, 1 L. Ed. 111; *Ruston v. Ruston*, 2 Dall. 243, 244, 1 L. Ed. 365; *Robinson v. Adams*, 4 Dall. appx. xii, xvi, 1 L. Ed. 920; *Lambert v. Paine*, 3 Cranch 97, 133, 2 L. Ed. 377; *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 113, 7 L. Ed. 617; *Finlay v. King*, 3 Pet. 346, 377, 7 L. Ed. 701; *Shriver v. Lynn*, 2 How. 43, 56, 11 L. Ed. 172; *Burwell v. Mandeville*, 2 How. 560, 578, 11 L. Ed. 378; *Doe v. Watson*, 8 How. 263, 272, 12 L. Ed. 1072; *Bosley v. Bosley*, 14 How. 390, 397, 14 L. Ed. 468; *Abbott v. Essex County*, 18 How. 202, 213, 15 L. Ed. 352; *Doe v. Considine*, 6 Wall. 458, 480, 18 L. Ed. 869; *Cropley v. Cooper*, 19 Wall. 167, 172, 22 L. Ed. 109; *Patch v. White*, 117 U. S. 210, 219, 29 L. Ed. 860; *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138; *Gibbons v. Mahon*, 136 U. S. 549, 559, 34 L. Ed. 525; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851; *Kenaday v. Sinnott*, 179 U. S. 606, 616, 45 L. Ed. 339. See *Beyer v. LeFevre*, 186 U. S. 114, 125, 46 L. Ed. 1080.

"The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law." *Smith v. Bell*, 6 Pet. 68, 75, 8 L. Ed. 322, quoted with approval in *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138; *Hardenbergh v. Ray*, 151 U. S. 112, 120, 38 L. Ed. 93; *Home for Incurables v. Noble*, 172 U. S. 383, 391, 43 L. Ed. 486; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851; *Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865.

"In the absence of some absolute and controlling rule of law to the contrary, the intentions of a testator, as deduced from the language of the will, construed in the light of the circumstances surrounding him at the date of its execution, always control as to the disposition of the estate." *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851.

"If the court can see a general intention, consistent with the rules of law, but the testator has attempted to carry it into effect, in a way that is not permitted, the court is to give effect to the general intention, though the particular

mode shall fail." *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 117, 7 L. Ed. 617.

In construing testamentary intention and wills, the law does not decide upon conjectures, but upon plain, reasonable, and certain expressions of intention found on the face of the will. *Wright v. Page*, 10 Wheat. 204, 239, 6 L. Ed. 303.

The testator, in his will, said: "Whereas, my will is lengthy, and it is possible, I may have committed some error or errors, I, therefore, authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention; whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator. *Pray v. Belt*, 1 Pet. 670, 679, 7 L. Ed. 309.

While the predominant idea of a testator's mind, when discovered, is to be heeded as against all doubtful and conflicting provisions which might of themselves defeat it, and the general intent and particular intent being inconsistent, the latter must be sacrificed to the former, still there are other cardinal rules in the interpretation of wills which must be regarded. *Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865.

"Whether the property passes to the devisee or descends to the heir, as in a case of intestacy, must depend upon the intention of the testator, to be gathered from the will and codicil. It is always necessarily a question of intention." *Bosley v. Bosley*, 14 How. 390, 397, 14 L. Ed. 468.

An omission of the testator to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Robinson v. Portland Orphan Asylum*, 123 U. S. 702, 707, 31 L. Ed. 293.

While an apparent general intent can-

rule of law it must yield to the rule.³ This intention is to be collected from the entire will,⁴ and is to be sought in the instrument itself.⁵

not control his particular directions plainly to the contrary, or enlarge dispositions beyond their legitimate meaning, it is of weight in determining what he intended by particular devises or bequests that may admit of an enlarged or a limited construction. *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458.

Intention the polar star.—"The courts look upon the intention of the testator as the polar star to direct them in the construction of wills." *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, quoted in *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138. See *Taylor v. Benham*, 5 How. 233, 267, 12 L. Ed. 130.

The object of the whole law concerning wills is to enable the owners of property reasonably to control its disposition at their decease. To cause their real intentions and wishes to be expressed, and their expression to be so preserved and manifested that they can be ascertained and carried into effect, are the chief purposes of legislation on this subject. *Carroll v. Carroll*, 16 How. 275, 281, 14 L. Ed. 936.

Wills are expounded more favorably, to carry the intent of the testator into effect, than conveyances at common law, which takes effect in the lifetime of the parties; wills being frequently made by people enfeebled by age or indisposition, and without the aid of counsel learned in the law. *Lambert v. Paine*, 3 Cranch 97, 138, 2 L. Ed. 377.

Whether an interest in land devised is a life estate or a fee simple conditional, is governed by the intention of the testator. *Shriver v. Lynn*, 2 How. 43, 56, 11 L. Ed. 172.

The operation of general words to pass an absolute title may be restricted by a context manifesting an intention that the legatee shall take an estate for life only. *Wellford v. Snyder*, 137 U. S. 521, 526, 34 L. Ed. 780.

Devises are governed by the intention of the testator; legacies by the rules of the civil and ecclesiastical courts. *Kerlin v. Bull*, 1 Dall. 175, 177, 1 L. Ed. 88.

The civil code of California, § 1317, provides that, "a will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible." *Colton v. Colton*, 127 U. S. 300, 311, 32 L. Ed. 138.

Rule in Shelley's Case.—In construing wills (where the question of the application of the rule in Shelley's Case arises) the intention of the testator must be fully carried out, so far as it can be done consistently with the rules of law, but no further. *Daniel v. Whartenby*, 17 Wall. 639, 642, 21 L. Ed. 661, cited in *De*

Vaughn v. Hutchinson, 165 U. S. 566, 576, 577, 41 L. Ed. 827. And see the title *SHELLEY'S CASE, RULE IN*, vol. 10, p. 1131.

3. Intention yields to established rule of law.—*Lambert v. Paine*, 3 Cranch 97, 133, 2 L. Ed. 377; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, quoted in *Colton v. Colton*, 127 U. S. 300, 307, 32 L. Ed. 138.

"His expressed intention constitutes the law, unless it shall conflict with some established legal principle." *Shriver v. Lynn*, 2 How. 43, 56, 11 L. Ed. 172.

Where the rule of law overrules, the intention is reducible to four instances: 1. Where the devise would make a perpetuity. 2. Where it would put the freehold in abeyance. 3. Where chattels are limited as inheritances. 4. Where a fee is limited on a fee. And this intention must be collected from the whole of the will or writing itself. *Ruston v. Ruston*, 2 Dall. 243, 244, 1 L. Ed. 365.

4. Intent collected from entire will.—*Robinson v. Adams*, 4 Dall., appx. xii, xvi, 1 L. Ed. 920; *Doe v. Watson*, 8 How. 263, 277, 12 L. Ed. 1072. See *Patch v. White*, 117 U. S. 210, 219, 29 L. Ed. 860; *Ruston v. Ruston*, 2 Dall. 243, 244, 1 L. Ed. 365.

In giving a construction to a will, all the parts of it should be examined and compared; and the intention of the testator must be ascertained, not from a part, but the whole of the instrument. *Lane v. Vick*, 3 How. 464, 472, 11 L. Ed. 681.

If two parts of the will are totally irreconcilable they should, if possible, be reconciled, and the intention be collected from the whole will. *Smith v. Bell*, 6 Pet. 68, 84, 8 L. Ed. 322.

"As in all of these cases, so in this, we are remitted to the language of the will to ascertain the intention of the testatrix, and if that intention is clearly deducible from the terms used, taking the whole will together, then we are bound to give that construction which will effectuate and not defeat it." *Young Women's Christian Home v. French*, 187 U. S. 401, 417, 47 L. Ed. 233.

In finding the testator's intent, every word is to have its effect. Every word is to be taken according to the natural and common import; but whatever may be the strict grammatical construction of the words, that is not to govern, if the intention of the testator unavoidably requires a different construction. *Smith v. Bell*, 6 Pet. 68, 83, 8 L. Ed. 322.

5. Given v. Hilton, 95 U. S. 591, 596, 24 L. Ed. 458.

The intention is to be collected from

2. **CONSTRUED AS A WHOLE.**—No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole.⁶

3. **CONSTRUED TO GIVE EFFECT TO ALL WORDS OF WILL.**—Effect must be given to all the words of a will, if by rules of law, it can be done.⁷

4. **CONSTRUED TO GIVE EVERY EXPRESSION SOME EFFECT.**—In **California** it is provided by statute that the words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. Such provision is merely declaratory of pre-existing law.⁸

5. **CONSTRUED IN LIGHT OF SURROUNDING FACTS AND CIRCUMSTANCES.**—In construing a will the court may put itself in the place of the testator, by looking into the state of his property, and the circumstances by which he was surrounded when he made the will.⁹

6. **CONSTRUED AGAINST INTESTACY.**—See post, "Against Intestacy," VIII, G, 1. The law prefers a construction which will prevent a partial intestacy to

the instrument and not from extrinsic circumstances. *Lambert v. Paine*, 3 Cranch 97, 133, 2 L. Ed. 377.

Testator's intention is to be collected from his words. *Smith v. Bell*, 6 Pet. 68, 75, 8 L. Ed. 322, cited in *Hardenbergh v. Ray*, 151 U. S. 112, 126, 38 L. Ed. 93; *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138; *Home for Incurables v. Noble*, 172 U. S. 383, 391, 43 L. Ed. 486; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851.

And in ascertaining what the intention of the testator is, the words used are to be taken according to their meaning as gathered from the construction of the whole instrument. *Hardenbergh v. Ray*, 151 U. S. 112, 126, 38 L. Ed. 93.

"In the construction of a will the first great rule—one that should control and govern all others—is that the court should seek the intention of the testator from four corners of his will. All technical rules, from *Shelley's Case* down, were established by courts only for the purpose of effectuating such intention. But it is easy to pervert the testator's intention by an astute application of cases and precedents." *Doe v. Considine*, 6 Wall. 458, 480, 18 L. Ed. 869.

The true construction of a will is to be collected from the words; and is not to be affected by collateral circumstances; consequently, not by events subsequent, remote, uncertain, and utterly unconnected with the contingencies alluded to in the will. This rule cannot be departed from. The security of property, and the order of society, depend on an observance of the laws. *Robinson v. Adams*, 4 Dall., appx. xii, xxi, 1 L. Ed. 920.

6. **Construed as a whole.**—*Smith v. Bell*, 6 Pet. 68, 75, 8 L. Ed. 322, quoted with approval in *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851.

In **California** it is so provided by statute. *Colton v. Colton*, 127 U. S. 300, 311,

32 L. Ed. 138, wherein it was held that such statutory provision was merely declaratory of pre-existing law.

7. **All words of will must be given effect.**—*Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865, quoting *Wright v. Page*, 10 Wheat. 204, 239, 6 L. Ed. 303.

In finding testator's intention every word is to have its effect. *Smith v. Bell*, 6 Pet. 68, 83, 8 L. Ed. 322.

8. *Colton v. Colton*, 127 U. S. 300, 312, 32 L. Ed. 138.

9. **Construed in light of surrounding facts and circumstances.**—*Allen v. Allen*, 18 How. 385, 393, 15 L. Ed. 396. See *Dandridge v. Washington*, 2 Pet. 370, 377, 7 L. Ed. 454.

"When interpreting a will, the attending circumstances of the testator, such as the condition of his family, and the amount and character of his property, may and ought to be taken into consideration. The interpreter may place himself in the position occupied by the testator when he made the will, and from that standpoint discover what was intended. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322." *Blake v. Hawkins*, 98 U. S. 315, 324, 25 L. Ed. 139, quoted with approval in *Adams v. Cowen*, 177 U. S. 471, 476, 44 L. Ed. 851, citing *Clarke v. Boorman*, 18 Wall. 493, 502, 21 L. Ed. 904; *Colton v. Colton*, 127 U. S. 300, 310, 32 L. Ed. 138; *Lee v. Simpson*, 134 U. S. 572, 587, 33 L. Ed. 1038. See *Giles v. Little*, 104 U. S. 291, 293, 26 L. Ed. 745.

"We must construe the will then according to its terms and to events within the contemplation of the testator; and not interpose limitations by conjecture, which he might have interposed if he could have foreseen what is now certain, the failure of the first objects of his bounty." *King v. Mitchell*, 8 Pet. 326, 349, 8 L. Ed. 962.

The civil code of **California**, § 1318, provides that: "In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the

one that will permit it, if such a construction may be reasonably given.¹⁰

7. **CONSTRUED IN FAVOR OF HEIRS.**—See post, "In Favor of Heirs," VIII, G, 3. It is a well-settled rule in the construction of wills that the interest of the heir at law will be regarded.¹¹ The policy of the law in favor of the heir¹² yields to the intention of a testator if clearly expressed or manifested.¹³

8. **CONSTRUED WITHOUT REFERENCE TO GRAMMAR.**—The strict grammatical construction of words is not to govern if the intention of the testator unavoidably requires a different construction.¹⁴

9. **CONSTRUED ACCORDING TO USUAL ACCEPTATION OF TERMS.**—Where words occur in a will, their plain and ordinary sense is to be attached to them, unless the testator manifestly applies them in some other sense.¹⁵

10. **CONSTRUED ACCORDING TO PRECEDENT AND TECHNICAL RULES.**—Little

testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations." *Colton v. Colton*, 127 U. S. 300, 311, 32 L. Ed. 138.

"In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration, in expounding doubtful words, and ascertaining the meaning in which the testator used them." *Smith v. Bell*, 6 Pet. 68, 75, 8 L. Ed. 322, quoted with approval in *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851.

10. **Construed against intestacy.**—*Given v. Hilton*, 95 U. S. 591, 594, 24 L. Ed. 458; *Kenaday v. Sinnott*, 179 U. S. 606, 616, 45 L. Ed. 339; *Young Women's Christian Home v. French*, 187 U. S. 401, 411, 47 L. Ed. 233; *Hardenbergh v. Ray*, 151 U. S. 112, 127, 38 L. Ed. 93.

The circumstances that a testator's mind was clearly directed to each of his heirs and that he carefully measured out his bounty to each, discriminating between them so as to show great inequality of affection, operate powerfully against the opinion that he intended to leave a very large property to descend upon them, by the silent operation of law. *Finlay v. King*, 3 Pet. 346, 379, 7 L. Ed. 701.

"And certainly when, as in this case, the intent to make a complete disposition of all the testator's property is manifest throughout his will, its provisions should be so construed, if they reasonably may be, as to carry into effect his general intent." *Given v. Hilton*, 95 U. S. 591, 594, 24 L. Ed. 458, quoted with approval in *Hardenbergh v. Ray*, 151 U. S. 112, 127, 38 L. Ed. 93.

11. **Construed in favor of heirs.**—*Walker v. Parker*, 13 Pet. 166, 173, 10 L. Ed. 109.

12. *Lambert v. Paine*, 3 Cranch 97, 130,

2 L. Ed. 377; *McCaffrey v. Manogue*, 196 U. S. 563, 569, 49 L. Ed. 600.

In *Wright v. Page*, 10 Wheat. 204, 228, 6 L. Ed. 303, the court said: "The law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape." *McCaffrey v. Manogue*, 196 U. S. 563, 569, 49 L. Ed. 600. See *Home for Incurables v. Noble*, 172 U. S. 383, 390, 43 L. Ed. 486.

It is settled in Massachusetts as well as elsewhere that "where a clause is fairly susceptible of two constructions also, that certainly is to be preferred which inclines to the inheritance of the child of a deceased child." *Blagge v. Balch*, 162 U. S. 439, 465, 40 L. Ed. 1032.

By the law of Pennsylvania, heirs must take, unless they are disinherited by express words or necessary implication. *Allen v. Allen*, 18 How. 385, 15 L. Ed. 396.

In Connecticut, when the terms of a will leave the intention of the testator in doubt, the courts generally incline to adopt that construction which conforms more nearly to the statute of distributions. *Blagge v. Balch*, 162 U. S. 439, 465, 40 L. Ed. 1032.

13. *McCaffrey v. Manogue*, 196 U. S. 563, 569, 49 L. Ed. 600.

When the language of a limitation is capable of two constructions, one of which would operate to disinherit a lineal descendant of the testator, while the other will not produce that effect, the latter should be preferred. An intention to disinherit an heir, even a lineal descendant, when expressed in plain and unambiguous language, must be carried out; but it will not be imputed to a testator by implication, when he uses language capable of construction which will not so operate. *Blagge v. Balch*, 162 U. S. 439, 464, 40 L. Ed. 1032.

14. **Construed without reference to grammar.**—*Smith v. Bell*, 6 Pet. 68, 83, 8 L. Ed. 322.

15. **Construed according to usual acceptance of terms.**—*Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865;

assistance is derived from general rules in the construction of a will.¹⁶ And except for the establishment of general principles, very little aid can be procured from adjudged cases,¹⁷ but it is a question in each case of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention.¹⁸ When, however, a particular expression in a will has received a definite meaning, by express adjudications, such definite meaning must be adhered to,¹⁹ and when a word is made use of, to which a clear legal signification has been attached, by successive adjudications, it ought rather to control the meaning of those of a more equivocal purport.²⁰

11. CONSTRUED WITH REFERENCE TO INTRODUCTORY CLAUSE.—See footnote.²¹

Wright v. Page, 10 Wheat. 204, 239, 6 L. Ed. 303; *Smith v. Bell*, 6 Pet. 68, 83, 8 L. Ed. 322.

"Remote explanations as to the meaning of words must be rejected when the will offers a different and more obvious one upon its face." *Rodriguez v. Vivoni*, 201 U. S. 371, 376, 50 L. Ed. 792.

Where the words of a testator are unambiguous their obvious, ordinary meaning must not be defeated by conjecture. *Travers v. Reinhardt*, 205 U. S. 423, 430, 51 L. Ed. 865.

The civil code of California provides that "the words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." *Colton v. Colton*, 127 U. S. 300, 312, 32 L. Ed. 138, wherein it was held that such provision was merely declaratory of pre-existing law.

16. Little assistance derived from general rules.—Given *v. Hilton*, 95 U. S. 591, 596, 24 L. Ed. 458.

It has not been the disposition of courts of justice, in modern times, to extend the application of these rigid technical rules; but rather to carry out the intention of the testator, when no fixed rule of legal interpretation stands in the way. *Bosley v. Bosley*, 14 How. 390, 398, 14 L. Ed. 468.

17. Precedent.—*Lambert v. Paine*, 3 Cranch 97, 131, 2 L. Ed. 377; *King v. Mitchell*, 8 Pet. 326, 343, 8 L. Ed. 962; *Robison v. Portland Orphan Asylum*, 123 U. S. 702, 31 L. Ed. 293. See, generally, the title *STARE DECISIS*, ante, p. 27.

In the construction of wills courts are not required to adhere rigidly to precedents. *McCaffrey v. Manogue*, 196 U. S. 563, 571, 49 L. Ed. 600, citing *Abbott v. Essex County*, 18 How. 202, 213, 15 L. Ed. 352.

"It would be very unsafe as well as unjust to expound the will of one man, by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it." *Bosley v. Bosley*, 14 How. 390, 397, 14 L. Ed. 468.

"The construction put upon words in

one will, has been supposed to furnish a rule for construing the same words in other wills; and thereby to furnish some settled and fixed rules of construction which ought to be respected. We cannot say that this principle ought to be totally disregarded; but it should never be carried so far as to defeat the plain intent; if that intent may be carried into execution, without violating the rules of law. It has been said truly (3 Wils. 141), 'that cases on wills may guide us to general rules of construction; but, unless a case cited be in every respect directly in point, and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills.'" *Smith v. Bell*, 6 Pet. 68, 79, 8 L. Ed. 322, quoted in *Colton v. Colton*, 127 U. S. 300, 309, 32 L. Ed. 138; *Adams v. Cowen*, 177 U. S. 471, 475, 44 L. Ed. 851.

18. *Robison v. Portland Orphan Asylum*, 123 U. S. 702, 707, 31 L. Ed. 293.

19. *Lambert v. Paine*, 3 Cranch 97, 134, 2 L. Ed. 377. See *Bosley v. Bosley*, 14 How. 390, 397, 14 L. Ed. 468.

20. *Lambert v. Paine*, 3 Cranch 97, 129, 2 L. Ed. 377. See *Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865.

"But the construction of a will ought to depend much more upon the evident intent of the testator than upon the strict import of any term that he may make use of. Too critical an examination of the diction of a will is rather calculated to mislead the court than to conduct it to a just conclusion." *Lambert v. Paine*, 3 Cranch 97, 129, 2 L. Ed. 377.

21. Construed with reference to introductory clause.—The introductory clause in a will that "I, William King, have thought proper to make and ordain this to be my last will and testament, leaving and bequeathing my worldly estate in the manner following," is entitled to considerable influence in a question of doubtful intent, in a case where the whole property is given, and the question arises between the heir and devisee, respecting the interest devised. *Finlay v. King*, 3 Pet. 346, 347, 7 L. Ed. 701.

And where the words of a devise ad-

12. **PRIMARY INTENTION PREVAILS OVER SECONDARY.**—Where there are two intents, inconsistent with each other, that which is primary will control that which is secondary.²²

13. **LATER PARTS OF WILL PREVAIL OVER PRIOR.**—All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.²³

14. **DOCTRINE OF EJUSDEM GENERIS.**—In the construction of wills, where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things ejusdem generis, with the particular things mentioned. But this rule of construction rests on a mere presumption, easily rebutted by anything that shows the larger subject was in fact in the testator's view.²⁴

15. **COURTS NOT INCLINED TO REGARD WILL AS CONDITIONAL.**—Courts do not incline to regard a will as conditional where it can be reasonably held that the testator was merely expressing his inducement to make it, however inaccurate his use of language might be, if strictly construed.²⁵

C. Construction of Particular Words and Phrases.—See footnote.²⁶

mit of passing a greater interest than for life, courts will lay hold of the introductory clause, to assist them in ascertaining the intention of the testator. *Wright v. Page*, 10 Wheat. 204, 228, 6 L. Ed. 303. See *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 100, 41 L. Ed. 925.

22. **Primary intention prevails over secondary.**—*Smith v. Bell*, 6 Pet. 68, 78, 8 L. Ed. 322. See *Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865.

23. **Later parts of will prevail over prior.**—*Colton v. Colton*, 127 U. S. 300, 311, 312, 32 L. Ed. 138.

"The court said in *Sims v. Doughty*, 5 Ves. 247, 'and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention.' Blackstone, in his Commentaries, vol. 2, p. 380, asserts the same principle. The approved doctrine, however, unquestionably, is, that they should, if possible, be reconciled, and the intention be collected from the whole will." *Smith v. Bell*, 6 Pet. 68, 84, 8 L. Ed. 322.

In California it is so provided by statute. *Colton v. Colton*, 127 U. S. 300, 311, 32 L. Ed. 138.

24. **Doctrine of ejusdem generis.**—*Given v. Hilton*, 95 U. S. 591, 598, 24 L. Ed. 458.

Movables.—A testatrix bequeathed to M. all her wearing apparel, household furniture, plate, linen, books, and "every movable whatever," and bequeathed the rest and residue of the estate to S. It was held that "movables" must be confined to things of the same nature with those before specified and did not embrace debts due testatrix by M. *Jackson v. Vandersprengle*, 2 Dall. 142, 1 L. Ed. 323.

25. **Courts not inclined to regard wills as conditional.**—*Eaton v. Brown*, 193 U. S. 411, 414, 48 L. Ed. 730.

A will began in this manner: "Being about to travel a considerable distance, and knowing the uncertainty of life, think it advisable to make some disposition of my estate, do make this my last will and testament, etc." It was contended, that the condition upon which the instrument was to take effect as a will was his dying on the journey and not returning home again. Held, it is no condition, but only assigning the reason why he made his will at that time; but the instrument's taking effect as a will is not made at all to depend upon the event of his return or not from his journey. There is no color, therefore, for annulling this will, on the ground that it was conditional. *Tarver v. Tarver*, 9 Pet. 174, 179, 9 L. Ed. 91.

The following will of an illiterate testatrix was held not to be conditional: "I am going on a Journey and may, not ever return. And if I do not, this is my last request. The Mortgage on the King House, which is in the possession of Mr H H Brown to go to the Methodist Church at Bloomingburgh All the rest of my properday both real and personal to My adopted Son L. B. Eaton of the life Saving Service, Treasury Department Washington D. C. All I have is my one hard earnings and I propose to leave it to whome I please." The court said: The last sentence imports an unqualified disposition of property, not a disposition having reference to a special state of facts by which alone it is justified and to which it is confined. *Eaton v. Brown*, 193 U. S. 411, 412, 415, 48 L. Ed. 730.

26. **Construction of particular words and phrases—After.**—See AFTER, vol. 1, p. 203.

ALL.—See ALL, vol. 1, p. 257.

Children.—See post, "Designation of Legatees and Devisees," VIII, H.

D. Transposing, Rejecting, Substituting, Supplying and Altering Words.—To effect the intention of the testator, the court will vary the strict meaning of words,²⁷ and sometimes transpose them.²⁸ And in giving effect to such intention, some words may be rejected, or so restrained in their application, as materially to change the literal meaning of the particular sentence.²⁹ But no words are to be rejected that can possibly have any sense assigned to them, not incompatible with clearer expressions, or manifest general intent.³⁰

Substituting Words.—Courts are not justified in substituting a word or words in a will unless the whole context of the instrument plainly and beyond question requires that it be done in order to give effect to the intention of the testator.³¹

Where legal technical terms are wanting, the intention, to supply them,

Dying without issue.—See *DIE WITHOUT ISSUE*, vol. 5, p. 347.

Effects.—See *EFFECTS*, vol. 5, pp. 693, 694.

The meaning of the word "effects," when used indefinitely in wills, but in connection with something particular and certain, is limited by its association to other things of a like kind. It is from the subject matter of its use that intention of something else is to be implied; and that of course may be larger or less. In some instances in wills, the word has carried the whole personal estate. When in connection with words of themselves of larger meaning, or of fixed legal import, as there were in the case of *Bosley v. Bosley*, 14 How. 390, 14 L. Ed. 468, such a clause in a will is residuary. *Ennis v. Smith*, 14 How. 400, 421, 14 L. Ed. 472.

Equal—Equally.—See *EQUAL—EQUALLY*, vol. 5, p. 800.

Estate.—See the title *ESTATES*, vol. 5, p. 905. See, also, post, "Words Necessary to Create," VIII, K, 1, a, (1).

"In some useful trade."—Testatrix bequeathed the interest of certain funds "to the proper education" of certain persons "in some useful trade." Held, that in ascertaining the amount applicable to such education, one of the learned professions cannot be taken as the standard, with as much propriety as the trade or art of a mechanic. But when the situation and character of the parties is considered, and also the language of the will, it will be construed that the testatrix intended such an education as would fit such persons to hold a distinguished place in that line of life in which she designed them to move. *Dandridge v. Washington*, 2 Pet. 370, 377, 7 L. Ed. 454.

Issue.—See post, "Designation of Legatees and Devisees," VII, H.

The words "legacy" and "legatee" may be construed to apply to real estate where the context of the will shows such to be the intention of the testator. *Burwell v. Mandeville*, 2 How. 560, 578, 11 L. Ed. 378.

"Life or lives in being."—See *LIFE*, vol. 7, p. 878.

Movables.—See ante, "Doctrine of Eiusdem Generis," VIII, B, 14.

Next of kin.—See post, "Designation of Legatees and Devisees," VIII, H.

Proper education.—See *EDUCATION*, vol. 5, p. 693.

Adverbs of time in a devise of a remainder.—See the title *REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS*, vol. 10, p. 642.

27. Court will vary meaning of words to effect testator's intention.—*Finlay v. King*, 3 Pet. 346, 383, 7 L. Ed. 701.

28. Transposing words.—*Finlay v. King*, 3 Pet. 346, 383, 7 L. Ed. 701.

Where a will provided "in case of having no children, I then leave and bequeath all my real estate, at the death of my wife to William King, on condition of his marrying a daughter of William Trigg, in trust for their eldest son," the court transposed the word "all" so that the clause read, "in case of having no children, I then leave my real estate, all, at the death of my wife, to William King," etc., in order to effect the intention of the testator. *Finlay v. King*, 3 Pet. 346, 383, 7 L. Ed. 701.

29. Rejecting words.—*Finlay v. King*, 3 Pet. 346, 377, 7 L. Ed. 701, cited in *Patch v. White*, 117 U. S. 210, 219, 29 L. Ed. 860; *Travers v. Reinhardt*, 205 U. S. 423, 431, 51 L. Ed. 865. See *Wright v. Page*, 10 Wheat. 204, 239, 6 L. Ed. 303.

30. Robinson v. Adams, 4 Dall., appx. xii, xvi, 1 L. Ed. 920.

31. Substituting words.—*Travers v. Reinhardt*, 205 U. S. 423, 430, 51 L. Ed. 865. See *Rodriguez v. Vivoni*, 201 U. S. 371, 376, 50 L. Ed. 792.

"And" for "or."—"If the intent of the testator be apparent, effect will be given to it, though he may have used inappropriate terms to attain his object. Under such circumstances, the conjunctive 'and' may be read as the disjunctive 'or,' or the disjunctive may be changed into the conjunctive. But this latitude of construction is never exercised where the language of the will is explicit, and the intent of the testator is not doubtful. In such a case, the import of the words used must be taken." *Doe v. Watson*, 8 How. 263, 272, 12 L. Ed. 1072.

Refusal to substitute "and" for "or."—*Travers v. Reinhardt*, 205 U. S. 423, 430, 51 L. Ed. 865.

must be clear and manifest from the words and expressions in the will.³²

The alteration of words, by judges, in considering wills, are not made, strictly speaking, to discover the intention of testators, but only to express it properly when discovered. They do not introduce a supposed intention, but wait upon the true intention.³³

E. Correcting Mistakes in Wills.—A court of equity has authority to correct mistakes in wills and to enforce the real intention of the testator by giving that construction which accomplishes such purpose.³⁴

F. Evidence to Aid Construction—1. **PAROL EVIDENCE**—a. *In General.*—Parol evidence, to show the intention of the testator, is not admissible.³⁵ Where a will is doubtful and uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain it,³⁶ and testimony to show a different intention in the testator from that which his will discloses, is inadmissible.³⁷

b. *In Cases of Ambiguities—Latent Ambiguities.*—It is settled doctrine that a latent ambiguity may be removed by extrinsic evidence.³⁸ Such an ambiguity

32. Supplying legal technical terms.—*Busby v. Busby*, 1 Dall. 226, 1 L. Ed. 111.

33. Alteration of words.—*Robinson v. Adams*, 4 Dall., appx. xii, xvii, 1 L. Ed. 920.

34. Power of court in equity to correct mistakes in wills.—*Home for Incurables v. Noble*, 172 U. S. 383, 391, 43 L. Ed. 486.

"Story, 1 Eq. Jur., 12th Ed., p. 174, says: 'Section 179. In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them, when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But, then, the mistake must be apparent on the face of the will, otherwise there can be no relief; for, at least since the statute of frauds, which requires wills to be in writing (whatever may have been the case before the statute), parol evidence, or evidence dehors the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. Section 180. But the mistake, in order to lead to relief, must be a clear mistake, or a clear omission, demonstrable from the structure and scope of the will. Thus, if in a will there is a mistake in the computation of a legacy, it will be rectified in equity. So, if there is a mistake in a name, or description, or number of the legatees, intended to take, or in the property intended to be bequeathed, equity will correct it.'" *Home for Incurables v. Noble*, 172 U. S. 383, 391, 43 L. Ed. 486.

35. Parol evidence to show testator's intention inadmissible.—*Mackie v. Story*, 93 U. S. 589, 23 L. Ed. 986.

If the language of a codicil is sufficient to indicate the testator's meaning, the court is not permitted to search out of it for an inference of his intention. *Homer v. Brown*, 16 How. 354, 366, 14 L. Ed. 970.

36. Weatherhead v. Baskerville, 11 How. 329, 357, 13 L. Ed. 717.

The interpretation of a will cannot be aided by extrinsic circumstances, namely, memoranda, declaration, and the actual amount and condition of the estate. *Allen v. Allen*, 18 How. 385, 393, 15 L. Ed. 396.

Evidence of extrinsic circumstances, such as the amount and condition of the estate, etc., cannot be received to control the interpretation of the will. It is only admissible to explain ambiguities arising out of extrinsic circumstances. *Allen v. Allen*, 18 How. 385, 15 L. Ed. 396.

The intention of the testator as to the limitations of an estate devised can be judged and decided only from his own language as contained within the "four corners" of his will. Parol evidence cannot be received to show that such inference was not founded on probability, or that this rule of construction ought not to apply under certain circumstances. *King v. Ackerman*, 2 Black 408, 415, 17 L. Ed. 292.

37. Weatherhead v. Baskerville, 11 How. 329, 357, 13 L. Ed. 717; *Allen v. Allen*, 18 How. 385, 392, 15 L. Ed. 396.

It was urged, as the animus testandi of a testator may be gathered from all the circumstances constituting the *res gestæ* of the execution of a will, that all and any of them may be used to prove that expressions and clauses were put into the will contrary to the intention and instructions of the testator. Held, without denying altogether that proposition, it must be admitted that the testimony for such a purpose must be of facts unconnected with any general declaration, or wishes expressed by a testator for the disposition of his property by will. *Weatherhead v. Baskerville*, 11 How. 329, 357, 13 L. Ed. 717.

38. In cases of latent ambiguities.—*Patch v. White*, 117 U. S. 210, 217, 29 L. Ed. 860, cited in *Gilmer v. Stone*, 120 U. S. 586, 590, 30 L. Ed. 734. See, also,

may arise upon a will, either when it names a person as the object of a gift, or a thing as the subject of it, and there are two persons or things that answer such names or description; or, secondly, it may arise when the will contains

Allen v. Allen, 18 How. 385, 393, 15 L. Ed. 396; *Home for Incurables v. Noble*, 172 U. S. 383, 391, 43 L. Ed. 486. See ante, "Correcting Mistakes in Wills," VIII, E.

Extrinsic evidence is only admissible to explain ambiguities arising out of extrinsic circumstances, as to persons provided for, objects of disposition, and the like. For instance, if the testator gave to his grandson, J. S., a plantation, and he had two grandsons of that name; or he devised his son J. his plantation on a certain river, and he had two plantations there, in each case proof might be heard to show the person or thing intended. But evidence cannot be heard to show a different intention in the testator from that which the will disclose. *Allen v. Allen*, 18 How. 385, 392, 15 L. Ed. 396.

"Of the competency of this evidence (extrinsic) there can be no doubt. The purpose of it was to place the court, as far as possible, in the situation in which the testator stood, and thus bring the words employed by him into contact with the circumstances attending the execution of the will. Such proof does not contradict the terms of that instrument, nor tend to wrest the words of the testator from their natural operation. It serves only to identify the institutions described by him as 'the board of foreign and the board of home missions,' and thus the court is enabled to avail itself of the light which the circumstances, in which the testator was placed at the time he made the will, would throw upon his intention." *Gilmer v. Stone*, 120 U. S. 586, 590, 30 L. Ed. 734.

A court may look beyond the face of the will, to explain an ambiguity as to the person or property to which it applies, but never for the purpose of enlarging or diminishing the estate devised. *King v. Ackerman*, 2 Black 408, 17 L. Ed. 292; *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 109, 41 L. Ed. 925.

To allow the legal construction of the terms of a will, executed and attested as required by law, to be affected by testimony to the testator's state of health at the time of publishing his will, or to his length of life afterwards, would be open in the highest degree to the confusion and uncertainty resulting from permitting the meaning of written instruments to be altered by parol evidence. *Barber v. Pittsburg, etc., R. Co.*, 166 U. S. 83, 109, 41 L. Ed. 925.

In *Stackhouse v. Stackhouse*, 2 Dall. 80, 1 L. Ed. 298, it seems that parol testimony was admitted to explain the meaning of a will to be that a devisee was entitled to 215 acres and 74 perches of land

instead of 171 acres and 90 perches allowed him.

It may be proved by parol evidence that the person to whom a bequest has been made was designated by the wrong Christian name. So where a testator bequeathed "unto his friend Samuel Powell" a certain sum, evidence was admitted, to show, that, though the legacy was bequeathed to Samuel Powell, it was in fact intended for William Powell. *Powell v. Biddle*, 2 Dall. 70, 1 L. Ed. 293.

Where there are two persons or things equally answering the description, the ambiguity may be removed by any evidence that will have that effect, either circumstances, or declarations of the testator. *Patch v. White*, 117 U. S. 210, 217, 29 L. Ed. 860.

Where a latent ambiguity consists of a misdescription, if the misdescription can be struck out, and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will. *Patch v. White*, 117 U. S. 210, 217, 29 L. Ed. 860.

"The rule is very distinctly laid down by Sir James Wigram, who says: 'A description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity, and, as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary, or add to the effect of the will by rejecting them.' Wigram on Extrinsic Evidence, 53. Of course when the author speaks of the rejected words as being 'inapplicable to any subject,' he means inapplicable because the subject is not in existence, or does not belong to the testator." *Patch v. White*, 117 U. S. 210, 218, 29 L. Ed. 860.

a misdescription of the object or subject; as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator.³⁹

2. **DECLARATIONS OF TESTATOR.**—Where a devise is, on the face of it, clear and intelligible, yet from external circumstances an ambiguity arises as to which of two or more things, or of two or more persons, the testator referred to, it being legally certain that he intended one or the other, evidence of his declarations, of the instructions given for his will, and of other circumstances

Testator devised to his brother "lot numbered six, in square four hundred and three, together with the improvements thereon erected" and appurtenances thereto belonging, and then, after giving other specific lots with houses thereon, he devised to his son, "the balance of my real estate believed to be and to consist in" certain described lots, but not including "lot number three in square 406." Parol evidence disclosed the fact that the testator did not, and never did, own lot 6, in square 403, but did own lot 3, in square 406, and that the former lot had no improvements on it, whilst the latter had a dwelling house on it, and was occupied by the testator's tenants—a circumstance which precludes the idea that he could have overlooked it. Held, that this evidence was properly admitted, that a latent ambiguity was raised, and that lot 3 in square 406 was lawfully devised to testator's brother. *Patch v. White*, 117 U. S. 210, 214, 29 L. Ed. 860.

"The case of the Roman Catholic Orphan Asylum v. Emmons, 3 Bradford 144, which arose before the Surrogate of New York, well illustrates the application of the rule. There a testatrix bequeathed her shares of the Mechanics' Bank stock to the Orphan Asylum. She had no bank stock except ten shares of the City Bank. Surrogate Bradford, in a learned opinion, held that the word 'Mechanics' must be rejected as inapplicable to any property ever owned by the testatrix, and the rejection of this word left the bequest to operate upon any bank stock possessed by her, and so to pass the City Bank shares." *Patch v. White*, 117 U. S. 210, 218, 29 L. Ed. 860.

Evidence of extrinsic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain ambiguities of description in the will, but never to control the construction or extent of devises therein contained. *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, 109, 41 L. Ed. 925.

In all cases where a difficulty arises in applying the words of a will to the subject matter of the devise, the difficulty or ambiguity which is introduced by the administration of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the estate or subject matter really intended to be

devised. *Atkinson v. Cummins*, 9 How. 479, 485, 13 L. Ed. 223.

"*Falsa demonstratio non nocet.*"—It is undoubtedly the general rule, that the maxim "*Falsa demonstratio non nocet*" is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised, independently of the false description, so that the devise would be effectual without it. But why should it not apply in every case where the extrinsic facts disclosed make it a matter of demonstrative certainty that an error has crept into the description, and what that error is? Of course, the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made. *Patch v. White*, 117 U. S. 210, 216, 29 L. Ed. 860.

Where a will contained the following expressions: "My estate to be equally divided amongst my children," and also, "my lands and slaves to be equally divided amongst my children;" and had in it also the following clause: "to each of my daughters a small tract of land," the last clause must be rejected as void and inoperative, and cannot be used for the purpose of showing such an ambiguity as would let in extrinsic testimony to explain the intentions of the testator. When such testimony is introduced, it must be of facts unconnected with any general declaration or wishes expressed by a testator for the disposition of his property. In the present case, the testimony offered purported to express those wishes, and was therefore inadmissible. *Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717.

Whilst no bill in equity lies to reform a will, because its author is dead, and his intent can only be known from the language he has used, when applied to the circumstances by which he was surrounded, yet a careful study of that language and of those circumstances will generally disclose any inadvertency or mistake in the description of persons or things, and the manner in which it should be corrected, without adding anything to the testator's language, and thereby making a different will from that left by him. *Patch v. White*, 117 U. S. 210, 219, 29 L. Ed. 860.

39. **When latent ambiguity arises.**—*Patch v. White*, 117 U. S. 210, 217, 29 L. Ed. 860; *Gilmer v. Stone*, 120 U. S. 586, 590, 30 L. Ed. 734.

of the like nature, is admissible to determine his intention.⁴⁰

3. **SURROUNDING FACTS AND CIRCUMSTANCES.**—See ante, "Construed in Light of Surrounding Facts and Circumstances," VIII, B, 5; "In Cases of Ambiguities—Latent Ambiguities," VIII, F, 1, d.

G. Presumptions in Aid of Construction.—1. **AGAINST INTESTACY.**—It is settled by the authorities that when one undertakes to make a will it will be presumed that his purpose is to dispose of his entire estate.⁴¹ And no presumption of an intent to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole.⁴²

2. **IN FAVOR OF FIRST TAKER.**—The first taker is always the favorite object of testator's bounty, and as such entitled to the benefit of every implication.⁴³

3. **IN FAVOR OF HEIR.**—The presumption in respect to after-acquired real property is in favor of the heir.⁴⁴

H. Designation of Legatees and Devisees.—Particular Descriptions.—See footnote.⁴⁵

40. *Coulam v. Doull*, 133 U. S. 216, 231, 33 L. Ed. 596.

41. **Presumption against intestacy.**—*Hardenberg v. Ray*, 151 U. S. 112, 126, 38 L. Ed. 93; *Lambert v. Paine*, 3 Cranch 97, 129, 2 L. Ed. 377. See *Robinson v. Adams*, 4 Dall., appx. xii, 1 L. Ed. 920.

42. *Hardenbergh v. Ray*, 151 U. S. 112, 127, 38 L. Ed. 93; *Given v. Hilton*, 95 U. S. 591, 594, 24 L. Ed. 458, wherein in construing the will it was held that the testator intended to dispose of the entire estate, and not to die intestate as to any portion of it.

43. **In favor of first taker—Pennsylvania.**—*Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, 100, 41 L. Ed. 925.

44. **In favor of heir.**—*Hardenbergh v. Ray*, 151 U. S. 112, 126, 38 L. Ed. 93, citing *Smith v. Edrington*, 8 Cranch 66, 3 L. Ed. 490. See ante, "Construed in Favor of Heirs," VIII, B, 7.

45. **Particular descriptions.**—"Children" has a legal significance, extending, as the case may be, to grandchildren and even illegitimate children, but never permitting the term sons to be substituted for it, unless such shall be the plain intention of a testator in his will in favor of sons to the exclusion of daughters. *Weatherhead v. Baskerville*, 11 How. 329, 358, 13 L. Ed. 717.

But the legal construction of the word "children" accords with its popular signification, namely, as designating the immediate offspring. It is true, in the construction of wills, where greater latitude is allowed, in order to effect the obvious intention of the testator, grandchildren have been allowed to take, under a devise "to my surviving children." But even in a will, this word will not be construed to mean grandchildren, unless a strong case of intention or necessary implication requires it. *Adams v. Law*, 17 How. 417, 421, 15 L. Ed. 149.

The word "issue" is a general term, which, if not qualified or explained, may be construed to include grandchildren as well as children. *Adams v. Law*, 17 How. 417, 421, 15 L. Ed. 149.

"In the construction * * * of wills, * * * where the instrument has not, so carefully as in the present case, limited the word 'issue' to children living, etc., but where the term is used without qualification, and is in another part of the same instrument supplied by the word child, or children, as a synonym, the courts have uniformly restrained its signification to children." *Adams v. Law*, 17 How. 417, 421, 15 L. Ed. 149.

The word "issue" in a devise to one, "during the term of his natural life, and if he leaves lawful issue, then to such issue; but in case of his dying without issue, or they dying under twenty-one years," then to another in fee, was held to be a word of limitation. *James's Claim*, 1 Dall. 47, 1 L. Ed. 31.

The words "issue of his body" are more flexible than the words "heirs of his body," and courts more readily interpret the former as the synonym of children and a mere descriptive personarum than the latter. *Daniel v. Whartenby*, 17 Wall. 639, 643, 21 L. Ed. 661.

An estate was given to Richard, "during his natural life," "after his death, to his issue by him lawfully begotten of his body." These must necessarily have been his children. *Daniel v. Whartenby*, 17 Wall. 639, 644, 21 L. Ed. 661.

The word "offspring" used as a synonym for "issue." *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, 101, 41 L. Ed. 925.

Next of kin.—In the construction of wills and settlements, after considerable conflict of opinion, the established rule of interpretation in England is that the phrase "next of kin," when found in ulterior limitations, must be understood to mean nearest of kin without regard to the statutes of distribution. This rule was followed in Massachusetts. But the rule does not appear to have been approved in New York and New Hampshire. *Blagge v. Balch*, 162 U. S. 439, 464, 40 L. Ed. 1032.

Heirs.—Although, strictly speaking, no

I. Construction of Gifts to Classes.—Gift in Remainder.—See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS, vol. 10, p. 648.

Shares of Members of Class—Taking Per Capita or Per Stirpes.—According to the general rule of construction in the case of a gift to the children of several persons described as standing in a certain relation to the testator, the objects of the gift take per capita and not per stirpes.⁴⁶

J. Property Devised or Bequeathed—1. IN GENERAL.—A devise of the profits of land, or even a grant of them, will pass a right to the land itself.⁴⁷

2. UNDER PARTICULAR DESCRIPTIONS.—See footnote.⁴⁸

one is the heir of a living person, yet a devise to the "heirs" of a person named (who is a living person, and is so recognized in the will) describes with sufficient certainty the persons intended, and shows that the word is not used in the strict sense, but as meaning the heirs apparent of that person, or the persons who would be his heirs were he dead when the devise takes effect. *Barber v. Pittsburgh, etc.*, R. Co., 166 U. S. 83, 108, 41 L. Ed. 925.

In *Barber v. Pittsburgh, etc.*, R. Co., 166 U. S. 83, 41 L. Ed. 925, the court said: "The word 'heirs' is not limited, in its own meaning, or by anything in this will, to children; and applies either to John Barber's children or his more remote descendants, whichever may be his heirs if he be dead, or his heir's apparent if he be living, when the devise in question takes effect."

Devise to the first heir male of I, when he shall arrive at the age of twenty-one years, he paying to A and B, the daughters of I, £40 each; after devisor's death, I had a son, who attained the age specified and paid his sisters the £40 each. Held, the intent of the testator is clear that the first son of I should take; he is entitled to recover. *Asheton v. Asheton*, 1 Dall. 4, 1 L. Ed. 12.

A clause of a will contained the following words: "It is my will, that, if either of my said sons, namely, * * *, should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs." In construing this clause, the court said: "We think that no two minds could differ as to the clear intention of the testator. By 'lawful heirs of their own,' he evidently meant lineal descendants or 'issue.'" *Abbott v. Essex County*, 18 How. 202, 215, 15 L. Ed. 352.

Where the operative words of the will were: "I give the proceeds thereof (of his real estate) to my said brothers and sisters, and their heirs, forever, or such of them as shall be living at the decease of my son, to be divided between them in equal portions, share and share alike," it was held that the word "heirs" is to be construed to be a word of limitation, and, consequently, that the devise to the brothers and sisters failed to take effect

by their deaths in the lifetime of the son. *Daly v. James*, 8 Wheat. 495, 533, 5 L. Ed. 670.

"Sucession legitima."—See SUCCESSION LEGITIMA, ante, p. 297.

46. **Taking per capita.**—*Walker v. Griffin*, 11 Wheat. 375, 379, 6 L. Ed. 498; *McIntire v. McIntire*, 192 U. S. 116, 121, 48 L. Ed. 369.

A will contained the following clause: "The remainder if any, is to be equally divided between my brothers Edwin and Charles children." At the date of the will the brother Charles was living and had two sons, C. and H., the latter of whom died before the testator. The brother Edwin had died, leaving six children, one of whom died before the testator. Held, the objects of the right take per capita and not per stirpes. *McIntire v. McIntire*, 192 U. S. 116, 120, 48 L. Ed. 369.

Taking per stirpes.—Devise of the testator's estate, "One-fourth part to be given to the families of G. Holloway, W. B. Blackburn and A. Bartlett, to those of their children that my wife shall think proper, but in a greater proportion to F. P. Holloway, than to any other of G. Holloway's children; to E. P. Bartlett in a greater proportion than any of A. Bartlett's children; the balance to be given to the families of C. and T. F. Griffin's children in equal proportion." Held, that the children of C. and J. T. Griffin took per stirpes, and not per capita, and that the property devised to them was to be divided into two equal parts, one moiety to be assigned to each family. *Walker v. Griffin*, 11 Wheat. 375, 6 L. Ed. 498.

47. **Devise of profits of land passes land.**—*Green v. Biddle*, 8 Wheat. 1, 75, 5 L. Ed. 547.

48. **Under particular descriptions.**—A clause in a will bequeathing certificates held by brother of testatrix does not include warrants for bounty lands never held by him, though the words certificates and warrants of the sort in question were sometimes used synonymously. *Edmondson v. Bloomshire*, 11 Wall. 382, 391, 20 L. Ed. 44.

A will provided as follows: "To my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and di-

3. UNDER RESIDUARY CLAUSE.—See footnote.⁴⁹

4. AFTER-ACQUIRED PROPERTY—*a. Real Property.*—A will devising real estate, under the rules of the common law, would not operate to pass real estate

vided when my son Westley arrives at the age of twenty-one;" and further provided "that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs." Held, it was not the intention of the testator to include the town lots in the devise of his lands to his sons. But these town lots must be sold, after the payment of debts, for the use and benefit of all the heirs of the testator. *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681.

Testatrix bequeathed certain stocks in trust to pay "the dividends" thereof to her daughter "during her lifetime." The will provided that upon such daughter's death the stocks and income should revert to the trustee's estate, "without incumbrance or impeachment of waste." A stock dividend was declared on such stocks. Held, that such stock dividend was capital, and the daughter was entitled to only the income thereof. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525.

A direction by testator in his will "that any and all notes, bills, accounts, agreements, or other evidences of indebtedness against any of my said brothers and sisters, held by me at the time of my decease, be canceled by my said executors and delivered up to the maker or makers thereof, except two notes specified, does not include joint and several notes made to him, between the date of the will and his death, by a partnership of which one brother is a member, to obtain money to carry on the business of the partnership, and secured by an agreement to convey real estate. *Waterman v. Alden*, 143 U. S. 196, 197, 200, 36 L. Ed. 123.

"The case is quite different from a legacy to a particular person of 'his bond' for a sum named, which must, of course, pass a joint bond, when there is no other." *Waterman v. Alden*, 143 U. S. 196, 201, 36 L. Ed. 123.

Testator devised and bequeathed all his estate, real and personal, to his wife, and her heirs and assigns, upon the following trusts: 1st. That she should receive one-third of the net annual income of his real estate during her life, and one-third of his personal property absolutely. 2d. That the rents and profits, of his estate, with the exception of his wife's thirds, be applied to the payment of his debts, and especially to the cancelling of any incumbrance or mortgage existing at the time of his death; and, after full payment and cancellation of such debts and

incumbrances, be equally divided among his children. The court said: "The decree, in allowing the wife one-third of the net income of the real estate, deducting taxes, insurance and repairs, but without any deduction for interest on debts or mortgages, was clearly in accordance with the explicit provisions of the will." *May v. May*, 167 U. S. 310, 311, 323, 42 L. Ed. 179.

All of testator's estate.—Judges have particularly relied on such words as are used in this will, "for my worldly estate, etc.," to prove that the testator designed to devise all his interest in an estate. *Robinson v. Adams*, 4 Dall., appx. xii, xxi, 1 L. Ed. 920.

The words, "as to all my worldly estate," in the beginning of the will, unconnected with any particular devise, show an intention to dispose of his whole estate, but will not carry an estate that is clearly omitted. *Busby v. Busby*, 1 Dall. 226, 1 L. Ed. 111.

The introductory words to a will were: "I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal estate as I may possess, when called hence to a future state." Held, the testator intended by his will to dispose of the whole of his estate, real and personal. Such words show such intent. *Burwell v. Mandeville*, 2 How. 560, 577, 11 L. Ed. 378.

49. Under residuary clause.—Where it appears, from the context of a will, that a testator intended to dispose of his whole estate, and to give his residuary legatee a substantial, beneficial interest, such legatee will take real as well as personal estate, although the word "devisee" be not used. *Burwell v. Mandeville*, 2 How. 560, 11 L. Ed. 378.

Testator ordered that all his estate, except a single lot, and confounding realty and personalty, should be sold by his executor, and directed that the proceeds arising therefrom be divided in the manner and proportions, "as first written, named, and stated" in the will, as far as the amount realized from the sale would allow. Then followed a devise of the excepted lot, and various pecuniary bequests, succeeded by a residuary legacy to his son giving "all the rest and residue of my estate, of which I may die seised or possessed, which is not herein otherwise devised and bequeathed, such as moneys, bonds, stocks, judgments, notes, household furniture, and all personal effects of every description, and not herein otherwise disposed of," for his sole use and benefit and that of his children. Held, that with the exception of the lot devised, his entire estate, both real and personal, after the payment of his debts

acquired after the making of the will.⁵⁰ This strict and arbitrary rule of the common law has been modified by the statutes of most, if not all, of the states of the Union.⁵¹ Many of the cases hold that even where the power exists to dispose of after-acquired real property, it would not pass unless such was the clear and manifest intention on the part of the testator; in other words, that

and of the legacies prior to that given to the residuary legatee, passed to the latter. *Given v. Hilton*, 95 U. S. 591, 595, 24 L. Ed. 458.

Where a testator, in Pennsylvania, gave to his wife a life estate in the homestead and two lots, and charged upon his goods and lands an annuity to her, but did not mention his lands in any other part of the will, and then, after sundry legacies, bequeathed the surplus to be applied to the purposes of the Presbyterian church, this surplus does not relate to his lands, which his heirs will take. *Allen v. Allen*, 18 How. 385, 15 L. Ed. 396.

50. After-acquired real property.—*Hardenbergh v. Ray*, 151 U. S. 112, 122, 38 L. Ed. 93.

Under the statute of 32 Henry 8, real estate, subsequently acquired, could not pass by devise. The will as to lands spoke from the date of its execution. *Hardenbergh v. Ray*, 151 U. S. 112, 120, 38 L. Ed. 93.

Laws of the territory of Iowa, 1838-39, 471, was substantially the same as 32 Henry 8. *Hardenbergh v. Ray*, 151 U. S. 112, 121, 38 L. Ed. 93.

By the common law of Maryland, lands of which the testator was not seised at the time of making his will, could not be devised thereby. *Carroll v. Carroll*, 16 How. 275, 280, 14 L. Ed. 936.

"The rule in England, as well as in Virginia, in 1785 was that a will as to land speaks at the date of it." *Smith v. Edrington*, 8 Cranch 66, 70, 3 L. Ed. 490.

51. *Hardenbergh v. Ray*, 151 U. S. 112, 119, 38 L. Ed. 93.

"It may, therefore, be laid down as a general proposition that where the testator makes a general devise of his real estate especially by residuary clause, he will be considered as meaning to dispose of such property to the full extent of his capacity; and that such a devise will carry, not only the property held by him at the execution of the will, but also real estate subsequently acquired of which he may be seised and possessed at the date of his death, provided there is testamentary power to make such disposition." *Hardenbergh v. Ray*, 151 U. S. 112, 129, 38 L. Ed. 93.

The Virginia act of 1785 conferred the testamentary power to devise after-acquired land. *Hardenbergh v. Ray*, 151 U. S. 112, 125, 38 L. Ed. 93.

By the statute of Utah, approved February 18, 1876, § 685, Compiled Statutes, 1876, "every devise purporting to convey all the real estate of the testator" carried that subsequently acquired, "unless it shall

clearly appear by his or her will that he or she intended otherwise." *Coulam v. Doull*, 133 U. S. 216, 225, 33 L. Ed. 596.

The Oregon act of 1849, adopted from the state of Missouri (and since re-enacted), confers testamentary power to devise after-acquired real estate. *Hardenbergh v. Ray*, 151 U. S. 112, 125, 38 L. Ed. 93.

Maryland.—In 1850, the legislature of Maryland passed the following act: Section 1. Be it enacted, etc., That every last will and testament executed in due form of law, after the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will. Sec. 2. That the provisions of this act shall not apply to any will executed, before the passage of this act, by any person who may die before the first day of June next, unless in such will the intention of the testator or testatrix shall appear that the real and personal estate which he or she may own at his or her death, should thereby pass. Sec. 3. That this law shall take effect on the first day of June next. In 1837, testator duly executed his will, making his wife his residuary legatee and devisee. After the execution of his will, he acquired the land in controversy and died in August, 1851. Held, the lands which he purchased in 1842 did not pass to the devisee, but descended to the heirs. *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936.

Massachusetts.—The law of Massachusetts enabled testators to devise after-acquired lands. *Carroll v. Carroll*, 16 How. 275, 283, 14 L. Ed. 936.

"We have been referred to two decisions in the supreme court of Massachusetts, in which a retroactive effect was allowed to a statute of that state upon existing wills. * * * The law of Massachusetts did not enact a new rule of construction. It simply enables testators to devise after-acquired lands by plainly and manifestly declaring an intention to do so. The law could only operate in furtherance of the intention of the testator, and could never defeat that intent by applying to wills an arbitrary rule of construction. This distinction was pointed out by this court in *Smith v. Edrington*, 8 Cranch 66, 3 L. Ed. 490, in reference to a similar statute in Virginia; respecting which Mr. Justice Washington said, 'the law creates no new or different rule of construction, but merely gave a power to

the presumption in respect to such property was in favor of the heir at law.⁵²

b. *Personalty*.—The rule in England and Virginia in 1785 was that a will as to personal estate spoke at the time of the testator's death.⁵³

K. Estates or Interests Created—1. **FEE SIMPLE OR ABSOLUTE ESTATE**—a. *Fee Simple Estate in Realty*—(1) *Words Necessary to Create*.—Words of inheritance are not absolutely necessary in a will to the gift of a fee. Where the will shows that it was the intention of the testator to pass an estate in fee simple, whatever the words in which expressed, an estate in fee simple passes.⁵⁴

the testator to devise lands which he might possess or be entitled to at the time of his death, if it should be his pleasure to do so." *Carroll v. Carroll*, 16 How. 275, 283, 14 L. Ed. 936.

"To induce the court to believe the legislature intended to make this law retroactive upon a will then in existence, and cause it to pass after-acquired lands without any evidence that the testator desired or believed that it would do so, and to fix a particular day, before which the will should not so operate, and on and after which it should so operate, such intention of the legislature must be expressed with irresistible clearness." *Carroll v. Carroll*, 16 How. 275, 281, 14 L. Ed. 936.

"The case of *Wait v. Belding*, 24 Pick. 129, 136, 137, which arose under a will executed in 1797, before the Revised Statutes of Massachusetts went into effect, which devised to the testator's two sons the whole of his 'lands and buildings, lying and being in the town of Hatfield' (is directly in point to this case). By a codicil, dated May 2, 1812, he gave to the same sons lands, not enumerated in the will, purchased since then, in the town of Hatfield, or elsewhere. In construing this will, Chief Justice Shaw said: 'In general, a will looks to the future, it has no operation, either on real or personal property till the death of testator. General words, therefore, may as well include what the testator expects to acquire, as what he then actually holds. The term, "all my property," may as well include all which may be his at his decease, as all which is his at the date of the will, and will be construed to be so intended, unless there are words in the description which limit and restrain it. We are then brought back to the particular description, "the whole of my lands and buildings lying and being in the town of Hatfield." There are certainly no words, and nothing in the will, showing an intent to limit it to the lands and buildings then held by him. No such intent can be presumed. Had it been all my lands and buildings in Hatfield or elsewhere in the original will, the law would have equally restrained its operation to lands then held, not because it was the intent of the testator that it should so operate, but because, assuming that it was his intent that all should pass, such intent is in contravention of the rule of law, and cannot be carried into ef-

fect.'" *Hardenbergh v. Ray*, 151 U. S. 112, 127, 38 L. Ed. 93.

52. *Hardenbergh v. Ray*, 151 U. S. 112, 126, 38 L. Ed. 93, citing, with approval, *Smith v. Edrington*, 8 Cranch 66, 3 L. Ed. 490.

The presumption is that the testator means to confine his bequests to land to which he is then entitled; and this presumption can only be overruled by words clearly showing a contrary intention. *Smith v. Edrington*, 8 Cranch 66, 70, 3 L. Ed. 490.

Under the statute of Virginia, of 1785, respecting wills, it is necessary, in order that lands acquired after the date of the will, may pass by the will, that the intention of the testator should clearly appear upon the face of the will. *Smith v. Edrington*, 8 Cranch 66, 3 L. Ed. 490.

53. Personalty.—*Smith v. Edrington*, 8 Cranch 66, 70, 3 L. Ed. 490.

Under the statute of 32 Henry 8, a general devise of all the testator's estate would comprehend and include all the personalty to which he was entitled at the time of his death, but would not embrace after-acquired land, though such might be the expressed intention of the testator. *Hardenbergh v. Ray*, 151 U. S. 112, 120, 38 L. Ed. 93.

54. Words of inheritance unnecessary.—*Abbott v. Essex County*, 18 How. 202, 214, 215, 15 L. Ed. 352.

Subordinate to testator's intention.—The general rule at common law that words of inheritance are necessary to convey the fee simple is entirely subordinate to expressions of the testator's intention. *Lambert v. Paine*, 3 Cranch 97, 128, 2 L. Ed. 377.

A devise to trustees "and to their heirs," if unqualified by anything else in the clause, would pass the fee. *Doe v. Considine*, 6 Wall. 458, 470, 18 L. Ed. 869.

A devise of an improvement right, held by warrant, without words of inheritance, gives to the devisee an estate in fee. *Anonymous*, 3 Dall. 477, 1 L. Ed. 687.

In Pennsylvania the statement in the introductory clause of a will that the testator is desirous of making a distribution of his property in the event of his decease, will be carried down into the corpus of the will, to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used which plainly indicate an intent to limit it. Therefore a devise without words of

By statute in some states every devise is construed to convey an estate in fee simple unless a contrary intent is clearly shown.⁵⁵

The words "all of my estate, real and personal," carry a fee, unless restricted by other words.⁵⁶

The word "estate" in a will, connected with a devise, if not restricted by other words, will pass a fee simple without words of inheritance,⁵⁷ and this is so even though expressions of locality are annexed.⁵⁸

The terms "remainder" and "reversion" may, in some cases, connected with other clauses, carry a fee.⁵⁹

The word "tenements," used in a will, in connection with a clause, will not, independently of other circumstances, carry a fee.⁶⁰

The words "lands and tenements" sometimes carry a fee, and are not confined to a mere local description of the property.⁶¹

The words "freely to be possessed and enjoyed" are too uncertain, of themselves, to raise a fee, but they may be aided by other circumstances.⁶²

inheritance, in a will containing such an introductory statement, was held to confer an estate in fee, where not qualified by other provisions of the will, although the devise was made prior to the passage of the act of 1833, which provided that devises of real estate should pass the whole estate of the testator in the premises devised, although there were no words of inheritance or of perpetuity, unless it appeared by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate. *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, 100, 41 L. Ed. 925.

55. By the statutes of Nebraska, "every devise of land in any will hereafter made shall be construed to convey all the estate of the devisor therein, which he could lawfully devise unless it shall clearly appear by the will that the devisor intended to convey a less estate;" and "the term 'heirs,' or other technical words of inheritance, shall not be necessary to create or convey an estate in fee simple." Nebraska Comp. Stat., c. 23, § 124; c. 73, § 49. *Roberts v. Lewis*, 153 U. S. 367, 376, 38 L. Ed. 747.

56. *Roberts v. Lewis*, 153 U. S. 367, 377, 38 L. Ed. 747, citing *Lambert v. Paine*, 3 Cranch 97, 2 L. Ed. 377.

57. *Busby v. Busby*, 1 Dall. 226, 1 L. Ed. 111; *Lambert v. Paine*, 3 Cranch 97, 128, 2 L. Ed. 377; *Wright v. Page*, 10 Wheat. 204, 234, 235, 6 L. Ed. 303; *Abbott v. Essex County*, 18 How. 202, 215, 15 L. Ed. 352.

"The word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by my or the, or followed by at or in, or in the singular or plural number. The intent with which it is used is the decisive consideration." *Lambert v. Paine*, 3 Cranch 97, 126, 2 L. Ed. 377.

"The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It

is unquestionably true that its meaning may be restricted, by circumstances or expressions indicative of its being used in a limited or particular sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject." *Lambert v. Paine*, 3 Cranch 97, 128, 2 L. Ed. 377.

If a man, in his will, says: "I give all my estate in A." it has been held, that the whole of the testator's interest in such particular lands passed to the devisee, though no words of limitation are added. *Lambert v. Paine*, 3 Cranch 97, 135, 2 L. Ed. 377.

"If the word 'estate' stand by itself, as if a man devise 'all his estate to A,' it carries a fee, from its established and legal import and operation." *Lambert v. Paine*, 3 Cranch 97, 133, 2 L. Ed. 377.

"The word 'estate' may also, from the particular phraseology, connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself." *Lambert v. Paine*, 3 Cranch 97, 134, 2 L. Ed. 377.

58. "Estate will carry a fee though expressions of locality are annexed.—*Lambert v. Paine*, 3 Cranch 97, 134, 2 L. Ed. 377; *Abbott v. Essex County*, 18 How. 202, 215, 15 L. Ed. 352; *Busby v. Busby*, 1 Dall. 226, 1 L. Ed. 111.

59. *Wright v. Page*, 10 Wheat. 204, 237, 6 L. Ed. 303.

60. *Wright v. Page*, 10 Wheat. 204, 238, 6 L. Ed. 303.

61. *Wright v. Page*, 10 Wheat. 204, 236, 6 L. Ed. 303, wherein the court said: "In their ordinary sense, however, they import the latter only; and when a more extensive signification is given to them in wills, it arises from the context, and is justified by the apparent intention of the testator to use them in such extensive signification."

62. *Wright v. Page*, 10 Wheat. 204, 245, 6 L. Ed. 303.

The words of inheritance "to such issue, their heirs and assigns, forever" are the usual and largest terms employed in the creation of a fee simple estate.⁶³

The words "all the rest of my lands" do not, of themselves, import a devise of the fee; and unless aided by the context, the devisee, whether he be a sole or a residuary devisee, will, if there be no words of limitation, take only a life estate.⁶⁴

(2) *Provisions Creating Estates in Fee Simple*—(a) *In General*.—See footnote.⁶⁵

63. *Daniel v. Whartenby*, 17 Wall. 639, 644, 21 L. Ed. 661.

64. *Wright v. Page*, 10 Wheat. 204, 236, 6 L. Ed. 303.

65. **Provision creating estate in fee simple.**—See the title REMAINDERS, REVERSION AND EXECUTORY INTERESTS, vol. 10, pp. 644, 645, 656.

In a will the words "I give all the estate called Marrowbone, in the county of Henry, containing by estimation 2585 acres of land," carries the fee. *Lambert v. Paine*, 3 Cranch 97, 2 L. Ed. 377; *Wright v. Page*, 10 Wheat. 204, 234, 6 L. Ed. 303.

The testator devised to his son, J., certain portions of his estate in New York, to him, his heirs, executors and administrators, forever; in like manner, he devised to his son, M., his heirs and assigns, certain other portions of his property, and added the following clause: "It is my will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, I give all the property aforesaid to my brother, John Eden, of Lofters, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs." M. died without issue, having devised his estate to his widow, and other devisees named in his will. Held, according to the established law of New York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; but M., on the death of J., became seised of an estate in fee simple absolute. *Waring v. Eden*, 1 Pet. 570, 7 L. Ed. 266.

Testator directed that upon the death of his wife Eliza, and of certain beneficiaries of his bounty, the whole of his estate should be equally divided between C. and T., each taking one-third of the whole. Held, that C. on the death of testator's wife had a fee simple estate under the will. *Gay v. Parpart*, 106 U. S. 679, 687, 27 L. Ed. 256.

Testator gave a general devise to his wife, "provided she has no lawful issue." Held, the probable intention of this proviso was, "provided she has no lawful issue" by me. Nor can any intention to give a fee to the wife be legally deduced from the proviso, in any way of

interpreting the terms, because it is as perfectly consistent with the intention to defeat a life estate, as a fee in the whole of the lands. *Wright v. Page*, 10 Wheat. 204, 239, 240, 6 L. Ed. 303.

A will provided as follows: "Item, I give to my two sons, namely, William and Francis, all my land at the Horekilm, in Sussex county, etc., to be equally divided between them, and their heirs forever.

* * * If any one of my aforesaid children should die, before they come to lawful age, their land to go to the survivors; that is, if Thomas should die, before he comes to lawful age, I give his share of land, where William now lives, to my daughter Elizabeth Tilney, to her, and the lawful begotten heirs of her body forever; provided Thomas have heirs before he comes to lawful age, then to him, and his heirs, forever; and likewise, if William should die, without heirs, to go to Francis; and if Ann should die, without heirs, to go to Valiance; and if John should die, before he comes of lawful age, without heirs, then his share of land here, where I now live, I give to my daughter Comfort Leatherberry, to her and her lawful begotten heirs of her body forever." It was held that William took an estate in fee simple, subject to an executory devise to Francis. *Robinson v. Adams*, 4 Dall., appx. xii, 1 L. Ed. 920.

Mary Clarke devised to Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, "all that part of my said farm at Greenwich aforesaid, called Chelsea, etc., to have and to hold the said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, etc., during his natural life, and from and after the death of Thomas B. Clarke, in further trust, to convey the same in fee to the lawful issue of the said Thomas B. Clarke, living at his death." Under this devise, the first-born child of Thomas B. Clarke, at its birth, took a vested estate in remainder, which opened to let

(b) *Power of Disposal*.—Where land is devised without legal words of limitation, and a provision is added that the devisee may do therewith as he pleases, a fee is presumed to have been intended because such power would be incompatible with a less estate.⁶⁶

(c) *Charging Debts, etc., on Undivided Estate*.—Where a devisee whose estate is not defined is directed to pay debts, legacies, or a sum in gross, he takes a fee,⁶⁷

in his other children to the like estate, as they were successively born, and such vested remainder became a fee simple absolute in the children living, on the death of their father. *Williamson v. Berry*, 8 How. 495, 12 L. Ed. 1170.

A testator devised to his wife one-third of his personal estate forever, for her own proper use and benefit, and also one-third of all his real estate, during her lifetime, and in the event of her death, all the right in real property bequeathed to her should be, and by the will was, declared to be vested in his infant son; the testator then proceeded to devise sundry lots and houses to his mother, his sisters, his brothers, separately, and his son; these were given to the respective devisees "as their property forever;" he then devised the balance of his real estate to his infant son, "forever," believed to be certain lots specified in the will. Held, that the wife took, under the will, one-third of all the real estate of the testator, during her life, and that his son took a fee simple in one-third of the property given to the brothers and sisters of the testator, subject to the devise to his mother, and a fee simple in all the real estate, specifically devised to him, subject to the devise of one-third to his mother, during her life. *Walker v. Parker*, 13 Pet. 166, 10 L. Ed. 109.

In April, 1815, testator made his will by which he made sundry bequests to his son S. One of them was of the rent or improvement of the store and wharf privilege of the Stoddard property, during his natural life, and the premises to descent to his heirs. After two similar bequests, the will then gave to Samuel, absolutely, a share in certain property when turned into money. In May, 1816, testator made a codicil, revoking that part of the will wherein any part of the estate was devised or bequeathed to Samuel, and in lieu thereof, bequeathing to him only the income, interest, or rent. At his decease it was to go to the legal heirs. Held, under the circumstances of this will and codicil, the revoking part applied only to such share of the estate as was given to S. absolutely; leaving in the Stoddard property a life estate in Samuel, with a remainder to his heirs, which remainder was protected by the laws of Massachusetts until Samuel's death. At the death of S. the title to the property became vested in fee simple in the two children of Samuel. *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970.

Equitable estate in fee simple.—In *Potter v. Couch*, 141 U. S. 296, 313, 35 L. Ed. 721, the court said: "It necessarily follows that by the terms of the fourth and fifth clauses of the will, devising and bequeathing to the testator's brother and nephew, respectively, 'after the expiration of the trust estate vested in my executors and trustees, one-fourth part of all my estate, both real and personal' (after the payment of debts and legacies, which he charged upon the real estate), no legal title in any specific part of the estate, and no right of possession, vested in either of them, until the trustees had divided the estate and conveyed to each of them one-fourth of the estate or of the proceeds of its sale; but, on well-settled principles, an equitable estate in fee in one-fourth of the residue of the testator's whole property vested in the brother and in the nephew respectively from the death of the testator. *Cropley Cooper*, 19 Wall. 167, 22 L. Ed. 109; *McArthur v. Scott*, 113 U. S. 340, 378, 380, 28 L. Ed. 1015."

66. Devise with power of disposal.—*King v. Ackerman*, 2 Black 408, 17 L. Ed. 292.

Where a testator gives one piece of land to his son with the privilege of doing therewith as he pleased, and makes another devise to the same son, without those or any similar words, it does not follow that there was no actual intent to give a fee in the last-mentioned land. *King v. Ackerman*, 2 Black 408, 17 L. Ed. 292.

A devise and bequest of real and personal property to a person "to be held, used and enjoyed by him, his heirs, executors, administrators, and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or so much thereof as he, * * * shall not have disposed of by devise or sale, shall descend to my three beloved nieces," gives to such person an estate in fee simple with an absolute power of disposition either by sale or devise and the limitation over to the nieces of the testator is void. *Howard v. Carusi*, 109 U. S. 725, 726, 730, 27 L. Ed. 1089.

67. Direction to pay debts, etc.—*King v. Ackerman*, 2 Black 408, 17 L. Ed. 292. See *Giles v. Little*, 104 U. S. 291, 299, 26 L. Ed. 745.

In *King v. Ackerman*, 2 Black 408, 17

but the rule does not apply when the estate is clearly defined.⁶⁸

(d) *Life Estate with Power of Disposal*.—A devise to a person of "all my estate, real and personal" "so long as she remains my widow" but with full power of disposal, conveys a life estate with power of disposal of the entire fee, and if executed by the widow during the widowhood permits her to convey an estate in fee simple to purchasers.⁶⁹

(3) *Rule in Shelley's Case*.—See the title SHELLEY'S CASE, RULE IN, vol. 10, p. 1131.

b. *Absolute Estates in Personalty*.—A bequest of personalty in trust for daughter during life, then to her issue or sisters, and providing that "from and after her marriage" it shall be held in trust for certain purposes only, vests an absolute estate in an unmarried daughter.⁷⁰

L. Ed. 292, it was said: "The rule of law which gives a fee, where the devisee is charged with a sum of money, is a technical dominant rule, and intended to defeat the effect" of the artificial rule established in favor of the heir at law, that an indefinite devise of land passes nothing but a life estate. *McCaffrey v. Manogue*, 196 U. S. 563, 658, 49 L. Ed. 600.

This rule though founded on inference is as technical and rigid in its application as that to which it is an exception; for courts will not inquire into the relative value of the land and the charge, nor decide on the probability of the devisee being called on to pay the charge. *King v. Ackerman*, 2 Black 408, 17 L. Ed. 292.

68. "It is claimed by defendants in error that it is the settled rule that where a devisee, whose estate is undefined, is directed to pay debts, the devisee takes an estate in fee. The rule had no application here, for, as we have seen, the estate of the devisee and executrix is clearly defined. A direction to pay debts cannot enlarge it. The case of *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, is precisely in point against the application of the rule to this case." *Giles v. Little*, 104 U. S. 291, 299, 26 L. Ed. 745.

69. Testator devised and bequeathed to his wife "all my estate, real and personal, of which I may die seised, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike," and appointed his wife executrix of his will. It was held that such will gave to the widow such an estate in lands in Nebraska that she could during her widowhood convey to third persons an estate in fee simple therein. *Roberts v. Lewis*, 153 U. S. 367, 38 L. Ed. 747, overruling *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745, which held in construing a similar provision that

the wife took an estate for life in the testator's lands, subject to be divested on her ceasing to be his widow, with power to convey her qualified life estate only and her estate in the land and that of her grantees determined on her marriage. The court said: "When a power of disposal accompanies a bequest or devise of a life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power is intended."

70. Testator bequeathed to his daughters a certain sum apiece, to be invested in government securities, and he directed that such securities were to be held in trust by his executor "for my said daughters respectively;" and that the dividends, etc., of the securities be applied "to the use and benefit of my said daughters;" and further provided "and from and after the intermarriage of any of them, then my said executors shall hold the said * * * securities belonging to the said daughter so marrying, in trust for the following purposes, that is to say, in trust for the maintenance of her and her husband during their joint lives, then in trust for the survivor of the said husband and wife during his or her life, and after the death of such survivor, then in trust for such issue as she may leave at the time of her death. And in case she shall die without leaving such issue, then in trust for her surviving sisters (my other daughters) and the issue of any deceased sister—such issue taking such share as the deceased sister whom they represent would have taken, had she been alive to take. And it is my intention that the said * * * securities * * * shall be utterly free from the power or control of the husbands of my said daughters. And the better to secure the payment of these my daughters' fortunes, I do hereby direct that, if the funds hereinafter particularly appropriated for the payment of debts and legacies shall be insufficient for payment of debts and legacies, my estate generally must be charged to make up the deficiency to my said daughters." Held, that the principal of the sum be-

2. **DEFEASIBLE FEE.**—A devise to a certain person in fee, with devise over should she “die in her minority and without lawful issue then living,” conveys an estate in fee simple, subject to be divested on the happening of the contingency.⁷¹

3. **ESTATES TAIL.**—See the titles, *ESTATES*, vol. 5, p. 910; *REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS*, vol. 10, p. 645.

4. **LIFE ESTATES**—a. *In General.*—It is an established rule of the common law, that a devise of lands without words of limitation confers an estate for life only,⁷² but modern legislation has abolished the rule and established a con-

queathed to a daughter, who never married, vested in her absolutely, and went to her legatee. *Wellford v. Snyder*, 137 U. S. 521, 522, 528, 34 L. Ed. 780.

71. Where a testator specifically devised lands to his daughter in fee, and provided that should she “die in her minority, and without lawful issue then living, the lands hereby devised shall revert to and become part of the residue of my estate,” the substitutionary rule was not applied, either by the supreme courts of Pennsylvania, or by the federal supreme court; but both courts held that the daughter, having survived the testator, took an estate in fee, subject to be divested by her afterwards dying under age and without issue. *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, 103, 41 L. Ed. 925; *Britton v. Thornton*, 112 U. S. 526, 28 L. Ed. 816.

There is a line of cases in Pennsylvania in which a devise over, after a devise in fee, has been held to be substitutionary, when expressed by such words as if the first taker die “without children.” In none of these cases, however, was the devise so expressed that it could be construed as creating an estate tail. *Barber v. Pittsburgh, etc., R. Co.*, 166 U. S. 83, 103, 41 L. Ed. 925. See the title *REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS*, vol. 10, p. 656.

72. *King v. Ackerman*, 2 Black 408, 414, 17 L. Ed. 292; *Lambert v. Paine*, 3 Cranch 97, 130, 2 L. Ed. 377; *Wright v. Page*, 10 Wheat. 204, 228, 6 L. Ed. 303, cited in *McCaffrey v. Manogue*, 196 U. S. 563, 569, 49 L. Ed. 600.

Because this rule generally defeated the intention of the testator, the courts have been astute in finding exceptions to it. *King v. Ackerman*, 2 Black 408, 17 L. Ed. 292.

Life estate.—Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. *Wright v. Page*, 10 Wheat. 204, 227, 6 L. Ed. 303.

“Since, in most cases, this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases and is presumed to mean a disposition of his whole in-

terest, unless he uses words of limitation, courts, to effectuate this intention, will lay hold of general expressions in the will, which from their legal import comprehend the whole interest of the testator in the thing devised. But if other words be used restraining the meaning of the general expressions so as to render it doubtful whether the testator intended to pass his whole interest or not, the rule of law which favors the right of the heir must prevail. Thus, it has been determined that the words ‘all my estate at or in such a place,’ unless limited and restrained by other words, may be resorted to as evidence of an intention to pass not only the land itself but also the interest which the testator had in it. But words which import nothing more than a specification of the thing devised, as ‘all my lands,’ ‘all my farms,’ and the like, have never been construed to pass more than an estate for life even when aided by an introductory clause declaring an intention to dispose of all his estate.” *Lambert v. Paine*, 3 Cranch 97, 130, 2 L. Ed. 377.

“The will now presented for our consideration was made before this obnoxious rule was repealed in New York, and we are compelled to examine its provisions fettered by this technical, artificial, and now nearly obsolete rule of construction.” *King v. Ackerman*, 2 Black 408, 414, 17 L. Ed. 292.

The rule does not apply, where the testator intends to dispose of his whole estate and there is no residuary clause indicating that he intended passing less than all of his estate, and all of his heirs at law are devisees under the will. *McCaffrey v. Manogue*, 196 U. S. 563, 569, 573, 49 L. Ed. 600.

In *Wright v. Page*, 10 Wheat. 204, 227, 6 L. Ed. 303, the court said: “Where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate; we say, a plain intention, because, if it be doubtful or conjectural, upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may

trary one, in England and most of the states of the Union.⁷³

b. *Provisions Creating Life Estates*.—See footnote.⁷⁴

entertain a private belief that the testator intended a fee; it must see that he has expressed that intention, with reasonable certainty, on the face of his will." *McCaffrey v. Manogue*, 196 U. S. 563, 569, 49 L. Ed. 600.

73. *King v. Ackerman*, 2 Black, 408, 414, 17 L. Ed. 292.

74. *Provisions creating estates for life*.—See the title *REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS*, vol. 10, pp. 644, 650, 656.

The following words in a will, viz: "I give and bequeath unto my brother, E. M. during his natural life, 100 acres of land. In case the said E. M. should have heirs lawfully begotten of him in wedlock, I then give and bequeath the 100 acres of land aforesaid, to him, the said E. M., his heirs and assigns forever; but should he, the said E. M., die without an heir so begotten, I give, bequeath, devise, and desire, that the 100 acres of land aforesaid, be sold to the highest bidder and the money arising from the sale thereof, to be equally divided amongst my six children," give to E. M. only an estate for life, and not a fee simple conditional. *Shriver v. Lynn*, 2 How. 43, 11 L. Ed. 172.

Where a testator made a bequest to his wife of all his estate, real and personal, "to have and to hold during her life, and to do with as she sees proper before her death," the wife took a life estate in the property, with only such power as a life tenant can have, and her conveyance of the real property passed no greater interest. *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326, 23 L. Ed. 927, cited in *Roberts v. Lewis*, 153 U. S. 367, 379, 38 L. Ed. 747; *Giles v. Little*, 104 U. S. 291, 298, 26 L. Ed. 745.

A testator devised to his son, a house, etc., to have and to hold to him, his heirs and assigns forever, and to his wife certain land, and also one-third of his movable estate, in lieu of her dower. It was held that the wife took only an estate for life. *Busby v. Busby*, 1 Dall. 226, 1 L. Ed. 111.

In *Smith v. Bell*, 6 Pet. 68, 84, 8 L. Ed. 322, the testator gave all his personal estate, after certain payments, to his wife, "to and for her own use and disposal absolutely," with a provision that the remainder after her decease should go to his son. Held, that the latter clause qualified the former and showed that the wife only took a life estate. *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326, 333, 23 L. Ed. 927.

Testator devised land in the District of Columbia to M. during her natural life, and at her death to be equally divided among the heirs of her body be-

gotten, "share and share alike, and to their heirs and assigns forever." It was held that M. took a life estate only, and that her children took an estate in fee. *De Vaughn v. Hutchinson*, 165 U. S. 566, 578, 41 L. Ed. 827.

J., by his last will, after certain pecuniary legacies, devised as follows: "Item. I give and bequeath unto my loving wife, M., all the rest of my lands and tenements whatsoever, whereof I shall die seised, in possession, reversion or remainder, provided she has no lawful issue: Item. I give and bequeath unto M., my beloved wife, whom I likewise constitute, make and ordain my sole executrix of this my last will and testament, all and singular my lands, messuages and tenements, by her freely to be possessed and enjoyed," etc.; "and I make my loving friend, H. executor of this my will, to take care and see the same performed, according to my true intent and meaning," etc.; the testator died seised, without issue, and after the death of the testator, his wife M. married one G., by whom she had lawful issue. Held, that she took an estate for life only. *Wright v. Page*, 10 Wheat. 204, 6 L. Ed. 303.

Language of will construed and held to give the legal estate in all testator's land to his widow for life, and the equitable and beneficial estate for her life to her and their two children, or the survivors of them, in equal shares. *Thaw v. Ritchie*, 136 U. S. 519, 545, 34 L. Ed. 531.

In April, 1815, testator made his will by which he made sundry bequests to his son, S. One of them was of the rent or improvement of the store and wharf privilege of the Stoddard property, during his natural life, and the premises to descend to his heirs. After two similar bequests, the will then gave to S., absolutely, a share in certain property when turned into money. In May, 1816, testator made a codicil, revoking that part of the will wherein any part of the estate was devised or bequeathed to Samuel, and in lieu thereof, bequeathing to him only the income, interest, or rent. At his decease it was to go to the legal heirs. Held, under the circumstances of this will and codicil, the revoking part applied only to such share of the estate as was given to S. absolutely; leaving in the Stoddard property a life estate in S., with a remainder to his heirs, which remainder was protected by the laws of Massachusetts until S.'s death. *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970.

The words in a will "all the rest of my lands" do not of themselves, import a devise of the fee; and unless aided by the context, the devisee, whether he be

5. JOINT TENANCIES.—See footnote.⁷⁵

6. REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.—See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS, vol. 10, p. 642.

7. ESTATES IN TRUST.—See the titles EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119; TRUSTS AND TRUSTEES, ante, p. 676.

a. *Precatory Trusts*.—Wherever a person, by will, gives property, and points out the object, the property, and the way in which it shall go, a trust is created; unless the will shows clearly that the testator's desire expressed, is to be controlled by the trustee, and that he shall have an option to defeat it.⁷⁶

a sole or a residuary devisee, will, if there be no words of limitation, take only a life estate. *Wright v. Page*, 10 Wheat. 204, 236, 6 L. Ed. 303.

Equitable life estate.—A devise to trustees and "their heirs" for the use of B. during life, and in case he "should die leaving a legitimate child, or children, then, also, in trust for Maria Barr, wife of the said John M. Barr, in case she survives him, during her natural life, for the purpose of maintaining herself and the said child or children, and educating the said children." Held, in case B. should die, leaving issue, and his wife Maria should survive him, then an equitable estate for life to her with the usufruct of the property, for the benefit of herself and surviving child or children of B. *Doe v. Considine*, 6 Wall. 458, 460, 473, 18 L. Ed. 869.

A will contained the following provision: "I give and devise unto my sons-in-law, * * * and to their heirs, all and singular, that certain farm, tract or parcel of land, * * * to hold the same premises to them and their heirs in trust (first) for the use of my son, John M. Barr, during his natural life; but, nevertheless, to permit and suffer my son, John M. Barr, to hold, use, occupy, possess, and enjoy the said farm, and to receive and take the rents and profits thereof, during his natural life." Held, the will gave an equitable life estate, with the usufruct of the property to John M. Barr. *Doe v. Considine*, 6 Wall. 458, 459, 473, 18 L. Ed. 869.

75. Testator devised his real estate in trust for his daughters "equally," "share and share alike, for and during their respective lives, * * * and from and after their death in trust for the child or children of each of my said daughters, then living, in fee simple, such child or children, respectively, to take the share to which his, her or their parent was entitled. And if any of my said daughters shall die without having been married, her share shall pass to her or their surviving sisters or sister for life equally, and upon her or their death the same shall vest in her or their child or children in the same manner and for the same estate and pass on her or their death, as her or their original share or shares." It was held that the surviving daughter did not take

to the exclusion of her deceased sister's children and the will would not be construed to have such effect by rigidly giving plurality to the pronoun "their" in the provision "and from and after their death," etc. The court said: "It was only upon the death of the daughter 'without having been married' (and without issue possibly), that her share was to pass to her sisters or sister. We also agree with the courts below that the trust continues." *Cruit v. Owen*, 203 U. S. 368, 370, 371, 51 L. Ed. 227.

76. **Precatory trusts.**—*Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 119, 7 L. Ed. 617.

"If there be a trust sufficiently expressed and capable of enforcement by a court of equity, it does not disparage, much less defeat it, to call it 'precatory.' The question of its existence, after all, depends upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel, or advice, intended only to influence, and not to take away the discretion of the legatee growing out of his right to use and dispose of the property given as his own. On the other hand, the language employed may be imperative in fact, though not in form, conveying the intention of the testator in terms equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to define and limit the extent of the interest conferred upon his beneficiary. *Colton v. Colton*, 127 U. S. 300, 312, 32 L. Ed. 138.

"The existing state of the law on this question as received in England, and generally followed in the courts of the several states of this Union, is well stated by Gray, C. J., in *Hess v. Singler*, 114 Mass. 56, 59, as follows: 'It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some

b. *Spendthrift Trusts*.—See the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, ante, p. 26.

8. MERE USUFRUCT INTERESTS.—See footnote.⁷⁷

L. Vesting of Estates and Interests.—It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary.⁷⁸

Devise Held to Be Vested.—See footnote.⁷⁹

of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases in this, and in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence.” Colton v. Colton, 127 U. S. 300, 313, 32 L. Ed. 138.

“It is an error to suppose that the word ‘request’ necessarily imports an option to refuse, and excludes the idea of obedience as a corresponding duty. If a testator requests his executor to pay a given sum to a particular person, the legacy would be complete and recoverable. According to its context and manifest use, an expression of desire or wish will often be equivalent to a positive direction, where that is the evident purpose and meaning of the testator; as where a testator desired that all of his just debts, and those of a firm for which he was not liable, should be paid as soon as convenient after his decease, it was construed to operate as a legacy in favor of the creditors of the latter.” Colton v. Colton, 127 U. S. 300, 319, 32 L. Ed. 138.

A citizen of California provided in his will as follows: “I give and bequeath to my said wife, Ellen M. Colton, all of the estate, real and personal, of which I shall die seised, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best.” In a bill in equity filed by the mother and sister against the widow it was set up that the provision in the will created a trust. It was held that each of the complainants is entitled to take a beneficial interest under the will to the extent, out of the estate given by testator to his wife, of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come. Colton v. Colton, 127 U. S. 300, 301, 321, 32 L. Ed. 138.

Testatrix made a will vesting the fee in her niece and nephew, but charged with the duty of furnishing a home for her husband as long as he lived. While she gave them the power of alienation, she coupled with it the proviso that whatever was done with this property they should still secure a home to him during his lifetime. She directed in terms that provision for her husband should be made, and she doubtless believed that that direction would be binding, and it was binding. It was in the nature of a precatory trust, and so expressed as to be obligatory upon the devisees and enforceable in the courts. Beyer v. Le Fevre, 186 U. S. 114, 121, 46 L. Ed. 1080, citing Colton v. Colton, 127 U. S. 300, 32 L. Ed. 138.

Empowering an executor to make a change in a bequest so as to give the principal instead of the interest of it, is usually regarded as expressing a wish to have it done, if it be not clearly a mere power, and to require that that be considered as done which ought to be done, if forgotten or omitted. Gratz v. Cohen, 11 How. 1, 21, 13 L. Ed. 579.

77. Mere usufruct interests.—Under a will which devised land to the son of the testator, and provided that the widow should continue in possession and occupation of the premises until the son arrived at the age of fifteen years, she was entitled to their possession and enjoyment until the time when the child would have reached the age of fifteen if he had lived, although he died before that time. Her possession, therefore, was not adverse to the heirs of the child, during that period. Zeller v. Eckert, 4 How. 289, 11 L. Ed. 979.

78. Estates held to vest at earliest possible period.—Doe v. Considine, 6 Wall. 458, 475, 18 L. Ed. 869. See Finlay v. King, 3 Pet. 346, 374, 7 L. Ed. 701; Carver v. Jackson, 4 Pet. 1, 92, 7 L. Ed. 761.

79. Devise held to be vested.—A testator devised certain land to one of his sons when he arrived at age to hold to him, his heirs and assigns forever, and devised to his wife the use and profits of all his lands, in the meantime, for the maintenance and education of all the children. Such son died after the testator, under age, intestate, and without issue, leaving his mother, a brother and sisters. The question was whether the devise to such son was a vested or contingent and lapsed devise. It was held

Time of Vesting.—See footnote.⁸⁰

Effect of Vesting.—An estate once vested will not be divested unless the intent to divest clearly appears.⁸¹

M. Conditions.—See, generally, the titles CHARITIES, vol. 3, p. 690; CONDITIONS, vol. 3, p. 1004.

1. **DISTINCTION AND GENERAL CONSIDERATION.**—There is a distinction between a condition annexed to a bequest and a condition annexed to the payment of the bequest.⁸² Thus a bequest of a certain sum to a certain person when he attains majority is a conditional gift, and fails if he dies before attaining majority.⁸³ But a bequest to be paid to a certain person when he attains majority is an absolute gift, and does not fail though he dies before, the condition being annexed only to the payment.⁸⁴ Whether conditions annexed to a devise be precedent or subsequent, must be determined by the intention of the testator to be searched for in his will.⁸⁵

2. **CREATION OF CONDITIONS.**—Positive words are not indispensably necessary, to attach a condition. It may arise from implication, and grow out of a combination of circumstances which go to show, that without attaching such condition to a bequest, the primary views and prominent duties of the testator

to be vested. *Kerlin v. Bull*, 1 Dall. 175, 1 L. Ed. 88.

80. **Time of vesting.**—See the title RE-MAINDERS, REVERSIONS AND EXECUTORY INTERESTS, vol. 10, pp. 646, 647, 648.

A devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons, is a bequest to those persons and vests at the death of the testator. *Cropley v. Cooper*, 19 Wall. 167, 175, 22 L. Ed. 109.

Where a bequest is given by a direction to pay when the legatee attains to a certain age, and the interest of the fund is given to him in the meantime, this shows that a present gift was intended, and the legacy vests in interest at the death of the testator. *Cropley v. Cooper*, 19 Wall. 167, 174, 22 L. Ed. 109.

It is a general rule that a devise, in words of the present time, as, I give to A my lands in B, imports, if no contrary intent appears, an immediate interest, which vests in the devisee, on the death of the testator. *Finlay v. King*, 3 Pet. 346, 376, 7 L. Ed. 701.

Devise before competent to take.—At common law, lands may be granted to pious uses before there is a grantee competent to take. In the meantime, the fee will lie in abeyance. It will vest when the grantee exists. *Ould v. Washington Hospital*, 95 U. S. 303, 312, 24 L. Ed. 450, citing *Pawlet v. Clark*, 9 Cranch 292, 3 L. Ed. 735; *Beatty v. Kurtz*, 2 Pet. 566, 7 L. Ed. 521, and *Vincennes University v. Indiana*, 14 How. 268, 14 L. Ed. 416.

Vested with possession postponed.—Where property is devised to one, when he should arrive at age, and the use and profits in the meantime to his mother, for the maintenance and education of all the children, this is an immediate gift, though he is not to have the possession until he

came of age. *Kerlin v. Bull*, 1 Dall. 175, 177, 1 L. Ed. 88.

Vested subject to liens.—The title of a devisee, in an estate unconditionally devised by him, is, upon the death of the party under whom he claimed, immediately devolved upon him, and he acquires a vested estate. But this, though true in a general sense, still leaves his title incumbered with all the liens, which have been created by the party in his lifetime, or by the law at his decease. It is not an unqualified, though it be a vested, interest; and it confers no title, except to what remains after every such lien is discharged. *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. Ed. 542.

81. **Effect of vesting.**—*Doe v. Considine*, 6 Wall. 458, 476, 18 L. Ed. 869.

82. **Distinction between conditions annexed to gift and payment of gift.**—*Mackie v. Story*, 93 U. S. 589, 590, 23 L. Ed. 986.

83. **Condition annexed to bequest.**—*Mackie v. Story*, 93 U. S. 589, 590, 23 L. Ed. 986.

84. **Condition annexed to payment of bequest.**—*Mackie v. Story*, 93 U. S. 589, 590, 23 L. Ed. 986.

85. **Intention as expressed in will determines whether condition precedent or subsequent.**—*Taylor v. Mason*, 9 Wheat. 325, 341, 6 L. Ed. 101.

Whether in a given case a condition precedent, a condition subsequent, or a conditional limitation, is prescribed, is, in the absence of unmistakable language, matter of construction. And conditions cannot be annexed from words capable of being interpreted as mere description of what must occur before the estate given can arise. *Young Womens' Christian Home v. French*, 187 U. S. 401, 417, 47 L. Ed. 233.

As to distinction between conditions precedent and subsequent, see the title CONDITIONS, vol. 3, p. 1006.

will be pretermitted.⁸⁶

3. **REQUISITES AND VALIDITY**—a. *In General*.—In Louisiana a testator may decree the uses to which he destined his legacy to a city; and if the destination is for purposes within the range of the powers and duties of its public authorities, it is valid.⁸⁷

b. *Restraint upon Alienation*.—See the title **ESTATES**, vol. 5, p. 907. Conditions in a will, which impose restraints upon alienation and partition, and exact a particular management through agents of a specified description, are conditions subsequent, and would not, by the rule of common law, divest the estate, if pronounced to be illegal or immoral.⁸⁸ These conditions belong, too, to the class that are reprobated as repugnant to the legal rights which the law attaches to ownership. The common law pronounces such conditions void, in consequence of that repugnancy,⁸⁹ and the civil law treats them as recommendations and counsel, not designed to control the will of the donee.⁹⁰

A bequest of slaves on condition that they should not be sold or carried out of the state was held not a restraint on alienation inconsistent with the right to the property bequeathed to the legatee.⁹¹

Under the law of Louisiana conditions annexed to a legacy prohibiting the alienation or division of testator's estate, or the deviation from the testator's scheme does not invalidate it.⁹²

c. *Repugnant Condition*.—A condition repugnant to the estate devised is void.⁹³

d. *Illegal, Immoral or Impossible Condition*.—The common-law rule

86. Condition may arise from implication.—*Hunter v. Bryant*, 2 Wheat. 32, 37, 4 L. Ed. 177.

Effect of word "proviso."—See the title **CONDITIONS**, vol. 3, p. 1005.

87. Requisites and validity.—**In Louisiana**.—*McDonogh v. Murdock*, 15 How. 367, 410, 14 L. Ed. 732.

88. Restraints upon alienation and partition.—*McDonogh v. Murdock*, 15 How. 367, 412, 14 L. Ed. 732, citing *Finlay v. King*, 3 Pet. 346, 377, 7 L. Ed. 701.

The estate of the residuary devisees is not affected by the clause of a will, "that no creditors or assignees or purchasers shall be entitled to any part of the bounty or bounties intended to be given by me herein for the personal advantage of the persons named; and therefore it is my will that, if either of the devisees or legatees named in my will shall in any way or manner cease to be personally entitled to the legacy or devise made by me for his or her benefit, the share intended for such devisee or legatee shall go to his or her children, in the same manner as if such child or children had actually inherited the same, and, in the event of such person or persons having no children, then to my daughter and her heirs." *Potter v. Couch*, 141 U. S. 296, 314, 35 L. Ed. 721.

89. McDonogh v. Murdock, 15 How. 367, 412, 14 L. Ed. 732.

Condition against all alienation void.—See the title **ESTATES**, vol. 5, p. 907.

90. McDonogh v. Murdock, 15 How. 367, 412, 14 L. Ed. 732.

91. Bequest of slaves.—Testator, living in Maryland, bequeathed to her nephew

certain slaves, with a proviso in her will, "that he shall not carry them out of the state of Maryland, or sell them to any one; in either of which events, I will and desire the said negroes shall be free for life." Held, the bequest of the testatrix of the slave to her nephew, under the restrictions imposed by the will, was not a restraint on alienation inconsistent with the right to the property bequeathed to the legatee. It was a conditional limitation of freedom, and took effect the moment the negro was sold. *Williams v. Ash*, 1 How. 1, 11 L. Ed. 25.

92. McDonogh v. Murdock, 15 How. 367, 410, 14 L. Ed. 732.

A citizen of Louisiana, made a will, in which, after bequeathing certain legacies not involved in the present controversy, he gave, willed, and bequeathed all the rest, residue, and remainder of his property to the corporations of the cities of New Orleans and Baltimore forever, one half to each, for the education of the poor in those cities. No alienation of this general estate was ever to take place, under penalty of forfeiture, when the states of Maryland and Louisiana were to become his residuary devisees for the purpose of educating the poor of those states. Held, in case of the failure of the devise of the cities, the limitation over to the states of Maryland and Louisiana would have been operative, and the designation of the legacy to public uses in the city of Baltimore does not affect the valid operation of the bequest of Louisiana. *McDonogh v. Murdock*, 15 How. 367, 14 L. Ed. 732.

93. Repugnant condition.—*Potter v. Couch*, 141 U. S. 296, 315, 35 L. Ed. 721,

whether illegal, immoral or impossible conditions vitiate the devise depends upon the fact, whether the performance of the illegal, immoral, or impossible condition is prescribed as precedent or subsequent to the vesting of the estate of the devisee. In the former case, no estate exists till the condition is performed, and no right can be claimed through an illegal or immoral act. In the latter case, the estate remains, because it cannot be defeated as a consequence of the fulfillment of an illegal or immoral condition. This, however, applies only to devises of real estate; for the ecclesiastical and chancery courts in regard to bequest of personalty follow the rule of the civil law.⁹⁴

4. **CONDITION NOT TO CONTEST WILL.**—When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in wills or testaments, the conditions are not in general obligatory, but only in *terrorem*. If, therefore, there exists *probabilis causa litigandi* the non observance of the conditions will not be forfeitures.⁹⁵ But if there is a limitation over to another person in case the legatee contests the will, the restriction is no longer in *terrorem*, but is a conditional limitation and will pass the estate to the other person if the legatee contests the will.⁹⁶

5. **CONDITION NOT TO MAKE CLAIM AGAINST TESTATOR'S ESTATE.**—A condition annexed to a bequest that no other claim be made against the estate is lawful, and one which the testator had a right to annex in the disposition of his own property.⁹⁷ And if the beneficiary accepts the bequest, he must take it *cum onere*.⁹⁸

6. **CONDITION AGAINST INSOLVENCY OR BANKRUPTCY OF DEVISEE.**—A devise

citing *McDonogh v. Murdock*, 15 How. 367, 14 L. Ed. 732; *Howard v. Carusi*, 109 U. S. 725, 27 L. Ed. 1089.

94. **Illegal, immoral or impossible condition.**—*McDonogh v. Murdock*, 15 How. 367, 411, 14 L. Ed. 732.

In charitable bequests.—See the title **CHARITIES**, vol. 3, p. 692.

The Louisiana code provides that, "in all dispositions inter vivos and mortis causa, impossible conditions, those which are contrary to the laws or to morals, are reputed not written." Under the word "conditions" the various modes of appropriation, use, and destination attached to this legacy are included. *McDonogh v. Murdock*, 15 How. 367, 411, 14 L. Ed. 732.

95. **Condition not to contest will not obligatory.**—*Smithsonian Institution v. Meech*, 169 U. S. 398, 413, 42 L. Ed. 793.

"The reason seems to be this: A court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation." *Smithsonian Institution v. Meech*, 169 U. S. 398, 413, 42 L. Ed. 793.

96. **Limitation over on contest of will.**—*Smithsonian Institution v. Meech*, 169 U. S. 398, 413, 42 L. Ed. 793.

97. **Condition not to make claim against testator's estate.**—*Rogers v. Law*, 1 Black 253, 261, 17 L. Ed. 58.

A condition annexed to a legacy that the legatee shall make no claim or demand upon the testator's estate for a

debt which, if not relinquished, might be recoverable, is lawful. *Rogers v. Law*, 1 Black 253, 17 L. Ed. 58.

Testator bequeathed to C. a life estate in certain land "upon condition that she renounce all claim upon my estate for moneys accruing from the sale of a tract of land in Illinois conveyed to me in trust for her benefit" and upon her decease or declining the condition, it was provided that the property be sold "for the benefit of the daughters then surviving of my several daughters." C. brought suit against the executrix, for the recovery of the trust moneys. She set forth the clause of the will in relation to said land and stated "that she had not renounced said claim, so as aforesaid required to do, nor has she refused to renounce said claim, for the reason that plaintiff claims that by virtue of the deed of trust it is impossible for plaintiff to release said trust funds, and for the further reason that such a condition as aforesaid required is against conscience and justice." It was held that C. was not estopped from recovering the trust moneys. The court said: "No question of election proper, where something is given by will to one who is entitled to some other thing disposed of to another, arose in any stage of this litigation. This was a case of an express condition annexed to the devise upon compliance with which the devise might take, and not otherwise." *Carpenter v. Strange*, 141 U. S. 87, 104, 35 L. Ed. 640.

98. *Rogers v. Law*, 1 Black 253, 261, 17 L. Ed. 58.

"For every bequest is but a bounty, and

of the income from property, to cease on the insolvency or bankruptcy of the devisee, is good; and a limitation over to his wife and children, upon the happening of such contingency, is valid, and the entire interest passes to them; but if the devise be to him and his wife or children, or if he has in any way a vested interest thereunder, that interest, whatever it may be, may be separated from that of his wife or children, and paid over to his assignee in bankruptcy.⁹⁹

7. CONDITION THAT DEVISEE TAKE TESTATOR'S NAME.—A condition of a devise that the devisee, as soon as he should come into possession of the lands devised, should take the name of the testator, is a condition subsequent, of which only the person to whom the lands were devised over, can take advantage.¹

8. CONDITION THAT DEVISEE MARRY A CERTAIN PERSON.—A devise to one on condition that he shall marry a certain person if uncontrolled by other words is upon a condition subsequent.²

a bounty must be taken as it is given." *Hunter v. Bryant*, 2 Wheat. 32, 37, 4 L. Ed. 177.

Testator gave certain legacies to his grandchildren, annexing to the legacies the condition that if either of the legatees shall claim, ask, or demand, sue for, recover or receive any part or portion of his estate, rights, or credits, either in his lifetime or after his decease, under or by virtue of certain deeds (particularly describing them), then and in that case the bequest, etc., should be void. One of the grandchildren died under age. Upon the distribution of the testator's estate the two surviving grandchildren set up a claim under the interdicted deeds, and in the same proceeding they demanded the legacies. The claim under the deeds was finally disallowed on its own demerits. Held, that by setting up that claim the grandchildren forfeited their right to the legacies. *Rogers v. Law*, 1 Black 253, 17 L. Ed. 58.

99. Condition against insolvency or bankruptcy of devisee.—*Nichols v. Eaton*, 91 U. S. 716, 24 L. Ed. 254.

In *Nichols v. Eaton*, 91 U. S. 716, 24 L. Ed. 254, the mother of the bankrupt, had bequeathed to him by will the income of a fund, with a condition in the trust that on his bankruptcy or insolvency the legacy should cease and go to his wife and children, if he had any, and if not, it should lapse into the general fund of the testator's estate, and be subject to other dispositions. The assignee of the bankrupt sued to recover the interest bequeathed to the bankrupt, on the ground that this condition was void as against public policy. But the federal supreme court, on a full examination of the authorities, both in England and this country, held that the objection was not well taken; that the owner of property might make such a condition in the transfer of that which was his own, and in doing so violated no creditor's rights and principle of public policy. *Hyde v. Woods*, 94 U. S. 523, 526, 24 L. Ed. 264.

1. Condition that devisee take testator's name.—*Webster v. Cooper*, 14 How.

488, 501, 14 L. Ed. 510, citing *Taylor v. Mason*, 9 Wheat. 325, 6 L. Ed. 101; *Finlay v. King*, 3 Pet. 346, 347, 7 L. Ed. 701. See the title REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS, vol. 10, p. 645.

2. Condition that devisee marry a certain person.—*Finlay v. King*, 3 Pet. 346, 376, 7 L. Ed. 701, overruled on another point in *King v. Mitchell*, 8 Pet. 326, 8 L. Ed. 962.

Resulting trust—Not estate upon condition subsequent.—Testator devised as follows: "In case of having no children, I then leave and bequeath all my real estate, at the death of my wife, to William King, son of my brother James King, on condition of his marrying a daughter of William Trigg and my niece Rachel his wife, lately Rachel Finlay, in trust for the eldest son or issue of said marriage; and in case such marriage should not take place, I leave and bequeath said estate to any child, giving preference to age, of said William and Rachel Trigg, that will marry a child of my brother James King, or of sister Elizabeth, wife of John Mitchell, and to their issue." Upon the construction of the terms of this clause, it was decided in *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701 that William King, the devisee, took the estate upon a condition subsequent, and that it vested in him (so far as not otherwise expressly disposed of by the will) immediately upon the death of the testator. William Trigg having died without ever having had any daughter born of his wife Rachel, the condition became impossible; all the children of William Trigg and Rachel his wife, and of James King and Elizabeth Mitchell, were married to other persons; and there had been no marriage between any of them, by which the devise over upon the default of marriage of William King (the devisee) with a daughter of the Triggs, could take effect. The case was again brought before the court, on an appeal by William King, in whom it had been decided the estate devised was vested in trust; and the court held, that William King did not take a

9. **CONSTRUCTION AND OPERATION.**—Whether words in a devise constitute common-law conditions annexed to an estate, a breach of which or any one of which, will work a forfeiture, defeat the devise, and let in the heirs, or whether they are regulations for the management of the estate, and explanatory of the terms under which it was intended to have it managed, is matter to be gathered, not from a particular expression in the devise, but from the whole instrument.³ Where legacies are given with the provision that if the legatees die under age and without issue a devise over to another shall take effect, and the legatees become of age, the devise over does not take effect.⁴

10. **PERFORMANCE.—Necessity for Performance.**—See the title **CHARITIES**, vol. 3, p. 691.

Under the Spanish law no heir can claim a devise, without performing the condition annexed to it.⁵

Time of Performance.—It is a general rule, that if an estate be given on a condition, for the performance of which no time is limited, the devisee has his life for performance.⁶

11. **BREACH OF CONDITION.—Effect of Breach.**—See the title **CONDITIONS**, vol. 3, p. 1008.

N. Powers.—See the title **POWERS**, vol. 9, p. 588. See, also, the titles **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 119; **TRUSTS AND TRUSTEES**, ante, p. 676.

1. **CONSTRUCTION AND OPERATION.—Courts apply to the construction of powers** contained in a will, the great and leading principle which applies to the construction of other parts of the will—to ascertain and carry into execution the intention of the testator.⁷

And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator.⁸

Clause Empowering Heirs to Remove Trustee Appointed in Will.—See the title **TRUSTS AND TRUSTEES**, ante, p. 676.

That power “to dispose of,” imports power to make partition, see the title **POWERS**, vol. 9, p. 597.

As to rights of creditors where person has general power of appointment by will to dispose of property, see the title **POWERS**, vol. 9, p. 599.

2. **EXECUTION OF POWERS.**—See footnote.⁹

3. **POWER OF SALE BY EXECUTOR OR ADMINISTRATOR.**—See the title **EXECUTORS AND ADMINISTRATORS**, vol. 6, p. 143, et seq.

beneficial estate in fee in the premises, but a resulting trust for the heirs at law of the testator. *King v. Mitchell*, 8 Pet. 326, 8 L. Ed. 962, reversing *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701.

3. **Construction and operation.**—*Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502.

4. **Devise over never takes effect where condition subsequent never happens.**—Where a testator made certain devises to his two grandchildren, “provided, and the legacies herein before devised are upon this special condition, that, if both my said grandchildren shall happen to die under age and without any lawful issue, then it is my will that three-fourth parts shall be equally divided between Sarah Smallwood and others,” etc., and the two grandchildren lived many years after they arrived at full age, and then both died without issue, the devise over to Sarah Smallwood, etc., never took effect, because the two grandchildren both arrived at full age. *Doe v. Watson*, 8 How. 263, 12 L. Ed. 1072.

5. **Necessity for performance under Spanish law.**—*Meegan v. Boyle*, 19 How. 130, 149, 15 L. Ed. 577.

6. **Time of performance.**—*Finlay v. King*, 3 Pet. 346, 376, 7 L. Ed. 701.

A devise to A., on condition that he shall marry B., if uncontrolled by other words, takes effect immediately; and the devisee performs the condition, if he marry B., at any time during his life. *Finlay v. King*, 3 Pet. 346, 376, 7 L. Ed. 701.

7. **Construction.**—*Peter v. Beverly*, 10 Pet. 532, 564, 9 L. Ed. 522.

8. *Peter v. Beverly*, 10 Pet. 532, 564, 9 L. Ed. 522.

9. **Execution of powers.**—See the title **POWERS**, vol. 9, p. 604.

The power to encumber the estate “by way of mortgage or trust deed or otherwise, and renew the same,” is broad enough to include the renewal and extension of an existing encumbrance which had been placed on real estate of testatrix in her lifetime as well as the crea-

O. Survivorship.—See footnote.¹⁰

P. Conversion and Reconversion.—See elsewhere.¹¹ That it is within the exclusive jurisdiction of the courts of the state in which the realty is situated to determine the question of the equitable conversion of realty into personality, by will, see the title **CONFLICT OF LAWS**, vol. 3, p. 1036.

Q. Suits to Construe Wills.—There cannot be such a construction given to a clause in a will that, in case of any dispute, whatever the executors determined was to be conclusive of testator's intention, without any resort to a court of justice, as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice; a court must decide, whether the construction of the will adopted by those who are named, is the right construction, or the grossest injustice might be done.¹²

IX. Legacies and Devises.

A. Classes of Legacies and Devises—1. **GENERAL LEGACIES.**—A legacy is general when it is so given as not to amount to a bequest of a particular

tion of a new one, and the husband could do so. *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 370, 27 L. Ed. 962.

A testatrix devised all of her estate to her husband for life, remainder to her children, "But provided, that said Cyrenius Beers may encumber the same by way of mortgage or trust deed or otherwise, and renew the same for the purpose of raising money to pay off any and all encumbrances now on said property, and which trust deed or mortgage so made shall be as valid as though he held an absolute estate in said property." He extended a debt secured by a mortgage, on real estate devised. The agreement of extension did not refer to the will, or to the power conferred thereby. It was held, that it must be regarded as a valid execution of the power. *Warner v. Connecticut Mut. Life Ins. Co.*, 109 U. S. 357, 368, 27 L. Ed. 962.

Testamentary powers.—See the title **POWERS**, vol. 9, p. 600.

Power of appointment required to be executed by will.—See the title **POWERS**, vol. 9, p. 600.

Intention to execute power.—See the title **POWERS**, vol. 9, pp. 603, 604.

10. Survivorship.—See ante, "Joint Tenancies," VIII, K, 5.

Testatrix devised and bequeathed to her husband one-half of the income from her estate and to her son all of her property subject to that given to her husband and provided that in the event of her becoming the survivor of both her husband and son then she devised and bequeathed all of her property to the Young Women's Christian Home. After the death of the husband, testatrix and son went down together in a shipwreck. It did not appear that the testatrix survived her son or the son the testatrix. The next of kin of testatrix and of the son and the Young Women's Christian Home claimed the estate. Held, testa-

trix intended to dispose of all her estate, and she had in mind only three objects of her bounty, her husband, her son and the Home, and her intention, failing husband and son, was that the Home should take. Her manifest intention is not to be defeated because instead of saying, "If neither my husband nor my son should survive me, I give and bequeath my property to the Home," she said: "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I give and bequeath all my property to the Young Women's Christian Home." The property passed under the will to the Home, and neither the next of kin of the mother nor the next of kin of the son can defeat its destination. *Young Women's Christian Home v. French*, 187 U. S. 401, 417, 418, 419, 47 L. Ed. 233.

Conjoint legacy in Louisiana.—See post, "Conjoint Legacies," IX, E, 1.

Presumption of survivorship.—See the title **PRESUMPTIONS AND BURDEN OF PROOF**, vol. 9, p. 618.

11. Conversion and reconversion.—See the title **CONVERSION AND RECONVERSION**, vol. 4, p. 509, and references given.

12. Pray v. Belt, 1 Pet. 670, 7 L. Ed. 309.

Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, courts of justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of such a power, so given in a will, one not foreseen, and which could not be intended, by the testator, it has been considered as a case, in which the general power of courts of justice to decide on the rights of parties ought to be exercised. *Pray v. Belt*, 1 Pet. 670, 680, 7 L. Ed. 309.

thing or money of the testator, distinguished from all others of the same kind.¹³

A legacy of quantity is ordinarily a general legacy.¹⁴

General Legacies Favored.—The courts are inclined to hold legacies to be general.¹⁵

2. **SPECIFIC LEGACIES AND DEVISES.**—See ante, "General Legacies," IX, A, 1.

A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished.¹⁶

A bequest of freedom to a slave is a specific legacy.¹⁷

Specific Legacies Not Favored.—The courts in general are averse to construing legacies to be specific;¹⁸ and will not do so unless such be the clear intention of the testator.¹⁹

Specific Devise.—A devise of the "balance" of testator's real estate to his infant son, which describes particularly the property, is a specific devise.²⁰

3. **DEMONSTRATIVE LEGACIES.**—See ante, "General Legacies," IX, A, 1. If a legacy be given, with reference to a particular fund only, as pointing out a convenient mode of payment, it is to be construed as demonstrative and the legatee will not be disappointed though the fund wholly fail.²¹

13. **General legacies.**—*Kenaday v. Sinnott*, 175 U. S. 606, 618, 45 L. Ed. 339.

14. **Legacy of quantity.**—*Kenaday v. Sinnott*, 179 U. S. 606, 618, 45 L. Ed. 339.

But there are legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is denominated in the law a demonstrative legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with general legacies upon a deficiency of assets. *Kenaday v. Sinnott*, 179 U. S. 606, 618, 45 L. Ed. 339.

General intention of testator controls.—The authorities seem to be clear in holding that whether a legacy is to be treated as a demonstrative legacy, or is one dependent exclusively upon a particular fund for payment, is a question of construction, to be determined according to what may appear to have been the general intention of the testator. It is true, as a general proposition, that where a testator bequeaths a sum of money in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund. *Kenaday v. Sinnott*, 179 U. S. 606, 620, 45 L. Ed. 339.

15. **General legacies favored.**—The inclination of the courts to hold legacies to be general, rather than specific, and on which the rule is based that to make a legacy specific, its terms must clearly re-

quire such a construction, rests upon solid grounds. The presumption is stronger that a testator intends some benefit to a legatee, than that he intends a benefit only upon the collateral condition that he shall remain till death, owner of the property bequeathed. The motives which ordinarily determine men in selecting legatees are their feelings of regard, and the presumption of course is that their feelings continue and they are looked upon as likely to continue. An intention of benefit being once expressed, to make its taking effect turn upon the contingency of the condition of the testator's property being unchanged, instead of upon the continuance of the same feelings which in the first instance prompted the selection of the legatee, requires, as it ought, clear language to convey that intention. *Kenaday v. Sinnott*, 179 U. S. 606, 619, 45 L. Ed. 339.

16. **Specific legacy.**—*Kenaday v. Sinnott*, 179 U. S. 606, 618, 45 L. Ed. 339.

17. **Bequest of freedom.**—*Williams v. Ash*, 1 How. 1, 13, 11 L. Ed. 25.

18. **Specific legacies not favored.**—*Kenaday v. Sinnott*, 179 U. S. 606, 618, 45 L. Ed. 339.

19. **Intention of testator prevails.**—*Kenaday v. Sinnott*, 179 U. S. 606, 619, 45 L. Ed. 339.

"The intention of the testator must prevail, and legacies will not be held specific, when the result would be that the mere transmutation of money into securities raised an irrebuttable presumption of ademption inconsistent with the intention of the testator as plainly deducible from all the terms of his will taken together." *Kenaday v. Sinnott*, 179 U. S. 606, 620, 45 L. Ed. 339.

20. **Specific devise.**—*Walker v. Parker*, 13 Pet. 166, 173, 10 L. Ed. 109.

21. **Demonstrative legacy.**—*Kenaday*

4. **CONJOINT LEGACIES.**—See post, "Conjoint Legacies," IX, E, 1.

B. Who May Be Legatees and Devisees—1. **ALIENS.**—See the title **ALIENS**, vol. 1, pp. 210, 225.

2. **BASTARDS.**—A bastard in esse, whether born or unborn, is competent to be a devisee or legatee of real or personal estate. The only question in such a case is, whether, when in esse, the bastard is sufficiently designated as the object of the bequest.²²

The Code of Louisiana makes a distinction between acknowledged natural children and adulterine children; allowing the former to take as legatees, but not allowing the latter to do so, except to a small amount.²³

Under Virginia Act of 1785.—See footnote.²⁴

3. **CORPORATIONS.**—**Municipal Corporations.**—See the title **MUNICIPAL CORPORATIONS**, vol. 8, pp. 596, 597.

By a statute of New York, a devise of lands in that state can only be made to natural persons and to such corporations as are created under the laws of the state and are authorized to take by devise. A devise, therefore, of lands in the state to the government of the United States, is void.²⁵

C. Property Subject to Be Devised.—Legal and equitable estates are alike devisable,²⁶ and the same rules of law apply to both.²⁷

D. Acceptance or Refusal.—See ante, "Conditions," VIII, M; post, "Election," IX, E, 7.

By the Spanish law it is required that the heir shall appear before the judge, and either accept or reject the devise.²⁸

E. Operation and Effect—1. **CONJOINT LEGACIES.**—**In Louisiana**, a legacy to two persons, "to be divided equally between them," is a conjoint one. If but one of them survive the testator, he is entitled, by accretion, to the whole of the thing bequeathed.²⁹

2. **BEQUEST TO DEBTOR.**—See footnote.³⁰

3. **SATISFACTION OF CREDITORS BY LEGACIES.**—Where a debtor bequeaths to his creditor a legacy equal to or greater than the amount of his debt, it is presumed, in the absence of a contrary intent inferable from the will, that the

v. Sinnott, 179 U. S. 606, 619, 45 L. Ed. 339, wherein the bequest was held to be in the nature of a demonstrative legacy.

22. **Bastards.**—*Gaines v. Hennen*, 24 How. 553, 592, 16 L. Ed. 770.

23. **In Louisiana.**—*Gaines v. Hennen*, 24 How. 553, 16 L. Ed. 770.

24. **Under Virginia act of 1785.**—Previous to 1775, H. of Virginia, cohabited with A., and had by her, the appellants, whom he recognized as his children; in July, 1775, he made his will, which was duly proved, after his decease, in which he described them, as the children of himself, and of his wife A., and devised the whole of his property to them and their mother; in June, 1776, he was appointed a colonel in the Virginia line, upon the continental establishment, and died in the service, having, in July, 1776, intermarried with the mother, and died, leaving her pregnant with a child, who was afterwards born, and named R.; after the death of H. and the birth of such son, a warrant for a tract of military lands was granted by the state of Virginia, to R., who died in 1796, in his minority, without wife or children, and without having located or disposed of the warrant; his mother also died before

1796. Held, that the children of H. were not entitled to the lands, as devisees under his will, under the act of assembly; nor did the will so far operate, as to render them capable of taking under the act, as being named his legal representatives in the will. *Stevenson v. Sullivan*, 5 Wheat. 207, 5 L. Ed. 70.

25. *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192.

26. **Estates devisable.**—*Ould v. Washington Hospital*, 95 U. S. 303, 312, 24 L. Ed. 450, citing *Croxall v. Shererd*, 5 Wall. 268, 18 L. Ed. 572.

27. *Doe v. Considine*, 6 Wall. 458, 469, 18 L. Ed. 869. See the title **ESTATES**, vol. 5, p. 905.

28. **Acceptance or refusal.**—*Meegan v. Boyle*, 19 How. 130, 149, 15 L. Ed. 577.

29. **Conjoint legacies.**—*Mackie v. Story*, 93 U. S. 589, 23 L. Ed. 986.

30. **Bequest to debtor.**—Defendant who had taken charge of the affairs of testatrix some time before her death, borrowed £150 from her, for which he gave a bond. In her will she bequeathed to defendant the sum of £200 provided that he would bring no account against her estate. Quære, whether the bequest operated as a release of the bond. After

legacy was intended to be in satisfaction of the debt;³¹ but the rule is in fact nothing more than a presumption, and may be rebutted by slight evidence that such was not the intention of the testator.³²

The rule has no application to a case where the bequest is a general one—all of the property of the testator “to be divided between them share and share alike”—and the will is made six years before the indebtedness is liquidated.³³

4. DEVISE NOT BARRING DOWER.—See the title DOWER, vol. 5, pp. 490, 491.

5. DEVISE OR BEQUEST TO SLAVE.—A devise of property, real or personal, by a master to his slave, entitles the slave to his freedom, by necessary implication.³⁴

A bequest of freedom to a slave, under the laws of Maryland, stands on the same principles with a bequest over to a third person.³⁵

6. CHARGE OF DEBTS AND LEGACIES—a. *Charge of Debts*.—See the title MARSHALING ASSETS AND SECURITIES, vol. 8, p. 266. See, also, AFTER, vol. 1, p. 203. See footnote.³⁶

b. *Charge of Legacies*.—See the titles MARSHALING ASSETS AND SECURITIES, vol. 8, p. 268. See footnote.³⁷

depending for a great period on the docket, the suit was, finally, marked “not to be brought forward.” *Massey v. Leaming*, 4 Dall. 123, 1 L. Ed. 768.

31. **Satisfaction of creditors by legacies**.—*Glover v. Patten*, 165 U. S. 394, 410, 411, 41 L. Ed. 760.

32. Many cases hold that the mere fact that the debt was unliquidated is enough to rebut the presumption. *Glover v. Patten*, 165 U. S. 394, 411, 41 L. Ed. 760.

33. *Glover v. Patten*, 165 U. S. 394, 411, 41 L. Ed. 760.

So where a testatrix had made a general bequest to her five children, a prior loan to one was treated as an advancement, the court saying: “The instincts of a mother would naturally lead her to put her daughters upon an exact equality, and the case is manifestly one for the application of the legal maxim that ‘equality is equity.’” *Glover v. Patten*, 165 U. S. 394, 411, 41 L. Ed. 760.

“The whole theory of a debt being extinguished by a bequest presupposes a bequest subsequent to the indebtedness.” *Glover v. Patten*, 165 U. S. 394, 411, 41 L. Ed. 760.

34. **Devise or bequest to slave**.—*Le Grand v. Darnall*, 2 Pet. 664, 669, 7 L. Ed. 555.

35. *Williams v. Ash*, 1 How. 1, 11 L. Ed. 25. See *Le Grand v. Darnall*, 2 Pet. 664, 7 L. Ed. 555, where manumission by will was held valid.

A specific legacy.—See ante, “Specific Legacies and Devises,” IX, A, 2.

36. **Property subject to charge of debt**.—H., in contemplation of marriage with B., gave a bond for \$5,000 to trustees, to secure B.’s support with condition, that if H. should die before B., and by his will should, within a year from its date, make such devises and bequests as should be adequate to these provisions, then the bond to be void. H. died, leaving his widow B. and a son, having by his last

will, devised a tract of 1,000 acres of land in the Mississippi territory, to his son, in fee; a tract of 10,000 acres in Kentucky, equally between his wife and son, with a devise over to her in fee, of the son’s moiety, if he died before he attained “the lawful age to will it away;” and the residue of his estate, real and personal, to be divided equally between his wife and son, with the same contingent devise over to her, as with regard to the tract of 10,000 acres of land. The value of the property thus devised to her, beside the contingent interest, might have been estimated, at the time of H.’s death, at \$5,000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, “whether vested in her by the will of her deceased husband, or otherwise,” to be divided between her son and the plaintiff below (Bryant), with a contingent devise of the whole to the survivor. The son afterwards died, and the plaintiff brought this bill to charge the lands of H. with the payment of the bond of \$5,000, and interest, to which the plaintiff derived his right under the nuncupative will of B. Under all the circumstances of the case, the bond was chargeable on the residue of the estate, and of this, the personalty first in order. *Hunter v. Bryant*, 2 Wheat. 32, 4 L. Ed. 177.

37. **A charge of legacies on land** is not a devise of the real estate. It makes them a lien on, and payable out of, the land; but it is still distinguishable from an estate in the land. *Wright v. Page*, 10 Wheat. 204, 230, 6 L. Ed. 303.

Personal liability of devisee.—Where there is no such language as to show that testator intends for legacies to be a charge on the land, and there is no direction that the devisee shall pay the legacies out of the land, the charge is personal. *Wright v. Page*, 10 Wheat. 204, 227, 6 L. Ed. 303.

Application of payments.—Where land

7. **ELECTION.**—See the title **ESTOPPEL**, vol. 5, p. 974. A party taking the benefit of a provision in his favor under a will, is thereby precluded from at the same time attacking the validity of the very instrument under which he received the benefit.³⁸

Right of Widow to Elect—Not Personal.—See footnote.³⁹

F. Rights and Liabilities of Legatees and Devisees.—Legatees have no rights in the estate of a living person.⁴⁰

Liability Where Executor Has No Assets.—Creditors of testator may

be devised to a residuary devisee, charged with the payment of certain pecuniary legacies, is sold under a judgment against such devisee, the proceeds of the sale must be first applied to the payment of the legacies, and the remainder must go to the plaintiff. *Nicholas v. Postlethwaite*, 2 Dall. 131, 1 L. Ed. 319.

Charge of annuity.—See the title **ANNUITY**, vol. 1, p. 329.

38. **Election.**—*Utermehle v. Norment*, 197 U. S. 40, 57, 49 L. Ed. 655; *Smithsonian Institution v. Meech*, 169 U. S. 398, 414, 42 L. Ed. 793.

Although the testator has no legal power to dispose of the property of another, yet if he assumes to do so by his will, and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator. *Smithsonian Institution v. Meech*, 169 U. S. 398, 414, 42 L. Ed. 793.

"And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition, receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes." *Smithsonian Institution v. Meech*, 169 U. S. 398, 415, 42 L. Ed. 793.

When estoppel applies.—A devisee, who had taken the benefit of a provision in his favor under a will, was ignorant of any evidence on which to base a contest against a proof of the will. He did not know at that time that fraud or undue influence or duress had been exercised in order to obtain the will, nor did he know that the testator lacked testamentary capacity to execute a will, but there was no evidence that any means were used or representation made to prevent him from ascertaining what the facts really were. He was guilty of extreme negligence in attempting to discover the facts, and the position of other parties to the litigation had materially changed so that the original situation could not be restored. He alleged that he was ignorant of the rule of law that a party taking the benefit of a provision in his favor under a will is thereby estopped from at the same time attacking the validity of such instrument as grounds for contesting the will and setting aside the probate thereof. It was

held that the plaintiff was estopped from contesting the will and that the law covered his case although he was ignorant of it. *Utermehle v. Norment*, 197 U. S. 40, 49 L. Ed. 655.

When estoppel does not apply.—A widow does not estop herself from asserting against her husband's executor, a claim for separate moneys of hers, received by her husband to invest for her, but which he did so invest; by her acceptance of a provision under his will which makes a limited provision for her, to be received, with income under a certain trust deed, in satisfaction of dower. *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814.

Condition not to dispute will.—Where there is a condition against disputing the will, the acceptance of the legacy renders the condition binding upon the legatee, upon the well-known doctrine of election. *Smithsonian Institution v. Meech*, 169 U. S. 398, 414, 42 L. Ed. 793.

39. **Right of widow to elect—Passes to her devisee.**—H., in contemplation of marriage with B., gave a bond for \$5,000 to trustees for B.'s support, with condition, that if H. should die before B., and by his will should, within a year from its date, make such devises and bequests as should be adequate to these provisions, then the bond to be void. H. died, leaving his widow B., and a son, having, by his last will, devised to B. property which might have been estimated at \$5,000. B. subsequently died, having made a nuncupative will, by which she devised all her estate, "whether vested in her by the will of her deceased husband, or otherwise," to be divided between her son and the plaintiff below (*Bryant*), with a contingent devise of the whole to the survivor. The son afterwards died, and the plaintiff brought this bill to charge the lands of H. with the payment of the bond of \$5,000, to which the plaintiff derived his right under the nuncupative will of B. Held, that the provision made in the will of H. for his wife, must be taken in satisfaction of the bond, but subject to her liberty to elect between the provision under the will and the bond, and that this privilege was extended to her devisee, the plaintiff. *Hunter v. Bryant*, 2 Wheat. 32, 4 L. Ed. 177.

40. **Rights in estate of living person.**—*Scott v. McNeal*, 154 U. S. 34, 49, 38 L. Ed. 896.

proceed against devisees or legatees, if the executor has no assets.⁴¹

Contribution between Devisees.—See the title *MARSHALING ASSETS AND SECURITIES*, vol. 8, p. 269.

G. Abatement and Ademption.—1. **ABATEMENT.**—See the title *MARSHALING ASSETS AND SECURITIES*, vol. 8, p. 261. See, also, ante, "General Legacies," IX, A, 1. Where specific legacies are first given, it is the intent of the testator to prefer the specific legatees.⁴²

2. **ADEPTION.**—**Ademption may be defined** to the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation or clearly indicative of an intention to revoke.⁴³

The satisfaction of a general legacy depends on the intention of the testator as inferred from his acts.⁴⁴

The ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy should fail is presumed.⁴⁵

41. Liability where executor has no assets.—*Milligan v. Milledge*, 3 Cranch 220, 228, 2 L. Ed. 417.

42. Abatement.—*Silsby v. Young*, 3 Cranch 249, 265, 2 L. Ed. 429.

Testator used the following words: "In case the personal estate, and the produce arising from the real estate, which I shall die seised and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then and in such case, I direct, that the said annuities and legacies so by me bequeathed, shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the £1,500 bequeathed to E.," whom he also made his residuary legatee. The estate was more than sufficient at the time of the testator's death, to pay all debts, annuities and legacies, but afterwards, by the bankruptcy of the executor, became insufficient. Held, that if there be not sufficient assets to satisfy the specific legacies, the loss must fall exclusively on the amount given to E. until that fund be exhausted. *Silsby v. Young*, 3 Cranch 249, 263, 2 L. Ed. 429.

The court said: "The words, 'the personal and real estate of which I shall die seised and possessed,' are no more, in substance, than the words 'all my real and personal estate' would have been. They describe the subject, on the insufficiency of which an abatement of a particular legacy is to take place, but not the time when that insufficiency is to be tested. In the opinion of the court, that time is, when the will is carried into execution, by the application of the funds to their object. If, when that application is made, a deficiency appears, 'then and in that case' it is, that the abatement is to take place in the specific legacy to E." *Silsby v. Young*, 3 Cranch 249, 265, 2 L. Ed. 429.

In *Silsby v. Young*, 3 Cranch 249, 261, 2 L. Ed. 429, it was contended that the complainant legatees had forfeited their rights as to the payment of their lega-

cies, by a letter, selecting a particular debt in satisfaction of their legacy, which debt was lost. By the will, the whole estate was devised to executors and trustees, who were directed to place it out on security, in such manner as should, in their judgment, best promote the interests of the legatees. The testator then directs, among other bequests, that his trustees shall set apart. £1000 sterling for each of such complainant legatees, the interest of which was to be paid to them, during their natural lives. The executor and trustee addressed a letter to the legatees in which he mentions an offer which had been made him, of a mortgage of £2,000, the amount of the sums to be set apart for them, which he will take, if it meets their approbation. If the legatees had taken this mortgage, and the title had proved defective, or the mortgaged property had been destroyed, they would, most probably, have forfeited all claims upon the estate of their testator. They answered, "You mention an old friend of our dear brother's wishing to hire the £2,000 on mortgage. We would willingly oblige him, but cannot. We choose to let it remain, just as our brother left it." Held, that this letter is a plain declaration, that they do not mean to intermeddle with the duties of the executor, but to leave him to perform them according to the directions of his testator. The construction which would convert these words into a declaration, that they chose the debts of their testator not to be collected, and that they chose to take upon themselves the hazard of the solvency of any particular debtor, whose debt should remain outstanding, or of the executor, if he should happen to collect it, is really too violent a distortion of them, to be tolerated for an instant.

43. Ademption defined.—*Kenaday v. Sinnott*, 179 U. S. 606, 617, 45 L. Ed. 339.

44. Satisfaction of general legacy.—*Kenaday v. Sinnott*, 179 U. S. 606, 617, 45 L. Ed. 339.

45. Ademption of specific legacy.—*Kena-*

Demonstrative Legacy.—See footnote.⁴⁶

H. Vested Legacies or Bequests.—A court of competent jurisdiction may determine the proper distribution of vested bequests, even though the possession and enjoyment are deferred.⁴⁷

Whether Legacy Vested or Lapsed.—See footnote.⁴⁸

I. Advancements.—See the title ADVANCEMENTS, vol. 1, p. 198.

J. Division of Estate.—See ante, "Vested Legacies or Bequests," IX, H. See, generally, the title EXECUTOR AND ADMINISTRATORS, vol. 6, p. 119.

K. Assignment of Legacies.—The mere promise of a party not made upon an existing consideration, to make an assignment of a legacy to one to whom he was indebted, will not have priority over a subsequent formal assignment of such legacy.⁴⁹

L. Actions.—Parties.—See footnote.⁵⁰

day *v. Sinnott*, 179 U. S. 606, 617, 45 L. Ed. 339.

46. The general intention of the testator was to leave all his property to his wife except what was expressly otherwise disposed of, and he bequeathed to her "deposits of currency entered on my bank book of the National Metropolitan Bank amounting to \$10,000.00 more or less." Bonds to the amount of about \$9,000 were purchased after the execution of the will and the deposit in the banks was correspondingly reduced. It was held that the bequest should be regarded as in its nature of a demonstrative legacy, and not adeemed by the change from money into property. *Kenaday v. Sinnott*, 179 U. S. 606, 621, 45 L. Ed. 339.

47. *Colt v. Colt*, 111 U. S. 566, 28 L. Ed. 520.

Questions may be passed upon affecting rights to interest claimed in property, though the time for the actual enjoyment of the legacy is postponed by the will until the youngest attained the age of majority, where interest is vested, and the question of distribution in right, is before the court. *Colt v. Colt*, 111 U. S. 566, 579, 28 L. Ed. 520.

48. **Whether vested or lapsed.**—Testator devised land after the death or marriage of his wife, in trust, to be sold, and the proceeds divided among his children when they attained the age of twenty-one years, or became married. One of the children attained the age specified, married, and died in the lifetime of the widow. The question was, whether this was a vested legacy to such child, or whether it was lapsed, by his dying in the lifetime of the testator's widow. Held, that it was a vested legacy. *Price v. Watkins*, 1 Dall. 8, 1 L. Ed. 14.

49. **Assignment of legacies.**—*Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282.

50. A bill was filed against an administrator, claiming a legacy under an alleged codicil to a will. Held, the persons claiming as heirs of the testator should be made parties, that they may have an opportunity to test the plaintiff's title, as the real parties in interest. *Armstrong v. Lear*, 8 Pet. 52, 8 L. Ed. 863.

Where a legacy, for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in either family being ascertained by the will, all the claimants ought to be brought before the court; the right of each individual depends on the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed; if this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of the suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. *Pray v. Belt*, 1 Pet. 670, 7 L. Ed. 309.

The will being proved and recorded in the county where the land was situated, it was not necessary, in a suit in chancery by the life annuitant, to establish the arrears due on a life annuity as a specific lien on the land, to make as defendant the trustee in a deed of trust made by the devise under the will, provided, in a suit to enforce the deed of trust, brought by the beneficiaries under it, they were given the right to contest the validity of the lien claimed by the life annuitant and to redeem the land from such lien, when established. *Canal Bank v. Hudson*, 111 U. S. 66, 28 L. Ed. 354.

Where a bill in chancery was filed by a legatee against the person who had married the daughter and residuary devisee of the testator (there having been no administration in the United States upon the estate), this daughter, or her representatives if she were dead, ought to have been made a party defendant. *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819.

Where daughters do not sue as executrixes, but expressly aver that they bring the suit "in their own right" as creditors of their mother's estate, and for the purpose of establishing their debt, legatees need not be joined. *Glover v. Patten*, 165 U. S. 394, 402, 41 L. Ed. 760, citing with approval *Dandridge v. Washington*, 2 Pet. 370, 377, 7 L. Ed. 454.

As to special devisee of land being a necessary party defendant to the sale of land to pay legacies, see the title EXEC-

Conclusiveness of Settlement by Referees.—See footnote.⁵¹

M. Taxation of Legacies and Devises.—See the title SUCCESSION TAXES, ante, p. 288.

X. Contract to Devise.

Suit for Damages for Breach.—See footnote.⁵²

XI. Rights of Omitted and Pretermitted Children.

By statute in some states by express provisions, children born after the making of a will, as well as those in being but omitted when the will is made, take, unless it clearly appears that they should not take.⁵³ Such provisions have

UTORS AND ADMINISTRATORS, vol. 6, p. 148, note 71.

Residuary legatees are not proper parties to a suit where a bill is filed by those claiming the payment of a sum of money due under a will, against the executor. *Dandridge v. Washington*, 2 Pet. 370, 377, 7 L. Ed. 434, cited with approval in *Glover v. Patten*, 165 U. S. 394, 402, 41 L. Ed. 760.

Testatrix bequeathed the interest of certain funds for "the proper education" of her nephews, "in some useful trade;" and gave to each of them who should live to finish his education, or reach the age of twenty-one, one hundred pounds, to set him up in his trade; she also gave the whole of her estates, of every description, to be equally divided among certain persons, who should be living, when the interest applicable to the education of her nephews should cease to be required, they being some of the persons among whom the same was to be divided; and she directed, that so long as any one of the three nephews who should live, had not finished his education, or arrived at the age of twenty-one years, the division of the property so divided and given should be deferred, and no longer. A bill was filed by one of the nephews of the testatrix, charging that the executors had not paid the several sums of money bequeathed to him, and praying that they might be decreed to pay the same. Held: So far as the bill sought to obtain such a portion of the fund as was, by a fair construction of the will, applicable to the education of the nephews of the testatrix, they alone were required to be parties. *Dandridge v. Washington*, 2 Pet. 370, 7 L. Ed. 434.

51. In *Marriot v. Davey*, 1 Dall. 164, 1 L. Ed. 83, it was held that a settlement of a legatee's account by referees, on a former citation before a register of wills, was not conclusive, in an action for a legacy, brought by a legatee under the act of the 12 Geo. III, c. 16 (1 Sm. L. 333).

52. A father agreed that if an illegitimate son would live with him, and work his plantation until he became of age, he would give him a tract of land. The son remained and was maintained by the father. It was held that, considering the relation of the father, etc., it would be ex-

cessive to give the full value of the land in damages, but that the son should receive an equal share with the other children. *Conrad v. Conrad*, 4 Dall. 130, 1 L. Ed. 771.

53. In **Massachusetts**.—*Lorings v. Marsh*, 6 Wall. 337, 18 L. Ed. 802.

In **California**.—See *Coulam v. Doull*, 133 U. S. 216, 231, 33 L. Ed. 596.

By the **Utah statute**, specific provision is made for children born after the making of the will, and also for children in being but omitted when the will is made. Children born after the making of the will but before the decease, inherit, unless it appears from the will that the testator intended that they should not. And this applies to posthumous children. *Coulam v. Doull*, 133 U. S. 216, 229, 33 L. Ed. 596.

"The statute (of Utah) raises a presumption that the omission to provide for children or grandchildren living when a will is made is the result of forgetfulness, infirmity or misapprehension, and not of design; but this is a rebuttable presumption, in view of the language employed, which negatives a taking contrary to an intentional omission, and at the same time leaves undefined the mode by which the affirmative purpose is to be established." *Coulam v. Doull*, 133 U. S. 216, 230, 33 L. Ed. 596.

Massachusetts—Failure to provide for deceased child's issue.—Where a testatrix having children, and grandchildren the issue of one of them, makes a will, in form, leaving income of her property in trust equally between the children for life (saying nothing about the grandchildren), and afterwards to charities; and on the death of one of the children issueless, makes a codicil, distributing the income again among the surviving children for life (again saying nothing about the grandchildren), and the child having issue dies in the lifetime of the testatrix, leaving these, the grandchildren of the testatrix, and the testatrix then dies, the omission of such testatrix to provide for her grandchildren is to be taken (especially if parol proofs, admissible by the law of the state, aid such conclusion) to have been intentional and not have been occasioned by any accident or mistake. Hence, the case will not come within the 25th section of chapter 92 of the Revised Statutes of Mas-

been held to apply to posthumous children.⁵⁴ Moreover, whether or not the omission to provide for a child was intentional, or by mistake, may be ascertained from a careful perusal of the terms of the will, or by parol evidence.⁵⁵ It is the intention at the time of the execution of the will which is to be looked to, as to whether the omission was intentional, or by mistake.⁵⁶

WINDING UP CORPORATIONS.—See, generally, the title CORPORATIONS, vol. 4, p. 788.

WINE.—See the title INTOXICATING LIQUORS, vol. 7, p. 519.

WINNER.—See note 1.

WITH.—See note 2.

WITHDRAW.—To “withdraw assent” is the same as to “revoke permission,” and what would be implied from one form of expression will be, under like circumstances, from the other.³

WITHDRAWAL OF LAND FROM ENTRY.—See the title PUBLIC LANDS, vol. 10, p. 163.

WITHDRAWING APPEARANCE.—See the titles APPEAL AND ERROR, vol. 2, p. 172; APPEARANCES, vol. 2, p. 458.

WITHDRAWING EVIDENCE.—See the title EVIDENCE, vol. 5, p. 1055.

WITHDRAWING PLEAS.—See the title PLEADING, vol. 9, pp. 436, 450.

WITHHOLD.—See note 4.

sachusetts (A. D. 1860), which provides for the issue of any deceased child or children, as in cases of intestacy, “unless it shall appear that such omission was intentional, and not occasioned by any accident or mistake.” *Lorings v. Marsh*, 6 Wall. 337, 18 L. Ed. 802.

54. Applicable to posthumous children.—*Coulam v. Doull*, 133 U. S. 216, 33 L. Ed. 596.

55. *Lorings v. Marsh*, 6 Wall. 337, 350, 18 L. Ed. 802.

Under the statutes of Utah bearing upon the subject of the omission of a child in testator's will, where the testator intentionally excludes his children from any share of the property disposed of by the will, extrinsic evidence is admissible to establish that the omission to provide for the children was intentional. *Coulam v. Doull*, 133 U. S. 216, 224, 33 L. Ed. 596.

56. Whether the omission to provide for a child was intentional, or by mistake, is not confined to the period of death of testator; on the contrary, when the question is answered, from a perusal of the will, it is necessarily limited to the time of its execution. And, even when it depends on oral proof, that proof is received for the purpose of ascertaining the mind of the testatrix at the same period. For it is the state of her mind at the time of the execution, generally speaking, that is to be looked to, in the contemplation of the statute, with a view to determine whether the omission was intentional, or by mistake. *Lorings v. Marsh*, 6 Wall. 337, 352, 18 L. Ed. 802.

1. Winner of money.—A broker paying out money of his principal in settlement of sales of grain made on the Chicago board of trade was not a winner of

money within the meaning of an Illinois statute allowing recovery of money lost in gambling transactions. *White v. Barber*, 123 U. S. 392, 424, 31 L. Ed. 243. See the title GAMBLING CONTRACTS, vol. 6, p. 542.

2. With cargo.—The words of a charter party describing a steam ship as “now sailed, or about to sail, from Benzaf, with cargo for Philadelphia,” imply that the vessel is loaded, because the words “with cargo” apply not only to the words “about to sail,” but to the word “sailed.” *Davison v. Von Lingen*, 113 U. S. 40, 49, 28 L. Ed. 885.

With all faults.—See ALL, vol. 1, p. 258.

With all possible dispatch.—See ALL, vol. 1, p. 258.

As to a stipulation in a charter party that a vessel will proceed from one port to another “with all possible dispatch,” see the titles CONTRACTS, vol. 4, p. 582; SHIPS AND SHIPPING, vol. 10, p. 1168.

3. Withdraw assent.—*Bridge Co. v. United States*, 105 U. S. 470, 479, 26 L. Ed. 1143.

4. Attorney withholding moneys collected for his clients.—See the title ATTORNEY AND CLIENT, vol. 2, p. 722.

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Withholding of pensions from the pensioner when collected by agents, attorneys or other persons.—See the title PENSIONS, vol. 9, p. 381.

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WITHHOLDING EVIDENCE.—As to presumption from, see the title **PRE-SUMPTIONS AND BURDEN OF PROOF**, vol. 9, p. 629.

WITHIN.—See note 1.

WITHOUT JUST COMPENSATION.—As to requirement that no property be taken without a just compensation, see the title **EMINENT DOMAIN**, vol. 5, p. 776.

WITHOUT PREJUDICE.—As to dismissal, see the titles **DISMISSAL**, **DISCONTINUANCE** AND **NONSUIT**, vol. 5, pp. 385, 386, 387; **RES ADJUDICATA**, vol. 10, p. 788, et seq.

WITHOUT RECOURSE.—As to indorsement, see the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 295.

satisfied that a postmaster has made a false return of business, it is within his discretion to **withhold** commissions on such, the words "to **withhold**" commissions seem fairly to imply a temporary suspension, rather than a total and final denial or rejection of the same. *United States v. Dumas*, 149 U. S. 278, 284, 37 L. Ed. 734.

1. **Performance of contract "from" or "within" certain periods**, see the title **CONTRACTS**, vol. 4, p. 579.

Within the city.—The ferry boats of a corporation incorporated in one state, and carrying passengers, etc., forward and back across a river to a city situated

in another state, are not taxable under a law taxing boats "**within** the city," in a case where the relation of the boats to the city was simply that of contact, as one of the termini of their transit. *St. Louis v. The Ferry Co.*, 11 Wall. 423, 431, 20 L. Ed. 192.

Within ten days after ascertainment and liquidation of duties.—As to the provision that the decision of a collector on rate and amount of duties on goods shall be conclusive, unless the importer shall "**within** ten days after the ascertainment and liquidation of the duties," give notice of his dissatisfaction, see the title **REVENUE LAWS**, vol. 10, pp. 544, 943.

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9, p. 1; PARTNERSHIP, vol. 9, p. 73; PATENTS, vol. 9, p. 136; PERJURY, vol. 9, p. 385; PRINCIPAL AND AGENT, vol. 9, p. 640; PRINCIPAL AND SURETY, vol. 9, p. 713; PRIVILEGE, vol. 9, p. 734; PRIVILEGED COMMUNICATIONS, vol. 9, p. 740; PRIZE, vol. 9, p. 744; PRODUCTION OF DOCUMENTS, vol. 9, p. 788; PUBLIC LANDS, vol. 10, p. 1; REFERENCE, vol. 10, p. 601; RESCISSION, CANCELLATION AND REFORMATION, vol. 10, p. 799; REVENUE LAWS, vol. 10, p. 838; SEARCHES AND SEIZURES, vol. 10, p. 1087; TAXATION, ante, p. 356; TREASON, ante, p. 628; TRIAL, ante, p. 667; TRUSTS AND TRUSTEES, ante, p. 676; UNITED STATES, ante, p. 747; UNITED STATES MARSHALS, ante, p. 822; USURY, ante, p. 838; VERDICT, ante, p. 917; WILLS, ante, p. 1015.

As to depositions of witnesses, see the title DEPOSITIONS, vol. 5, p. 321. As to whether or not attempt must be made to secure attendance of witness in order to use depositions, see the title DEPOSITIONS, vol. 5, p. 329. As to where a deposition of a witness was admitted, over the defendant's objection while the witness was in court, but the defendant subsequently called the witness who testified fully as to the deposition, not constituting sufficient error for a reversal, see the title APPEAL AND ERROR, vol. 2, p. 343. As to cross-examination of a witness by the opposite party being waiver of exceptions to regularity of the deposition, but not to competency of witness, see the title DEPOSITIONS, vol. 5, p. 333. As to waiver of objection to depositions because of nonannexation of deposition used to refresh memory, see the title DEPOSITIONS, vol. 5, p. 333. As to objections and exceptions to depositions, see the title DEPOSITIONS, vol. 5, p. 331, et seq. As to right and duty of court to cure errors from the erroneous admission of evidence, see the title APPEAL AND ERROR, vol. 2, p. 343. As to the writ of ad prosequendum, testificandum, deliberandum, etc., when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, see the title HABEAS CORPUS, vol. 6, p. 618. As to privilege of witness from arrest, see the title PRIVILEGE, vol. 9, p. 734. As to whether or not members of congress are exempted from the service or obligations of a subpoena in criminal cases, see the title PRIVILEGE, vol. 9, p. 737, note 18. As to competency of expert witnesses, see the title EXPERT AND OPINION EVIDENCE, vol. 6, p. 200. As to accomplices as witnesses, and the insufficiency of the uncorroborated testimony of an accomplice, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 66. As to the lack of authority in a district attorney to grant immunity to the accused when testifying against accomplices, see the title DISTRICT AND PROSECUTING ATTORNEYS, vol. 5, p. 400. As to the equitable right of a person testifying for the prosecution against his accomplice to a pardon, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 67. As to the rule that the state rules as to competency of witness obtains in suits of a civil nature, in the federal courts, where there is no act of congress touching the subject, see the title COURTS, vol. 4, p. 1083. As to the rule that where there is a conflict between an act of congress, and a law of the state in regard to the competency of witnesses, the United States courts are bound to follow the act of congress, see the title COURTS, vol. 4, p. 1085. As to the rule that state statutes regulating the competency of husband and wife as witness for or against each other are controlling on the federal courts, see the title COURTS, vol. 4, p. 1083. As to provision of § 858, Rev. Stat., that "the laws of the state in which the court is held shall be the rules of decision as to competency of witnesses in the court of the United States," being inapplicable to criminal trials, see the title COURTS, vol. 4, p. 1085. As to continuances because of absence of witnesses, see the title CONTINUANCES, vol. 4, pp. 545, 547. As to whether a trial should be delayed for the production of witnesses being in the discretion of the trial court, see the title APPEAL AND ERROR, vol. 1, p. 987. As to requirement that a copy of the indictment and a list of the jurors and witnesses be delivered to the defendant before trial, see the title CRIMINAL LAW, vol. 5, p. 111. As to the rule that in the absence of some

statutory provision there is no irregularity in calling a witness whose name does not appear on the indictment or has not been furnished to the defendant before the trial, see the title *CRIMINAL LAW*, vol. 5, p. 110. As to parol evidence being inadmissible in Louisiana to prove an acknowledgment by a decedent a debt which would otherwise be barred by prescription, see the title *LIMITATION OF ACTIONS AND ADVERSE POSSESSION*, vol. 7, p. 1032. As to necessity of notice of defenses to entitle a party to examine a witness in a patent cause to disprove the right of the patentee to the invention by showing its prior use, see the title *PATENTS*, vol. 9, p. 295. As to refusal of witness to testify constituting contempt of court, see the title *CONTEMPT*, vol. 4, p. 536. As to a witness's refusal to testify before a United States senate committee rendering him liable to punishment for contempt by the senate and to an indictment under a statute for misdemeanor, see the title *AUTREFOIS, ACQUIT AND CONVICT*, vol. 2, p. 759. As right of accused to confront accusers and witness and the exceptions thereto, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 496. As to taxing as an item of costs, the amount paid witnesses, their mileage, and the necessary expense incurred in summoning them, see the title *COSTS*, vol. 4, p. 819. As to ex post facto laws as to competency of witnesses, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 525. As to right of accused to call witness to show that his character is such that he would not be likely to commit the crime charged though he has not himself testified, see the title *CRIMINAL LAW*, vol. 5, p. 125. As to presumptions on appeal as to rejection of witnesses, see the title *APPEAL AND ERROR*, vol. 2, p. 325. As to attempts to intimidate witnesses, see the title *CONTEMPT*, vol. 4, p. 535. As to conspiring to deter persons from attending court and testifying, see the titles *CONTEMPT*, vol. 4, p. 535; *OBSTRUCTING JUSTICE*, vol. 8, p. 954. As to subscribing witnesses, see the titles *DEEDS*, vol. 4, p. 262; *DOCUMENTARY EVIDENCE*, vol. 5, p. 465; *WILLS*, ante, p. 1015.

I. Attendance and Compensation.

A. Attendance—1. **RIGHT TO COMPEL ATTENDANCE.**—**Criminal Proceedings.**—The constitution gives to every man charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses;¹ but the denial of such right does not render the judgment void.² It lies in the discretion of the trial court to summon such witness at the expense of the government.³

Congressional Investigations.—As to right of compulsory attendance of witnesses and production of books and papers in congressional investigations, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 316.

Interstate Commerce Commission.—As to the power of interstate commerce commission to require the attendance and testimony of witnesses and the

1. **Defendant's right to compulsory attendance of witnesses.**—United States v. Cooper, 4 Dall. 341, 1 L. Ed. 859. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 503.

Under the law as it formerly stood the right of compulsory attendance of witnesses was denied. See the title *CONSTITUTIONAL LAW*, vol. 4, p. 503.

Indigent defendants.—Section 878 of the Revised Statutes provides that witnesses may be summoned in criminal proceedings on behalf of the accused, at the expense of the government upon a proper affidavit being made by the defendant. *Tucker v. United States*, 151 U. S. 164, 167, 38 L. Ed. 112.

2. **Denial of compulsory process.**—The

denial of compulsory process to compel attendance of witnesses in favor of the prisoner, does not render the judgment void, and a writ of habeas corpus does not give the supreme court authority for its correction. *Ex parte Harding*, 120 U. S. 782, 784, 30 L. Ed. 824. See the title *HABEAS CORPUS*, vol. 6, p. 639.

3. **Discretion of court.**—As to the right to summon witnesses at the expense of the government under Revised Statutes, § 878, providing for compulsory attendance of witnesses in behalf of indigent persons charged with crime, being left to the discretion of the trial court, the exercise of which is not reviewable on appeal, see the title *APPEAL AND ERROR*, vol. 1, p. 991.

production of papers relating to any matter under investigation, see the title **INTERSTATE AND FOREIGN COMMERCE**, vol. 7, p. 510.

Grand Jury Proceedings.—As to summoning witnesses before a grand jury and power of examination, see the title **GRAND JURY**, vol. 6, p. 578.

2. **SERVICE OF SUBPŒNA.**—**Extraterritorial Effect of Subpœnas.**—Witnesses residing in one state are not subject to process issued out of the courts of another.⁴ Subpœnas for witnesses in the United States courts, in any district, may run into other districts, where such witnesses do not live farther than one hundred miles from where the court is held.⁵

Service by Special Messenger.—In an early case, the court directed that the sheriff be consulted as to the proper person to be hired to subpœna witnesses residing in another county, which was beyond the sheriff's jurisdiction.⁶

3. **ATTACHMENTS FOR NONATTENDANCE.**—**Attachment a Process of Court.**—An attachment against a witness for failure to attend at the return of a subpœna is a process of the court, regularly issuing for the administration of justice.⁷

Subpœna Prerequisite to Award of Attachment.—But the subpœna must have been actually served before the attachment can be awarded; and all the documents, upon which it is awarded, must be filed with the court.⁸

Attachment Obviated by Satisfactory Excuse.—The issuance of an attachment is not a necessary consequence of the nonattendance of a witness after service of a subpœna. A satisfactory reason may appear to the court to justify or excuse it.⁹

Service of Attachments.—See the title **UNITED STATES MARSHALS**, ante, p. 825.

4. **SUBPŒNA DUCES TECUM.**—As to definition, nature and sufficiency of a subpœna ducet tecum, see the title **PRODUCTION OF DOCUMENTS**, vol. 9, p. 788.

B. Compensation.—Witnesses in Federal Courts.—Section 848, Rev. Stat., allows witnesses one dollar and fifty cents per diem, and a travel fee of five cents;¹⁰ but if subpœnaed in more than one cause between the same parties, at the same court, only one travel fee and one per diem compensation is allowed.¹¹

Imprisoned Witnesses.—Section 848 of the Revised Statutes allows wit-

4. Not within the power of the Georgia courts to compel the attendance of witnesses who are beyond the limits of the state.—*Minder v. Georgia*, 183 U. S. 559, 562, 46 L. Ed. 328. See the title **DUE PROCESS OF LAW**, vol. 5, p. 673.

Subscribing witnesses.—As to effect on federal courts of a presumption by a state court that subscribing witnesses to a contract made without the state, reside where it was made, and are not subject to its process, so admit secondary evidence in proof of contract, see the title **COURTS**, vol. 4, p. 1082.

5. **Service of subpœnas in other districts.**—*Patapasco Ins. Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243; Act of March 2, 1793; Rev. Stat., § 876.

6. **Service by special messenger.**—*Respublica v. St. Clair*, 2 Dall. 101, 1 L. Ed. 307.

7. **Attachments.**—*United States v. Montgomery*, 2 Dall. 335, 1 L. Ed. 404.

Contempt.—As to disobeying a subpœna being a contempt, see the title **CONTEMPT**, vol. 4, p. 536.

8. **Prerequisite to award.**—*United States*

v. Caldwell, 2 Dall. 333, 334, 1 L. Ed. 404.

9. **Attachment excused.**—*United States v. Cooper*, 4 Dall. 341, 1 L. Ed. 859.

Where on attachment of witnesses served with subpœna, they gave satisfactory excuses, they were not in contempt, and the costs of attachment abided the event of the suit. *Butcher v. Coats*, 1 Dall. 340, 1 L. Ed. 166. See, generally, the title **COSTS**, vol. 4, p. 802.

10. **Amount allowed.**—*United States v. Sanborn*, 135 U. S. 271, 283, 34 L. Ed. 112.

Mileage allowed witness both in going from residence to the place of trial and returning.—*United States v. Sanborn*, 135 U. S. 271, 283, 34 L. Ed. 112.

Amount allowed taxed as costs.—As to amount paid witnesses, their mileage and the necessary expenses in summoning them being taxed as costs and included in the judgment, see the title **COSTS**, vol. 4, p. 819.

11. **Allowance where subpœnaed in more than one cause between same parties.**—*United States v. Sanborn*, 135 U. S. 271, 283, 34 L. Ed. 112.

nesses imprisoned for want of security for appearance, one dollar a day in addition to their subsistence.¹²

Federal Officers.—As to clerks and officers of the United States being allowed no more than their necessary expenses when sent away from their place of business as witnesses for the government, see the title *COSTS*, vol. 4, p. 819.

Officers of Federal Courts.—Section 848 of the Revised Statutes provides that officers of the United States courts are not entitled to witness fees for attendance before any court or commissioner where they are officiating.¹³

Coroners' Inquests.—As to allowance of fees to witnesses lawfully summoned to coroners' inquests and reimbursement of coroner for fees advanced, see the title *CORONERS*, vol. 4, p. 620.

Commissioners.—As to fees of United States commissioners for administering oaths to witnesses, hearing the preliminary charges of witnesses, and for the performance of other duties regarding witnesses, see the title *UNITED STATES COMMISSIONERS*, ante, p. 817.

Clerks of Court.—As to fees for clerks of court for administering oaths to witnesses, and issuing subpoenas, and for performance of other matters regarding witnesses, see the title *CLERKS OF COURT*, vol. 3, p. 857, et seq.

II. Competency.

A. Parties to Record and Persons Interested—1. **INTRODUCTORY.**—The common-law incompetency of parties to the record and persons interested, to testify, having been universally removed by statutory enactments, only a brief treatment will be accorded this obsolete rule.

2. **PARTIES TO RECORD.**—**In General.**—The general rule of the common law was that no party to the record could be a witness for or against himself, or for or against any other party to the suit,¹⁴ and it extended to both civil and criminal cases.¹⁵ In suits in equity, however, the rule of exclusion was not so rigid as in trials at law.¹⁶

12. Imprisoned witnesses.—United States *v.* Sanborn, 135 U. S. 271, 283, 34 L. Ed. 112.

13. Right of officers of federal courts to witness fees.—United States *v.* Sanborn, 135 U. S. 271, 283, 34 L. Ed. 112.

14. Common-law rule.—Texas *v.* Chiles, 21 Wall. 488, 489, 22 L. Ed. 650; Stein *v.* Bowman, 13 Pet. 209, 219, 10 L. Ed. 129; Bridges *v.* Armour, 5 How. 91, 94, 12 L. Ed. 64; De Wolf *v.* Johnson, 10 Wheat. 367, 384, 6 L. Ed. 343; Scott *v.* Lloyd, 12 Pet. 145, 9 L. Ed. 1033; Benson *v.* United States, 146 U. S. 325, 335, 36 L. Ed. 991; United States *v.* Clark, 96 U. S. 37, 41, 24 L. Ed. 696; Dick *v.* Balch, 8 Pet. 30, 35, 8 L. Ed. 856; Snyder *v.* Fiedler, 139 U. S. 478, 480, 35 L. Ed. 218; Smyth *v.* Strader, 4 How. 404, 417, 11 L. Ed. 1031.

A certificated bankrupt or insolvent, a party to the record, was incompetent. De Wolf *v.* Johnson, 10 Wheat. 367, 383, 6 L. Ed. 343. See, generally, the title *BANKRUPTCY*, vol. 2, p. 792.

Affidavit of defendant in prosecution for libel offered in mitigation of crime.—See the title *CRIMINAL LAW*, vol. 5, p. 129.

Judgment merely on oath of the party interested could not be sustained.—It was not merely upon plaintiff's oath, that an original entry in his books were received

as evidence; and the affidavit of the defendant, that the debt was proved by the plaintiff's oath alone, though not conclusive, was sufficient to throw the onus probandi upon plaintiff to show other evidence was produced. Vansciver *v.* Bolton, 2 Dall. 114, 1 L. Ed. 312. See Sharpe *v.* Thatcher, 2 Dall. 77, 1 L. Ed. 296. See, generally, the title *DOCUMENTARY EVIDENCE*, vol. 5, p. 431.

Mandamus to restore trustee's corporate or visitatorial power, establishment of own or corporate rights.—Dartmouth College *v.* Woodward, 4 Wheat. 518, 705, 4 L. Ed. 629.

Suit for damages in the obstruction in the exercise of a college trustee's official powers.—Dartmouth College *v.* Woodward, 4 Wheat. 518, 705, 4 L. Ed. 629.

Admissibility of record of another suit in which plaintiff was a witness.—See Griffin *v.* Reynolds, 17 How. 609, 15 L. Ed. 229.

The reason of the rule was the fear of perjury. Benson *v.* United States, 146 U. S. 325, 333, 36 L. Ed. 991.

15. Rule applicable to both criminal and civil cases.—Benson *v.* United States, 146 U. S. 325, 333, 36 L. Ed. 991.

16. Suits in equity.—The complainant could examine the defendant as a witness, upon interrogatories, and that one defendant might examine another, but they

Exceptions to General Rule.—There were certain exceptions to the general rule which sprang from the supposed necessities of the case, but they were carried no further than such necessities demanded.¹⁷

Improper Joinder of Defendants.—Where a defendant who was a material witness for other defendants was improperly joined in a suit, for the purpose of excluding his testimony, the jury were directed to find a separate verdict in his favor, so that he could be admitted as a witness for them.¹⁸

3. PERSONS NOT PARTIES BUT INTERESTED—a. *In General.*—The rules of the common law carefully excluded from the witness stand not only parties to the record, but also all who were interested in the result;¹⁹ and the rule extended to both civil and criminal cases.²⁰

Exceptions to Rule.—There were, however, many exceptions to the rule, which sprang from the supposed necessities of the case, but they were carried no further than such necessities demanded.²¹

could not examine the complainant without his consent, and the right to examine a defendant was attended with serious restrictions and embarrassment. *Texas v. Chiles*, 21 Wall. 488, 489, 22 L. Ed. 650. See, generally, the title EQUITY, vol. 5, p. 803.

17. Exceptions arose from necessity.—*Benson v. United States*, 146 U. S. 325, 335, 36 L. Ed. 991. See, also, *United States v. Clark*, 96 L. Ed. 37, 41, 24 L. Ed. 696.

Collateral questions.—The rule did not apply to questions which did not affect the matter in controversy, but were matters auxiliary to the trial, and facilitated it. See the title AFFIDAVITS, vol. 1, p. 202, where illustrations are shown.

Proof of death of subscribing witness.—The plaintiff was a good witness to prove the death of the subscribing witness, in order to let in evidence of handwriting. *Douglass v. Sanderson*, 2 Dall. 116, 118, 1 L. Ed. 312. See, generally, the title HANDWRITING, vol. 6, p. 674.

A party to a suit was a competent witness to prove the contents of a trunk or package, which, by other testimony, was shown to have been lost or destroyed under circumstances that rendered some one liable for the loss. *United States v. Clark*, 96 U. S. 37, 41, 24 L. Ed. 696.

A petitioner in the court of claims is a competent witness to prove the contents of a package of government money taken from his official safe by robbers, notwithstanding § 1079 of the Revised Statutes, which was intended to do no more than to restore in the court of claims the common-law rule excluding parties as witnesses, abolished by act of July 2, 1864 (13 Stat. 351). *United States v. Clark*, 96 U. S. 37, 24 L. Ed. 696. See post, "Witnesses in Court of Claims," II, Q.

18. Improper joinder of defendants in action of trespass.—*Castle v. Bullard*, 23 How. 172, 184, 16 L. Ed. 424.

This course, however, could be allowed only where there was no evidence what-

ever against the defendant, for the reason that then only did it appear that he was improperly joined in the suit, through the artifice and fraud of the plaintiff. *Castle v. Bullard*, 23 How. 172, 184, 16 L. Ed. 424.

19. Persons interested but not parties.—*Benson v. United States*, 146 U. S. 325, 335, 36 L. Ed. 991; *United States v. Murphy*, 16 Pet. 203, 210, 10 L. Ed. 937; *United States v. Clark*, 96 U. S. 37, 41, 24 L. Ed. 696; *Reagan v. United States*, 157 U. S. 301, 306, 39 L. Ed. 709; *Mifflin v. Bingham*, 1 Dall. 272, 275, 1 L. Ed. 133.

Persons interested in the issue to be tried were those who, although not parties to the record, held such relations to the issue that they would lose or gain by the direct legal operation and effect of the judgment; a witness may be interested in the issue without being a party thereto. *Potter v. National Bank*, 102 U. S. 163, 164, 26 L. Ed. 111.

Proof of handwriting by interested witness.—As to where one or two subscribing witnesses to a deed became interested, the deed could not be proved by proof of his handwriting, if the other witness resided within the county, see the title DOCUMENTARY EVIDENCE, vol. 5, p. 465.

Fear of perjury reason for the rule.—*Benson v. United States*, 146 U. S. 325, 335, 36 L. Ed. 991. See *Reagan v. United States*, 157 U. S. 301, 306, 39 L. Ed. 709.

20. Rule applied both to civil and criminal cases.—*Benson v. United States*, 146 U. S. 325, 335, 36 L. Ed. 991; *United States v. Murphy*, 16 Pet. 203, 210, 10 L. Ed. 937.

21. Many exceptions to general rule.—*United States v. Murphy*, 16 Pet. 203, 210, 10 L. Ed. 937; *Benson v. United States*, 146 U. S. 325, 335, 36 L. Ed. 991. See post, "Application of Rule," II, A, 3, c.

Where statute would be nugatory.—In cases of necessity, where a statute can receive no execution, unless the party interested be a witness, there he must be

Presumption as to Continuance of Interest.—A witness once interested was presumed to remain so, unless the contrary was proved by a release, or other satisfactory evidence.²²

b. *Nature of Disqualifying Interest.*—The witness must have been interested in that suit in which he was examined to affect his competency;²³ and the interest required was a certain, not a contingent one.²⁴ A witness was not disqualified who stood in point of interest, indifferent between the litigating parties,²⁵ or testified against their interest.²⁶

c. *Application of Rule.*—**Agent's Authority and Actions.**—Agents were competent witnesses to prove their authority, and their acts in the name of their principals.²⁷

allowed to testify, for the statute must not be rendered ineffectual by the impossibility of proof. *United States v. Murphy*, 16 Pet. 203, 10 L. Ed. 937.

The owner of stolen goods was admitted to prove the identity of his property and the effect of the theft, if not all other facts; and in robbery cases, the person robbed was a competent witness, although he would be entitled to a restitution of his goods upon conviction of the offender. *United States v. Murphy*, 16 Pet. 203, 210, 10 L. Ed. 937. See, generally, the titles LARCENY, vol. 7, p. 844; ROBBERY, vol. 10, p. 1019.

The owner of property was a competent witness to prove ownership of property stolen on board an American vessel, on the high seas, although it was provided that one moiety of the fine was to be paid to the owner and the other to the informer. *United States v. Murphy*, 16 Pet. 203, 10 L. Ed. 937; *Benson v. United States*, 146 U. S. 325, 335, 36 L. Ed. 991.

Officers of customs seizing goods are competent witnesses. *Taylor v. United States*, 3 How. 197, 206, 11 L. Ed. 559. See, also, *United States v. Murphy*, 16 Pet. 203, 10 L. Ed. 937. See, generally, the title REVENUE LAWS, vol. 10, p. 838.

22. **Presumption as to continuance of interest.**—*Mifflin v. Bingham*, 1 Dall. 272, 275, 1 L. Ed. 133.

23. **Interest disqualification confined to particular suit.**—*Owings v. Speed*, 5 Wheat. 420, 423, 5 L. Ed. 124.

24. **A certain interest required.**—*Evans v. Eaton*, 7 Wheat. 356, 426, 5 L. Ed. 472.

Interest in event of suit, not merely in question involved.—*Evans v. Eaton*, 7 Wheat. 356, 425, 5 L. Ed. 472.

Liability of witness to like action, or his standing in the same predicament with party sued, if the verdict could not be given in evidence for or against him, was an interest in the question, and did not exclude him. *Evans v. Eaton*, 7 Wheat. 356, 424, 5 L. Ed. 472. See, also, *Evans v. Hettich*, 7 Wheat. 453, 469, 5 L. Ed. 496.

Witness in a patent cause sued in another action for infringement of the same

patent.—*Evans v. Hettich*, 7 Wheat. 453, 5 L. Ed. 496. See, generally, the title PATENTS, vol. 9, p. 136.

Refusal to pay witness on like liability until determination of case.—*Wallace v. Child*, 1 Dall. 7, 1 L. Ed. 13.

Witness appearing uninterested in event of suit, certainly not in particular fact to which he deposed.—*Smith v. Carrington*, 4 Cranch 62, 69, 2 L. Ed. 550.

The mortgagee of property insured was a competent witness, in an action by the insured to recover a loss, alleged to have been sustained by the destruction of the property insured. See the title INSURANCE, vol. 7, p. 214.

25. **Indifferent between parties.**—*Le Roy, etc., Co. v. Johnson*, 2 Pet. 186, 195, 7 L. Ed. 391.

The assignee of a pre-emption warrant was competent to prove assignment was made in trust for assignor, where he could derive no benefit and never was entitled to the land in dispute. *Wilson v. Speed*, 3 Cranch 283, 291, 2 L. Ed. 441. See, generally, the title PUBLIC LANDS, vol. 10, p. 1.

Property involved in suit in any event would be applied to discharge witnesses' debts.—*Grove v. Brien*, 8 How. 429, 440, 12 L. Ed. 1142.

26. **Interest against party calling him as witness.**—*Le Roy, etc., Co. v. Johnson*, 2 Pet. 186, 195, 7 L. Ed. 391. See the title PARTNERSHIP, vol. 9, p. 126.

Auctioneer in action by vendee to set aside auction sale, on the ground of fictitious bidding by auctioneer.—See *Veazie v. Williams*, 8 How. 134, 159, 12 L. Ed. 1018. See the title AUCTIONS AND AUCTIONEERS, vol. 2, p. 743.

27. **Competency of agent to prove his own authority.**—See the title PRINCIPAL AND AGENT, vol. 9, p. 660.

Agents competent to prove what they had done in name of their principals.—*Cookendorfer v. Preston*, 4 How. 317, 325, 11 L. Ed. 992.

A notary public was competent to prove protest of paper deposited in bank for collection, although he had given bank a bond for faithful performance of duty. See the title BILLS, NOTES AND CHECKS, vol. 3, p. 333.

Competency of broker to prove au-

Liability for Costs.—The liability of a witness for costs rendered him incompetent.²⁸

Expectation of Benefit from Result.—The competency²⁹ or incompetency³⁰ of witnesses standing in certain relations to the litigating parties depended upon whether or not they expected some benefit from the result of the trial.

Prosecutors and Informers.—The competency of informers and prosecutors, it would seem, depended upon whether or not they expected some direct benefit from the defendant's conviction.³¹

thority, and the contract made on behalf of his principal.—See the title **BROKERS**, vol. 3, p. 540.

28. Liability for costs.—*Smith v. Indiana*, 191 U. S. 138, 149, 48 L. Ed. 125.

Principal obligor in bond not a competent witness for surety, in an action upon the bond.—*Riddle v. Moss*, 7 Cranch 206, 3 L. Ed. 317; *United States v. Leffler*, 11 Pet. 86, 95, 9 L. Ed. 642.

Contract to save another harmless on resisting claim tainted by usury.—*Scott v. Lloyd*, 9 Pet. 418, 9 L. Ed. 178.

Discharged bankrupt.—*Bridges v. Armour*, 5 How. 91, 95, 12 L. Ed. 64.

An informer liable for costs was incompetent, notwithstanding the execution of a release, and the court could not exempt him in absence of statute. *Rapp v. Le Blanc*, 1 Dall. 63, 1 L. Ed. 38. See, generally, the title **INFORMERS**, vol. 6, p. 1020.

29. Indorser to bill competent unless interested, the relation affected credibility rather than competency.—*United States Bank v. Dunn*, 6 Pet. 51, 57, 8 L. Ed. 316. See, however, *Wilson v. Lenox*, 1 Cranch 194, 201, 2 L. Ed. 79. See, generally, the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

Creditor of petitioner competent to prove fraud on application for discharge.—See the title **INSOLVENCY**, vol. 7, p. 12.

Alleged maker or indorser of a promissory note competent to show forgery.—See the title **FORGERY AND COUNTERFEITING**, vol. 6, p. 383.

Payee and notary public were competent witnesses to prove a contract between two indorsers that they would divide the loss between them. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 346.

Attorney holding notes of clients for collection as mere trustee, a competent witness.—*Patton v. Taylor*, 7 How. 132, 12 L. Ed. 637.

A residuary legatee, whose interest was so remote as to raise no presumption of bias, was admitted as a witness and his credibility was left to the jury. *Galbraith v. Scott*, 2 Dall. 95, 1 L. Ed. 304.

An attorney whose judgment fee depended upon his success, was nevertheless admitted as a witness for his client. *Holmes v. Comegys*, 1 Dall. 439, 1 L. Ed. 213.

30. Witness a judgment creditor of one of the parties and expecting a benefit from result was incompetent.—*Innis v. Miller*, 2 Dall. 50, 1 L. Ed. 284.

Discharge bankrupt's interest in increasing funds in hands of his assignee.—*Bridges v. Armour*, 5 How. 91, 95, 12 L. Ed. 64. See, generally, the title **BANKRUPTCY**, vol. 2, p. 792.

An executor of a stockholder in the bank entitled to a share in the residuum of his testator's estate was incompetent as a witness in an action by bank on a note. *Bank v. Wycoff*, 4 Dall. 151, 1 L. Ed. 778. See, generally, the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 257.

31. Prosecutors and informers.—There was a great difference between an information or action *qui tam*, in which a part of the penalty or forfeiture belonged to the informer or prosecutor, and in an indictment, the conviction upon which might entitle the informer or prosecutor to a part of the penalty or forfeiture. In the former case, the informer or prosecutor might not be a good witness, at least, not unless under special circumstances; while in the latter case, he might be. *United States v. Murphy*, 16 Pet. 203, 209, 10 L. Ed. 937. See, generally, the title **INFORMERS**, vol. 6, p. 1020.

A witness expecting something from the informer in case goods were condemned was incompetent.—*McVeagh v. Goods*, 1 Dall. 62, 1 L. Ed. 37.

Informer entitled to a moiety of seized British goods held incompetent.—*Rapp v. Le Blanc*, 1 Dall. 63, 1 L. Ed. 38.

The president of an insurance company was a competent witness in a prosecution for casting away and destroying a vessel to the prejudice of the company. *United States v. Jones*, 4 Dall. 412, 415, 1 L. Ed. 888. See, generally, the title **MARINE INSURANCE**, vol. 8, p. 149.

Reward for conviction of offender.—A person who was to receive a reward for or upon the conviction of the offender was recognized as a competent witness, whether the reward was offered by the public or by private persons. *United States v. Murphy*, 16 Pet. 203, 210, 10 L. Ed. 937.

Courts will infer competency from statutes giving the party or the informer a part of the penalty of forfeiture, but con-

Prize Courts.—In courts of prize, no person was incompetent, merely on ground of interest.³²

4. **RELEASE AND EXTINGUISHMENT OF INTEREST**—a. *Parties to Record.*—While a party to the record was not rendered a competent witness in the cause, by a release of his interest in the suit,³³ or becoming divested of all interest in the result of the trial,³⁴ he became a competent witness on being completely severed from the record, and ceasing to be a party.³⁵

b. *Persons Not Parties but Interested.*—Where the witness, not a party to the record, had become divested of all interest in the cause and was not liable for costs, he was a competent witness;³⁶ and he could lawfully transfer all his interest in property, about to become the subject of suit, for the purpose of making himself a competent witness.³⁷

B. Children.—There is no precise age which determines the question of the competency of an infant as a witness; this depends on the capacity and intel-

tainings no direct affirmation that he shall, nevertheless, be a competent witness. *United States v. Murphy*, 16 Pet. 203, 10 L. Ed. 937. See ante, "Persons Not Parties but Interested," II, A, 3.

32. **Captors of prizes.**—Such testimony was admitted subject to all exceptions as to its credibility. *The Anne*, 3 Wheat. 435, 445, 4 L. Ed. 428. See, generally, the title PRIZE, vol. 9, p. 744.

33. **Party not competent by release of interest.**—*Bridges v. Armour*, 5 How. 91, 94, 12 L. Ed. 64; *Stein v. Bowman*, 13 Pet. 209, 219, 10 L. Ed. 129; *Scott v. Lloyd*, 12 Pet. 145, 9 L. Ed. 1033.

Reason for rule.—Courts declared that a contrary rule would have held out to parties a strong temptation to perjury. *Scott v. Lloyd*, 12 Pet. 145, 9 L. Ed. 1033; *Stein v. Bowman*, 13 Pet. 209, 219, 10 L. Ed. 129; *Bridges v. Armour*, 5 How. 91, 94, 12 L. Ed. 64.

34. **Discharged bankrupt.**—*Bridges v. Armour*, 5 How. 91, 12 L. Ed. 64.

As to answer and disposition of one defendant not being evidence against his codefendant, although he had been discharged from his debts, see the title EQUITY, vol. 5, p. 891.

Giving security for costs.—The execution of a release for costs or payment of money to cover them would not have restored the competency of a party to the record. *Stein v. Bowman*, 13 Pet. 209, 219, 10 L. Ed. 129; *Bridges v. Armour*, 5 How. 91, 94, 12 L. Ed. 64.

In an early case, however, the plaintiff having become a certified bankrupt and his assignee carried on the suit and entered into security for costs, he was admitted to prove parol acceptance of a bill of exchange, on releasing his interest at bar. *McEwen v. Gibbs*, 4 Dall. 137, 1 L. Ed. 774.

35. **Confession of judgment by the principal in a joint action on joint and several bond, followed by satisfaction of execution.**—*United States v. Leffler*, 11 Pet. 86, 101, 9 L. Ed. 642.

Abatement of suit on return "no inhabitant."—See *Le Roy, etc., Co. v. Johnson*, 2 Pet. 186, 7 L. Ed. 391.

An action brought by administratrix but prosecuted by the administrator de bonis non, on her resignation, ceased to be one in which she was connected as a "party." *Snyder v. Fiedler*, 139 U. S. 478, 480, 35 L. Ed. 218. See, generally, the title EXECUTORS AND ADMINISTRATORS, vol. 6, p. 119.

36. **Proof by grantor of property charged with an annuity; of usury in the original agreement.**—*Scott v. Lloyd*, 12 Pet. 145, 150, 9 L. Ed. 1033. See, generally, the title USURY, ante, p. 838.

Principal obligor was competent where released by sureties of all liability including costs.—*United States v. Leffler*, 11 Pet. 86, 95, 9 L. Ed. 642. See, generally, the title PRINCIPAL AND SURETY, vol. 9, p. 713.

Captain of a privateer in suit between owners and a third party.—*Miffin v. Bingham*, 1 Dall. 272, 276, 1 L. Ed. 133.

In a proceeding for ascertaining and settling a land claim, the grantor of a purported land grant to claimants, without general warranty, was a competent witness in their behalf. *Luco v. United States*, 23 How. 515, 536, 16 L. Ed. 545. See, generally, the title PUBLIC LANDS, vol. 10, p. 1.

Settlement of accounts extinguishing interest.—*Taber v. Perrott*, 9 Cranch 39, 3 L. Ed. 649.

Partner a competent witness where released by the other.—See the title PARTNERSHIP, vol. 9, p. 126.

An attorney who was another's security for costs was not incompetent where the party had obtained judgment. *Patton v. Taylor*, 7 How. 132, 12 L. Ed. 637.

An indorser of three bills was not rendered competent by striking his name from the first and third bills of the set, because of his liability to a suit on the second bill, alleged to have been lost. *Steinmetz v. Currie*, 1 Dall. 270, 272, 1 L. Ed. 132. See, generally, the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

37. **Transfer of interest to become a witness.**—*Tobey v. Leonards*, 2 Wall. 423, 17 L. Ed. 842.

ligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.³⁸ The determination of this question rests largely in the discretion of the trial court.³⁹

C. Husband and Wife—1. *IN GENERAL*.—It is a rule of the common law that a wife cannot be received as a witness for or against her husband,⁴⁰ except in suits between them, or in criminal cases where he is prosecuted for wrong done to her.⁴¹

2. *EFFECT OF STATUTES*.—The general rule of the common law as to competency of husband and wife as witnesses for and against each other has been modified in several states, in many particulars, by direct legislation upon the subject,⁴² but statutes providing that there shall be no exclusion of wit-

38. Competency of infants.—*Wheeler v. United States*, 159 U. S. 523, 524, 40 L. Ed. 244. See, generally, the title *INFANTS*, vol. 6, p. 1012.

Where a boy that is nearly five and a half years of age, testified to a homicide that occurred when he was almost five years old but was intelligent and understood the difference between truth and falsehood, and the consequence of telling the latter, and also what was required by the oath which he had taken, it was held that he was a competent witness. *Wheeler v. United States*, 159 U. S. 523, 525, 40 L. Ed. 244.

Infant of tender years.—"No one would think of calling an infant two or three years old." *Wheeler v. United States*, 159 U. S. 523, 524, 40 L. Ed. 244.

Introduction of children as witnesses in family quarrels rebuked by the court.—*Tobey v. Leonards*, 2 Wall. 423, 17 L. Ed. 842. See, generally, the title *PARENT AND CHILD*, vol. 9, p. 10.

39. "The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous." *Wheeler v. United States*, 159 U. S. 523, 524, 40 L. Ed. 244.

40. Husband and wife as witnesses.—*Lucas v. Brooks*, 18 Wall. 436, 452, 21 L. Ed. 779; *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129; *Bassett v. United States*, 137 U. S. 496, 505, 34 L. Ed. 762; *Stickney v. Stickney*, 131 U. S. 227, 236, 33 L. Ed. 136; *Hopkins v. Grimshaw*, 165 U. S. 342, 349, 41 L. Ed. 739. See, generally, the title *HUSBAND AND WIFE*, vol. 6, p. 716.

They were not permitted even by consent, to give testimony for or against each other. *Hopkins v. Grimshaw*, 165 U. S. 342, 349, 41 L. Ed. 739.

Comment by district attorney on absence of wife as witness.—As to the wife of a defendant in a criminal case being

incompetent to testify either for or against him, and the effect of the district attorney's comment on her absence as a witness, see the title *ARGUMENT OF COUNSEL*, vol. 2, p. 490.

Competency of second wife in prosecution for bigamy.—As to the rule that in prosecutions for bigamy, the first wife is not a competent witness for or against her husband, but that the second wife may be, after proof of the first marriage, see the title *BIGAMY AND POLYGAMY*, vol. 3, p. 229.

In an indictment for forcible entry the court, in an early case, ruled that the wife of the prosecutor might be examined as a witness to prove the force, but only the force; for, otherwise, the statutes might be eluded in some cases. *Respublica v. Shryber*, 1 Dall. 68, 1 L. Ed. 40. See, generally, the title *FORCIBLE ENTRY AND DETAINER*, vol. 6, p. 303.

41. Suits between husband and wife and in crimes against wife by husband.—*Lucas v. Brooks*, 18 Wall. 436, 452, 21 L. Ed. 779.

"The wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse." *Bassett v. United States*, 137 U. S. 496, 505, 34 L. Ed. 762; *Stein v. Bowman*, 13 Pet. 209, 222, 10 L. Ed. 129.

Polygamy is not such a crime against the wife as will permit her to testify against her husband. *Bassett v. United States*, 137 U. S. 496, 506, 34 L. Ed. 762. See *In re Mayfield*, 141 U. S. 107, 113, 35 L. Ed. 635. See, also, the title *BIGAMY AND POLYGAMY*, vol. 3, p. 229.

42. Statutory changes as to competency of husband and wife as witnesses.—*Stickney v. Stickney*, 131 U. S. 227, 236, 33 L. Ed. 136.

Competency in Illinois where wife, if unmarried, would be a party, and where the suit concerns her separate estate.—Under the statute of Illinois of 1867, providing that neither husband nor wife were competent to testify for or against each other except in cases where the wife would, if unmarried, be plaintiff or defendant, and in cases of litigation concerning the separate property of the wife,

nesses in civil actions because they are parties to or interested in the issue tried, do not affect the exclusion of testimony of a husband or wife upon grounds of public policy.⁴³

3. **PRIVILEGED COMMUNICATIONS.**—At common law, upon grounds of public policy, husband and wife were not permitted, even by consent, to testify, even after the ending of the marriage relation by death or divorce, to private communications which took place between them while it lasted.⁴⁴ Statutes removing disqualifications of witnesses because they are parties to or persons interested in the issue tried, do not permit either the husband or wife to testify as to private communication between them where they are neither parties nor interested persons.⁴⁵ Conversations made in the presence of others are not in

the husband is not an incompetent witness in behalf of his wife, in a suit on a cross bill, where the wife would have been a defendant in the original suit, had she been unmarried, and a plaintiff in the cross suit; and the suit also concerned her separate property. *Kingsbury v. Buckner*, 134 U. S. 650, 684, 33 L. Ed. 1047.

43. **Statutes removing disqualification of parties and persons interested.**—The act of July 2, 1864, embodied in § 858 of the Revised Statutes, has merely removed all disqualifications of witnesses for interest, and does not affect the exclusion of testimony of a husband or wife upon grounds of public policy. *Hopkins v. Grimshaw*, 165 U. S. 342, 349, 41 L. Ed. 739; *Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779; *Bassett v. United States*, 137 U. S. 496, 505, 34 L. Ed. 762. See post, "Statutory Changes in Common-Law Rules," III.

This act does not give capacity to a wife to testify in favor of her husband. *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779.

State statutes.—"Though statutes similar to the act of congress (Act of July 2, 1864) exist in many of the states, they have not been held to remove the objection to a wife's competency to testify for or against her husband. And in West Virginia it has been expressly enacted that a husband shall not be examined for or against his wife, nor a wife for or against her husband, except in an action or suit between husband and wife." *Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779.

District of Columbia.—Section 876 of the Revised Statutes, relating to the District of Columbia, rendering parties to suits and those interested in the same competent witnesses, does not render a husband competent or compellable to give evidence for or against his wife, or a wife competent or compellable to give evidence for or against her husband, in any criminal proceeding or in any proceeding instituted in consequence of adultery. *Stickney v. Stickney*, 131 U. S. 227, 236, 33 L. Ed. 136.

Effect of statutes on rule as to privileged communications.—See post, "Privileged Communications," II, C, 3.

44. **Privileged communication.**—*Hopkins v. Grimshaw*, 165 U. S. 342, 349, 41 L. Ed. 739; *Stein v. Bowman*, 13 Pet. 209, 222, 10 L. Ed. 129.

Effect of death of husband.—The rule protecting the domestic relations from exposure, rests upon considerations connected with the peace of families. This principle does not afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence, in violation of the rule. The death of the husband would seem rather to increase than lessen the force of the rule. *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129.

The witness was called to discredit her husband, who was dead, to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions—confessions which, if ever made, were made under all the confidence that subsists between husband and wife. The wife, under such circumstances, cannot either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence, which render infamous the character of her husband. *Stein v. Bowman*, 13 Pet. 209, 223, 10 L. Ed. 129.

45. **The provision of § 877 of the revised statutes of the District of Columbia**, which render parties of record and parties interested competent witnesses in suits in the District of Columbia, but provides that neither husband nor wife shall be compellable to disclose any communication made to the other during the marriage, does not make a husband or wife, not a party to or interested in the suit, competent to testify, before or after the death of the other, to private communications between the latter and the witness. *Hopkins v. Grimshaw*, 165 U. S. 342, 350, 41 L. Ed. 739.

The witness, who was a widow, was neither a party to nor interested in this suit, having conveyed all her interest in the subject thereof to the defendant before the suit was brought. She was therefore incompetent to testify to private conversations between her and her husband in his lifetime; and a conversation between them in their own home, in the

the privilege in some states;⁴⁶ voluntary statements are also admissible under some statutes.⁴⁷

D. Idiots and Lunatics.—The general rule is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue,⁴⁸ and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity.⁴⁹

E. Infamy.—In General.—The infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment.⁵⁰ Statutes have been enacted rendering convicts competent witnesses both in civil actions and criminal proceedings.⁵¹

presence of no one but their young daughter, who does not appear to have taken any part in it, must be deemed to be a private conversation, within the rule. But the daughter herself may have been a competent witness to such a conversation. *Hopkins v. Grimshaw*, 165 U. S. 342, 351, 41 L. Ed. 739.

Where a suit was brought by a widow in the District of Columbia against the heirs of her husband's estate on a claim that certain property was acquired by the investment of her separate estate, she was at liberty, though not compellable, to state the directions given by her to her husband respecting the investment of her money. *Stickney v. Stickney*, 131 U. S. 227, 237, 33 L. Ed. 136.

46. Conversations in presence of others.—"In some states the statutes include only private conversations in the privilege, and not such as take place in the presence of others. *Fay v. Guyon*, 131 Mass. 31." *Stickney v. Stickney*, 131 U. S. 227, 236, 33 L. Ed. 136.

47. A voluntary statement is receivable under a New York statute providing that neither husband nor wife shall be compellable to disclose any communication made to him or her during the marriage. *Stickney v. Stickney*, 131 U. S. 227, 236, 33 L. Ed. 136.

48. Competency of lunatics.—District of Columbia *v. Armes*, 107 U. S. 519, 521, 27 L. Ed. 618. See, generally, the title *INSANITY*, vol. 6, p. 1072.

Because a person is subject to fits of derangement, is no objection either to his competency or credibility, if he is sane at the time of giving his testimony. *Evans v. Hettich*, 7 Wheat. 453, 470, 5 L. Ed. 496.

Persons dangerously insane.—A person may be insane to the extent of being dangerous if set at liberty, yet may have sufficient mental capacity to be a witness. *Keely v. Moore*, 196 U. S. 38, 46, 49 L. Ed. 376.

49. Competency a question for the court.—It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that

ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. *District of Columbia v. Armes*, 107 U. S. 519, 521, 27 L. Ed. 618.

50. Ex parte Wilson, 114 U. S. 417, 422, 29 L. Ed. 89. See, generally, the title *CONSTITUTIONAL LAW*, vol. 4, p. 494. See, also, *INFAMY*, vol. 6, p. 1011.

Crimes covered.—The disqualification to testify appears to have been limited to those adjudged guilty of treason, felony, forgery, and crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery, conspiring to accuse one of crime, or to procure the absence of a witness; and not to have been extended to cases of private cheats, such as the obtaining of goods by false pretenses, or the uttering of counterfeit coin or forged securities. *Ex parte Wilson*, 114 U. S. 417, 423, 29 L. Ed. 89.

Reasons for disqualification.—Whether a convict shall be permitted to testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others. *Ex parte Wilson*, 114 U. S. 417, 423, 29 L. Ed. 89.

By the first crimes act of the United States, persons convicted of perjury or subornation of perjury, rendered incapable of testifying in any court of the United States. Act of April 30, 1790, ch. 9; 1 Stat. 112-117. *Ex parte Wilson*, 114 U. S. 417, 427, 29 L. Ed. 89.

Infamous crime.—As to what constitutes an infamous crime, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 494.

51. Act of Utah Territory.—The act of March 9, 1882, repealing that provision of the civil practice act of Utah Territory, which provided that persons convicted of felonies were incompetent as witnesses, made them competent witnesses in both civil actions and criminal proceedings. *Hopt v. Utah*, 110 U. S. 574, 588, 28 L. Ed. 262.

Restoration of Competency by Pardon.—A full and unconditional pardon of a convict restores his competency as a witness,⁵² although granted after he has served out his term of imprisonment.⁵³

Extraterritorial Effect of Statutes.—As to the extraterritorial effect of a statute disqualifying convicts as witnesses, see the title **CONFLICT OF LAWS**, vol. 3, p. 1075.

F. Jurors.—The secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding.⁵⁴

G. Arbitrators, Appraisers and Commissioners.—**Arbitrators and Commissioners.**—It would seem that arbitrators are competent witnesses as to the facts and circumstances in which they made an award; the same is true of a jury appointed to assess damages and apportion benefits in widening of a street, and of commissioners appointed to condemn land for railroad purposes.⁵⁵

Merchant Appraisers.—A merchant appraiser may be called to show that he did not observe requirements of statute in making appraisement of goods.⁵⁶

52. Conviction of larceny and sentence to penitentiary.—The competency as a witness of a person who has been convicted of larceny and sentenced to the penitentiary, is completely restored by a full and unconditional pardon. *Boyd v. United States*, 142 U. S. 450, 454, 35 L. Ed. 1076, citing *United States v. Wilson*, 7 Pet. 150, 8 L. Ed. 640; *Ex parte Wells*, 18 How. 307, 315, 15 L. Ed. 421; *Ex parte Garland*, 4 Wall. 333, 380, 18 L. Ed. 366. See the title **PARDON**, vol. 9, p. 3.

As to pardon before conviction preventing any of the consequent penalties and disabilities, and after conviction removing them, see the title **PARDON**, vol. 9, p. 7.

Construction of pardon.—As to recital in pardon that it was granted on request of district attorney to render a witness competent, not altering the fact that it was "full and unconditional," see the title **PARDON**, vol. 9, p. 3.

53. Pardon after service of sentence.—Where one who was convicted and sentenced in Texas; and then received the full pardon of the governor of that state, although granted after he had served out his term of imprisonment, it was held that this took away all disqualifications as a witness, and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed by the pardon. *Logan v. United States*, 144 U. S. 263, 303, 36 L. Ed. 429, citing *Boyd v. United States*, 142 U. S. 450, 35 L. Ed. 1076.

54. Jurors.—*Packet Co. v. Sickles*, 5 Wall. 580, 593, 18 L. Ed. 550. See *Doss v. Tyack*, 14 How. 297, 14 L. Ed. 428.

Record furnishes only proper proof of verdict.—The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict. *Packet Co.*

v. Sickles, 5 Wall. 580, 593, 18 L. Ed. 550. See, generally, the title **VERDICT**, ante, p. 917.

55. Arbitrators.—In *Oelbermann v. Merritt*, 123 U. S. 356, 367, 31 L. Ed. 164, the court said: "It has been held that an arbitrator can be a witness as to the time when, and the circumstances in which he made an award, with a view to show that, by the terms of the submission, he was not authorized to make the award; *Woodbury v. Northy*, 3 Greenleaf 81; as to the fact that the arbitrators did not examine or act upon a certain matter, *Roop v. Brubaker*, 1 Rawle 304; as to facts which occurred at or during the arbitration, and which tend to show the award to be void for legal cause, *Strong v. Strong*, 9 Cush. 560, 576; and as to whether a certain claim was included in the award, *Hale v. Huse*, 10 Gray 99. See, also, *Spurck v. Crook*, 19 Ill. 415. The same principle has been applied in the case of a tribunal called a jury, appointed to assess damages and apportion benefits in the widening of a street, *Canal Bank v. Mayor*, 9 Wend. 244; and in the case of commissioners appointed to condemn land for railroad purposes, *Marquette Railroad Co. v. Probate Judge*, 53 Mich. 217. In *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, it was held that an arbitrator may be a witness as to what passed before him and as to what matters were presented to him for consideration. (See 2 Greenleaf on Evidence, § 78, and notes.)" See, generally, the title **ARBITRATION AND AWARD**, vol. 2, p. 464.

Reference.—"The practice prevails in the courts, where rules of reference are in use, to examine the arbitrators as witnesses, to ascertain facts material to the validity of the award." *York, etc., R. Co. v. Myers*, 18 How. 246, 252, 15 L. Ed. 380. See, generally, the title **REFERENCE**, vol. 10, p. 600.

56. Merchant appraiser.—See the title **REVENUE LAWS**, vol. 10, p. 915.

H. Slaves.—It was a settled point at common law, that a slave could not be a witness, because of the unbounded influence of his master over him; which was, at least, equal to duress.⁵⁷

I. Color No Disqualification.—Section 858 of the Revised Statutes, originally enacted July 2, 1864, declares that "in the courts of the United States no witness shall be excluded in any action on account of color."⁵⁸

J. Attorneys.—Attorney Testifying for Client.—There is nothing in the policy of the law which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client.⁵⁹

Privileged Communications.—As to the competency of attorney to testify as to relations existing between him and his clients though not as to communications, see the title **PRIVILEGED COMMUNICATIONS**, vol. 9, p. 740.

K. Confidential Agents.—A confidential agent or factor is not precluded from testifying in a cause against his constituent.⁶⁰

Confidential Statements to a Commercial Agency.—See the title **PRIVILEGED COMMUNICATIONS**, vol. 9, p. 742.

L. Physicians and Patients.—See the title **PRIVILEGED COMMUNICATIONS**, vol. 9, p. 742.

M. Detectives.—As to competency of a detective to testify in a prosecution for an offense against the postal laws, see the title **POSTAL LAWS**, vol. 9, p. 583.

N. Informers and Prosecutors.—This subject is treated elsewhere.⁶¹

O. Parties to Negotiable Paper Impeaching Its Validity.—It is well-settled that no one, who is a party to a negotiable instrument, shall be permitted, by his own testimony, to invalidate it.⁶² The rule applies only to a

57. Slave incompetent at common law.—*Respublica v. Bob*, 4 Dall. 145, 1 L. Ed. 776. See, generally, the title **SLAVERY AND INVOLUNTARY SERVITUDE**, vol. 10, p. 1209.

The early acts of the assembly of Pennsylvania did not change the principle. *Respublica v. Bob*, 4 Dall. 145, 1 L. Ed. 776.

58. Color no disqualification.—United States *v. Clark*, 96 U. S. 37, 41, 24 L. Ed. 696; *Goodwin v. Fox*, 129 U. S. 601, 630, 32 L. Ed. 805; *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117; *Benson v. United States*, 146 U. S. 325, 336, 36 L. Ed. 991; *Potter v. National Bank*, 102 U. S. 163, 164, 26 L. Ed. 111; *Connecticut, etc., Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 255, 28 L. Ed. 708. See, also, *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 37 L. Ed. 905; *Li Sing v. United States*, 180 U. S. 486, 494, 45 L. Ed. 634.

Power of congress to modify or repeal law.—"Competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of congress, which congress may at its discretion modify or repeal." *Fong Yue Ting v. United States*, 149 U. S. 698, 729, 37 L. Ed. 905.

59. Competency of attorney for client.—*French v. Hall*, 119 U. S. 152, 154, 30 L. Ed. 375.

"In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the

practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong." *French v. Hall*, 119 U. S. 152, 154, 30 L. Ed. 375.

60. Confidential agents or factors.—*Holmes v. Comegys*, 1 Dall. 439, 1 L. Ed. 213.

61. Informers and prosecutors.—See ante, "Application of the Rule," II, A, 3, c.

62. Right of party to impeach paper.—*United States Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316; *Renner v. Bank*, 9 Wheat. 581, 587, 6 L. Ed. 166; *Smyth v. Strader*, 4 How. 404, 11 L. Ed. 1031; *Bank v. Jones*, 8 Pet. 12, 8 L. Ed. 850; *United States v. Leffler*, 11 Pet. 86, 9 L. Ed. 642; *Davis v. Brown*, 94 U. S. 423, 426, 24 L. Ed. 204; *Stille v. Lynch*, 2 Dall. 194, 1 L. Ed. 345; *Scott v. Lloyd*, 12 Pet. 145, 9 L. Ed. 1033; *Saltmarsh v. Tuthill*, 13 How. 229, 14 L. Ed. 124. See the title **BILLS, NOTES AND CHECKS**, vol. 3, p. 363.

Maker and indorser.—A subsequent indorser is incompetent to prove facts which would tend to discharge the prior indorser from the responsibility of his indorsement, and the maker likewise is incompetent to prove facts which tend to discharge the indorser. *United States Bank v. Dunn*, 6 Pet. 51, 8 L. Ed. 316.

Payee of note.—In an action by the indorsee of a negotiable note against the maker, the payee was an incompetent

case where a man, by putting his name to a negotiable security, has given currency and credit to it, and does not apply to a case between original parties, where the paper has not been put into circulation, and each of the parties is cognizant of all the facts.⁶³ This rule does not extend to instruments not negotiable.⁶⁴

P. Separate Trials.—See the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 66.

Q. Witnesses in Court of Claims.—Section 1079 of the Revised Statutes restored in the court of claims the common-law rule excluding as witnesses, parties to the suit and persons interested; but the United States is entitled to call them as witnesses.⁶⁵

witness. *Stille v. Lynch*, 2 Dall. 194, 1 L. Ed. 345.

Gambling consideration.—One cannot show that a note was given for a gambling consideration or any other circumstances which would destroy its validity. *United States Bank v. Dunn*, 6 Pet. 51, 57, 8 L. Ed. 316.

Usury.—In a suit by the indorsee against the indorser of a bill where the defense was usury, the drawer and drawee were incompetent witnesses, when offered to prove certain facts, which, when taken in conjunction with certain other facts, to be proved by other witnesses, would invalidate the instrument. Being incompetent witnesses to establish the whole defense, they are also incompetent to establish a part. *Saltmarsh v. Tuthill*, 13 How. 229, 14 L. Ed. 124.

Want of consideration.—In an action by the indorser against the maker of a note, the payee is not a competent witness to invalidate it for want of consideration. *Stille v. Lynch*, 2 Dall. 194, 1 L. Ed. 345.

In a prosecution for forgery of a promissory note the alleged maker is a competent witness to prove the forgery, but an indorser would not be unless he has been released from liability as such. *Respublica v. Ross*, 2 Dall. 239, 240, 1 L. Ed. 364.

Partnership paper.—Where a note is drawn by one partner in the name of the firm, the testimony of one partner, offered for the purpose of proving the fraud committed by the drawer of the note, is not admissible. *Smyth v. Strader*, 4 How. 404, 11 L. Ed. 1031.

A member of the firm, by whom the endorsement was made, was incompetent to testify to facts tending to invalidate the bill. *Henderson v. Anderson*, 3 How. 73, 80, 11 L. Ed. 499.

Supreme court follows doctrine of Walton versus Shelly.—In the case of *Walton v. Shelly*, 1 T. R. 296, the court of King's Bench decided, that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal. Subsequently, by the

same court, this rule was so far relaxed or abrogated as to permit the impeachment of such an instrument by persons standing in the same relation to it. See *Jordaine v. Lashbrook*, 7 T. R. 601. Among the different states of our Union the decisions of the court of King's Bench on either side of this question have been adopted. In the supreme court the rule laid down in the case of *Walton v. Shelly* has been admitted and adhered to with a uniformity which establishes it as the law of the court. *Henderson v. Anderson*, 3 How. 73, 80, 11 L. Ed. 499; *Bank v. Jones*, 8 Pet. 12, 16, 8 L. Ed. 850; *United States Bank v. Dunn*, 6 Pet. 51, 57, 8 L. Ed. 316; *Smyth v. Strader*, 4 How. 404, 417, 11 L. Ed. 1031; *United States v. Leffler*, 11 Pet. 86, 94, 9 L. Ed. 642; *Sweeny v. Easter*, 1 Wall. 166, 174, 17 L. Ed. 681. See, however, *Davis v. Brown*, 94 U. S. 423, 426, 24 L. Ed. 204.

Parol evidence.—As to admission of parol evidence to contradict or vary a written instrument, see the title PAROL EVIDENCE, vol. 9, p. 12.

63. When rule applies.—*Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204.

Where paper is not put into circulation.—An indorser of a promissory note is a competent witness to prove an agreement in writing made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom the indorsement was made. *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204.

64. Rule inapplicable to nonnegotiable instruments.—See the title PAROL EVIDENCE, vol. 9, p. 32.

65. Parties and persons interested still incompetent in court of claims.—The act of June 25, 1868, embodied in § 1079, Rev. Stat., provides that claimants or the persons from or through whom such claimant derives his alleged right, title or claim, and persons interested in any such title, claim or right are incompetent witnesses; provided (§ 1080) that the United States may call them as witnesses. *United States v. Clark*, 96 U. S. 37, 42, 24 L. Ed. 696; *Bradley v. United States*, 104 U. S. 442, 443, 26 L. Ed. 894; *United States v. Anderson*, 9 Wall. 56, 67, 19 L. Ed. 615.

R. Determination of Competency—1. **NECESSITY FOR OBJECTIONS**.—See the title *APPEAL AND ERROR*, vol. 2, p. 118.

2. **TIME FOR OBJECTIONS**.—**In General**.—At common law, an objection to the competency of a witness on the ground of interest was required to be made before his examination in chief; or, if his interest was then not known, as soon as it was discovered. The rule was the same in criminal as in civil cases.⁶⁶

Depositions and Interrogatories.—As to necessity of making objection to the competency of a witness at the time of the taking of his deposition, see the title *DEPOSITIONS*, vol. 5, p. 332.

3. **MODE OF DETERMINATION**.—There are two ways of proving a witness to be interested in a cause—first, by examining him on his *voir dire*; or, secondly, by showing his interest from other evidence, either parol or written.⁶⁷ Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue, on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.⁶⁸

4. **COMPETENCY DETERMINED BY COURT**.—The question as to the competency of a witness is for the determination of the court.⁶⁹

See, generally, the titles *COURTS*, vol. 4, p. 1021; *UNITED STATES*, ante, p. 747.

Use by United States of witnesses adverse in interest to claimant.—This section does not prevent the United States from using as a witness to defeat the claim one whose interest is adverse to the claimant, and that, too, when a judgment in favor of the United States may have the effect of establishing the right of the witness to the same claim. *Bradley v. United States*, 104 U. S. 442, 443, 26 L. Ed. 824.

The act simply restored common-law rule as to parties and persons interested.—This act was intended to do no more than restore in the court of claims the common-law rule excluding parties and persons interested as witnesses, which had been abolished by act of July 2, 1864; so the petitioner was competent to prove the contents of a package of government money taken from his official safe by robbers. *United States v. Clark*, 96 U. S. 37, 42, 24 L. Ed. 696. See ante, "Parties to Record," II, A, 2.

Abandoned and captured property.—As to vendor of property taken and sold being a competent witness for claimants, when prosecuting their claim under the abandoned and captured property act, see the title *ABANDONED AND CAPTURED PROPERTY*, vol. 1, p. 11.

66. General rule as to time of objections.—*Benson v. United States*, 146 U. S. 325, 332, 36 L. Ed. 991.

Admiralty.—As to requirement that objection to a witness, on ground of incompetency from interest, must be made at the hearing, and comes too late if deferred until the argument, see the titles *ADMIRALTY*, vol. 1, p. 175; *APPEAL AND ERROR*, vol. 2, p. 118.

Interest discovered on cross-examina-

tion.—Although the competency of a witness because of interest did not appear until after cross-examination, it was grounds for the rejection of his evidence altogether. *Bank v. Wycoff*, 4 Dall. 151, 1 L. Ed. 778.

Dilatory motion to strike out.—Where no objection was made as to the competency of a wife to testify against her husband in a prosecution for murder and she was advised that she need not testify, and after she had left the stand and several of the witnesses had been examined the defendant interposed a motion to strike out her testimony on the ground that it was incompetent, it was held that the motion came too late. The defendant, by not objecting to her testimony at the time it was offered, waived the objection. *Benson v. United States*, 146 U. S. 325, 332, 36 L. Ed. 991.

67. Mode of proving witness interested.—*Miffin v. Bingham*, 1 Dall. 272, 275, 1 L. Ed. 133.

"But both these ways cannot be pursued at the same time; for the election of the one conclusively bars any subsequent recourse to the other. The defendant's cross-examination under the rule in this case, is not, however, upon the same footing with an examination upon the *voir dire*; and, therefore, we do not think that he is now precluded from the advantage of any legal exception to the competency of the witness." *Miffin v. Bingham*, 1 Dall. 272, 275, 1 L. Ed. 133.

68. Witnesses prima facie competent.—*Miles v. United States*, 103 U. S. 304, 314, 26 L. Ed. 481.

69. Competency a question for court.—*District of Columbia v. Armes*, 107 U. S. 519, 521, 27 L. Ed. 618.

Determination of qualifications of expert witness is largely in the discretion

III. Statutory Changes in Common-Law Rules.

A. Parties and Persons Interested.—Under modern statutes, parties to and persons interested in the issues tried are no longer excluded as witnesses in either the federal courts,⁷⁰ or those of the respective states and territo-

of court. See the titles *APPEAL AND ERROR*, vol. 1, p. 992; *EXPERT AND OPINION EVIDENCE*, vol. 6, p. 205.

Competency of children.—See ante, "Children," II, B.

Competency of idiots and lunatics.—See ante, "Idiots and Lunatics," II, D.

70. Federal statutes as to competency of witnesses.—Section 858 of the Revised Statutes, originally enacted July 2, 1864, declares that in the courts of the United States no witness shall be excluded "in any civil action because he is a party to or interested in the issue tried," with a proviso excepting to a certain extent suits by or against executors, administrators or guardians. *Benson v. United States*, 146 U. S. 325, 336, 36 L. Ed. 991; *United States v. Clark*, 96 U. S. 37, 42, 24 L. Ed. 696; *Hopkins v. Grimshaw*, 165 U. S. 342, 349, 41 L. Ed. 739; *Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779; *Bassett v. United States*, 137 U. S. 496, 505, 34 L. Ed. 762; *Goodwin v. Fox*, 129 U. S. 601, 630, 32 L. Ed. 805; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 277, 27 L. Ed. 935; *Hobbs v. McLean*, 117 U. S. 567, 579, 29 L. Ed. 940; *Potter v. National Bank*, 102 U. S. 163, 164, 26 L. Ed. 111; *Cornett v. Williams*, 20 Wall. 226, 22 L. Ed. 254; *Texas v. Chiles*, 21 Wall. 488, 22 L. Ed. 650; *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341; *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117; *Connecticut, etc., Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 255, 28 L. Ed. 708; *Bradley v. United States*, 104 U. S. 442, 26 L. Ed. 824; *Railroad Co. v. Pollard*, 22 Wall. 341, 342, 22 L. Ed. 877; *Page v. Burnstine*, 102 U. S. 664, 665, 26 L. Ed. 268. See post, "Transactions or Communications with Deceased or Incapacitated Persons," III, C.

Laws of the state are applicable in all other respects.—"In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty." *Potter v. National Bank*, 102 U. S. 163, 164, 26 L. Ed. 111; *Goodwin v. Fox*, 129 U. S. 601, 630, 32 L. Ed. 805; *Hobbs v. McLean*, 117 U. S. 567, 579, 29 L. Ed. 940; *Connecticut, etc., Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 255, 28 L. Ed. 708. See the title *COURTS*, vol. 4, pp. 1083, 1085.

A witness, although a party to and interested in, the issues tried, cannot be excluded as a witness on that account under § 858 of the Revised Statutes, unless the case is one covered by the proviso. The last clause of this section, which

makes the laws of the state the rules of the decision as to the competency of witnesses in the courts of the United States, in trials in equity, "in all other respects," means "in all other respects" than those provided for in so much of the section as precedes the word "provided," and does not qualify the clause which forms the proviso. *Goodwin v. Fox*, 129 U. S. 601, 631, 32 L. Ed. 805, citing *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111.

The purpose of § 858 of the Revised Statutes was to put the parties to a suit (except those named in a proviso to the enactment) on a footing of equality with other witnesses; that is to say, to make all admissible to testify for themselves, and all compellable to testify for others. An order was accordingly made for a subpoena to a defendant in equity, in order that his deposition might be taken for the complainant. *Texas v. Chiles*, 21 Wall. 488, 22 L. Ed. 650; *Railroad Co. v. Pollard*, 22 Wall. 341, 350, 22 L. Ed. 877.

Statute applicable where United States is a party.—The act of July 2d, 1864, which enacts that in courts of the United States, there shall be no exclusion of any witness in civil actions, "because he is a party to or interested in the issue tried," and the amendatory act of March 3d, 1865, making certain exceptions to the rule, apply to civil actions in which the United States are a party as well as to those between private parties. *Green v. United States*, 9 Wall. 655, 19 L. Ed. 806; *Fink v. O'Neil*, 106 U. S. 272, 281, 27 L. Ed. 196.

Parties may testify by depositions.—In courts of the United States, under § 858 of the Revised Statutes, parties to civil suits may testify by deposition as well as orally, there being, under the act of congress, no difference between them and other persons having no interest in the suit. *Railroad Co. v. Pollard*, 22 Wall. 341, 342, 22 L. Ed. 877.

Under the act of July 2d, 1864, witnesses may, other things allowing, testify (without any order of court) by deposition. And if not satisfied with a deposition which they have given, have a right, without order of court, to give a second one. *Cornett v. Williams*, 20 Wall. 226, 22 L. Ed. 254.

Act of 1864 has no application to territories.—*Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341.

State statutes in conflict with § 858 of the Revised Statutes not binding in federal courts.—As to rule that state statutes which disqualified interested parties were not binding on the federal courts after

ries,⁷¹ except where there exists some peculiarly confidential relation or the adverse party is dead.⁷²

B. The Accused in Criminal Cases.—Under modern statutes the defendant in a criminal case may testify in his own behalf.⁷³

C. Transactions or Communications with Deceased or Incapacitated Persons—1. **SUITS BY OR AGAINST EXECUTORS, ADMINISTRATORS OR GUARDIANS**—a. *In General.*—In actions in which judgment may be rendered for or against an executor, administrator or guardian, under the proviso of § 858, Rev. Stat., neither party to the action can testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.⁷⁴ The proviso does not apply to actions against the deceased's assignee

the act of congress providing that interest shall not disqualify a witness otherwise competent, see the title COURTS, vol. 4, p. 1085.

Power of congress to make parties to suits competent witnesses.—Ex parte Boyd, 105 U. S. 647, 657, 26 L. Ed. 1200.

Provision as to exclusion because of color.—Section 858 of the Revised Statutes also provides that no witness in the federal courts shall be excluded in any action on account of color. See ante, "Color No Disqualification," II, I.

Interest is now considered as affecting credibility not as a barrier to witness stand.—See post, "Interest and Bias," VI, E.

71. State statutes rendering parties and persons interested competent witnesses.—"Statutes providing that no witness shall be excluded in civil cases because he is a party to the suit, it is believed, have been adopted in some form in most, if not in all, of the states and territories of our Union." *Texas v. Chiles*, 21 Wall. 488, 490, 22 L. Ed. 650.

Parties and persons interested are competent witnesses in Ohio.—*Wright v. Bales*, 2 Black 535, 536, 17 L. Ed. 264; *Ryan v. Bindley*, 1 Wall. 66, 68, 17 L. Ed. 559; *Haussknecht v. Claypool*, 1 Black 431, 435, 17 L. Ed. 172. See the title APPEAL AND ERROR, vol. 2, p. 342.

Parties to the suit are by law competent witnesses in Massachusetts.—*Emerson v. Slater*, 22 How. 28, 38, 16 L. Ed. 360.

The act of the territory of Colorado of February 11, 1870, rendering parties to a suit competent witnesses, did not apply to cases which were at issue at the time of its passage. *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341.

Act of 1864 inapplicable to territories.—*Good v. Martin*, 95 U. S. 90, 98, 24 L. Ed. 341.

Effect of state statutes on federal courts.—As to rule that state statutes rendering parties to the action competent witnesses, in their own cause are controlling on the federal courts, see the title COURTS, vol. 4, p. 1083. See, also, the title COURTS, vol. 4, p. 1085, as to inapplicability of state statutes in con-

flict with § 858, Rev. Stat., as to competency of parties and persons interested.

72. Incompetency still preserved.—"Today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. * * * Steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence." *Benson v. United States*, 146 U. S. 325, 336, 36 L. Ed. 991. See ante, "Husband and Wife," II, C; post, "Transactions or Communications with Deceased or Incapacitated Persons," III, C.

73. Competency of the accused.—See the title CRIMINAL LAW, vol. 5, p. 128.

Under act of March 16, 1878, the defendant may be a witness at his own request, but not otherwise. See the title CRIMINAL LAW, vol. 5, p. 128.

Restored to full competency.—The act of March 16, 1878, in terms places no limitation on the scope of the testimony, and his competency being thus established, the limits of examination are those which apply to all other witnesses. *Benson v. United States*, 146 U. S. 325, 336, 36 L. Ed. 991.

Interest of accused now considered in the light of his credibility.—See the title CRIMINAL LAW, vol. 5, p. 130.

Comments on failure to testify.—As to the act of congress of March 16th, 1878 permitting the defendant in a criminal action to appear as a witness in his own behalf upon his own request prohibiting comments by the prosecution upon his failure to testify, see the titles ARGUMENT OF COUNSEL, vol. 2, p. 490; CRIMINAL LAW, vol. 5, p. 131.

74. Suits by or against executors, administrators or guardians.—*Potter v. National Bank*, 102 U. S. 163, 164, 26 L. Ed.

in bankruptcy,⁷⁵ or to suits by devisees.⁷⁶

b. *Parties and Persons Excluded*—(1) *Parties to the Record*.—**Real Issue between Other Parties.**—Though an administrator is a party to the suit, the proviso of § 858, Rev. Stat., is inapplicable where the real issue is between other parties to the suit, and there can be no judgment affecting the estate of the decedent.⁷⁷

Resignation of Administrator.—Where an administratrix brings suit, but resigns, and the court allows the administrator de bonis non to prosecute it in her place, the action ceases to be one in which she is concerned as a party, within the meaning of the proviso of § 858 of the Revised Statutes, and her credibility, in view of all circumstances, is for the jury.⁷⁸

(2) *Persons Not Parties but Interested.*—The proviso of § 858 of the Revised Statutes excludes only parties to the record, that is, those who, according to the established rules of pleading and evidence, are parties to the issue; and it is no objection to the competency of the witness that he is interested in the issue to be tried.⁷⁹

111; *Ex parte Fisk*, 113 U. S. 713, 721, 28 L. Ed. 1117; *Goodwin v. Fox*, 129 U. S. 601, 32 L. Ed. 805; *Hobbs v. McLean*, 117 U. S. 567, 579, 29 L. Ed. 940; *Connecticut, etc., Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 255, 28 L. Ed. 708.

The proviso of § 858, Rev. Stat., applies to the courts of the District of Columbia, as fully as to the circuit and district courts of the United States. *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268.

Provision applicable where United States a party.—The amendatory act of March 3, 1865, to the act of July 2, 1864, providing "that in actions by or against executors, administrators, or guardians, etc.," applies to civil actions in which the United States are a party, as well as those between private persons. *Green v. United States*, 9 Wall. 655, 657, 19 L. Ed. 806.

75. Competency of partner of deceased in an action against his assignee in bankruptcy.—See the title **PARTNERSHIP**, vol. 9, p. 126.

76. Where one claims as devisee.—Everyone is competent under § 858, Rev. Stat., unless the case is covered by the proviso. So where the plaintiff, although executrix of the will of her deceased husband, did not ask for a decree in her favor as executrix but claimed an interest only as devisee of real estate under her husband's will; and the final decree found that the witness, the defendant, was indebted to her, "as the legatee and devisee" of her husband, "for a certain sum," and moreover, the material transactions about which the defendant testified, were transactions between himself and another party, and not between himself and her deceased husband, the defendant was not an incompetent witness under § 858 of the Revised Statutes. *Goodwin v. Fox*, 129 U. S. 601, 631, 32 L. Ed. 805.

77. Real issue between other parties.—A creditor having recovered judgment against his debtor attached, as property

of the debtor, certain shares of the capital stock of a company, which stood in the name of a third person. The stock was claimed by the third person under an unrecorded assignment and transfer, for a valuable consideration, prior to the rendition of the judgment. In the progress of the litigation the debtor died, and his administrator was substituted of record as party defendant. Held, that both administrator and the third person were competent witnesses on the issue between the creditor and the third person, as to whether these shares of stock were the property of the latter, and subject to the former's attachment. The real issue was between the creditor and the third person; consequently, the case was within the first clause of § 858 of the Revised Statutes; and within the meaning and object of the proviso, this was not an action by or against an administrator, on which judgment might be rendered for or against him. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 277, 27 L. Ed. 935. See, generally, the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 660.

78. Resignation of administratrix.—*Snyder v. Fiedler*, 139 U. S. 478, 480, 35 L. Ed. 218.

79. Only parties to record excluded.—*Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 277, 27 L. Ed. 935; *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111.

Interest in the issue insufficient for exclusion.—In actions in which judgment may be rendered for or against an executor, administrator, or guardian, it is no objection to the competency of the witness that he is interested in the issue to be tried. *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 277, 27 L. Ed. 935; *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111; *Snyder v. Fiedler*, 139 U. S. 478, 480, 35 L. Ed. 218.

Witness interested but not a party.—In an action against an executor in his representative capacity, A., who was in-

c. *Transactions or Communications with Deceased.*—The transactions must have been between the witness and the deceased, and not a third person, in order to come within the terms of the proviso of § 858 of the Revised Statutes.⁸⁰

d. *Claims or Demands against Estates of Decedents.*—An action against an executor of an estate to establish a trust therein is a "claim or demand" against the estate of a deceased person.⁸¹

2. **SUITS BY OR AGAINST HEIRS**—a. *In General.*—In some states parties to civil actions and persons interested cannot testify therein when any adverse party sues or defends as an heir, unless called by him.⁸²

b. *Adverse Parties.*—A mere formal party having no interest in the event of the suit was not an adverse party in the sense of a statute rendering parties to civil actions and those interested, incompetent to testify when any adverse party sued or defended as an heir.⁸³

terested in the issue but not a party thereto, was, against the objection of the defendant, introduced as a witness by the plaintiff, and permitted to testify to statements of the testator touching the subject matter in controversy. Held, that the witness was competent and the evidence admissible. *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111.

Action by receiver of national bank.—Where in an action by the receiver against its directors and the representatives of deceased directors, testimony of one of the defendants that on a certain date he verbally resigned his office, and transferred his capital stock, to the president, since deceased, was not incompetent as against complainant. *Briggs v. Spaulding*, 141 U. S. 132, 153, 35 L. Ed. 662, citing Revised Statutes, § 853; *N. Y. Code Civ. Proc.*, § 829; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275, 27 L. Ed. 935; *Snyder v. Fiedler*, 139 U. S. 478, 35 L. Ed. 218. See, generally, the titles **BANKS AND BANKING**, vol. 3, p. 1; **RECEIVERS**, vol. 10, p. 538.

Where the witness was neither a party to nor interested in the suit, nor was the deceased nor his executor or administrator, the witness was competent to testify as to statements of the deceased, if relevant. *Jacksonville, etc., Nav. Co. v. Hooper*, 160 U. S. 514, 520, 40 L. Ed. 515.

80. Transactions with a third person.—*Goodwin v. Fox*, 129 U. S. 601, 631, 32 L. Ed. 805.

In a suit by the complainants against the defendant to construe the will of their mother and to charge the estate with certain claims prior to a general distribution of the assets, the complainants sought to testify as to their mother's statements, and as to the transactions in which she took part, not to prove their claim against the estate, but to show that a similar claim of the defendant's had been paid, and the testimony related to conversations between testatrix and the defendant. Held, that the statute did not apply—in other words, it was not a transaction with or a statement by the testator within the meaning of the statute.

Glover v. Patten, 165 U. S. 394, 408, 41 L. Ed. 760. See, generally, the title **WILLS**, ante, p. 1015.

81. An action against the executor of an estate to establish a trust is a "claim or demand" against decedent's estate within the meaning of an Utah statute, providing parties to an action against an executor upon a claim or demand against the estate of a deceased person may not testify as to any matter of fact occurring before the death of such deceased person and equally within the knowledge of both the witness and the deceased person. *Whitney v. Fox*, 166 U. S. 637, 646, 41 L. Ed. 1145. See, generally, the title **TRUSTS AND TRUSTEES**, ante, p. 676.

82. Illinois statute of 1867.—*Kingsbury v. Buckner*, 134 U. S. 650, 684, 33 L. Ed. 1047.

83. Suit under Illinois statute.—The heirs of A claimed certain property conveyed by B, and her husband C, and C joined his wife in a cross bill alleging that the conveyance constituted a trust in her favor and urged that it be enforced, giving his assent to any decree that would place the property under her sole control and preserve it for her benefit. Although a formal party to the cross suit, C was not directly interested in the event thereof, and was not a party adverse to the plaintiff in the sense of an Illinois statute of 1867 providing that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof shall be allowed to testify when any adverse party sues or defends as an heir of any deceased person, unless called by such adverse party." The wife, however, was incompetent. *Kingsbury v. Buckner*, 134 U. S. 650, 684, 33 L. Ed. 1047. See, generally, the title **TRUSTS AND TRUSTEES**, ante, p. 676.

In a suit by an heir claiming certain property, one of the defendants had no interest adverse either to the plaintiff or the other defendants, and her interest in the property was recognized by all the parties, and the decree could not have affected her rights; the fact that she was a party to the suit did not of itself disqualify her as a witness under the Illinois

IV. Examination of Witnesses.

A. General Consideration of Subject—1. **RIGHT OF EXAMINATION.**—As to right of examination of witnesses before arbitrators, see the title **ARBITRATION AND AWARD**, vol. 2, p. 477. As to right of party in admiralty to produce witnesses, to establish his claim, see the title **ADMIRALTY**, vol. 1, p. 175. As to right of examination of witnesses before a master or referee, see the title **REFERENCE**, vol. 10, p. 610. As to examination of witnesses by grand juries, see the title **GRAND JURY**, vol. 6, p. 577.

2. **MANNER OF EXAMINATION.**⁸⁴—A party calling a witness, may, if he sees fit, examine the witness by specific interrogatories instead of relying upon the general statements of witness, as made responsive to the oath under which he testifies.⁸⁵

3. **FORM AND PROPRIETY OF QUESTIONS**—a. *In General.*—A question that is clearly too general is, on that account, objectionable.⁸⁶ A question that calls for information which from any source might be in the possession of the witness, and not for his knowledge, is objectionable.⁸⁷

b. *Hypothetical Questions.*—The length of hypothetical statements presented to a witness to ascertain his opinion upon any matter growing out of the facts supposed, necessarily depend upon the simple or complicated character of the transaction recited, and the number of particulars which must be considered for the formation of the opinion desired; and must, in a great degree, be left to the discretion of the court.⁸⁸

c. *Relevancy and Competency.*—The right of parties to put particular questions to a witness must be established beyond any reasonable doubt, for the very purpose stated by them; and they cannot afterwards desert that purpose, and show the pertinency or relevancy of the evidence for any other purpose, not then suggested to the court.⁸⁹

statute of 1867. *Kingsbury v. Buckner*, 134 U. S. 650, 684, 33 L. Ed. 1047.

84. Examination of witnesses in open court.—As to statutory provision that a party to a suit may be examined any time before trial not being binding upon the federal courts, because in conflict with § 861 of the Revised Statutes, which provides that the mode of proof in trials of actions at common law shall be by oral testimony and examination of witnesses in open court, except as provided in special cases, see the title **COURTS**, vol. 4, p. 1085.

Manner of examination of witnesses in equity.—See the title **EQUITY**, vol. 5, p. 885.

85. Examination by specific interrogatories.—The *Ottawa*, 3 Wall. 268, 270, 18 L. Ed. 165.

86. Questions too general.—A witness was asked whether any one on a certain day pointed out to him the line between a certain company's ground and the defendants'; and, if so, whom; and if he knew where the line was. It was entirely immaterial, so far as anything appears, whether any one pointed out the line to the witness or not, unless it was some one connected with the suit of the parties. It is true, if he knew of his own knowledge where the line was, he might tell, but in the form the question was put he could well think he would be per-

mitted to tell where it was as it had been pointed out to him. If the witness knew facts that were material to the issue which was being tried, and the plaintiff desired to have them, the question should have been made more specific, and the objections to the form of that which was put removed. *Belk v. Meagher*, 104 U. S. 279, 290, 26 L. Ed. 735.

87. Question not calling for knowledge of witness.—*Xenia Bank v. Stewart*, 114 U. S. 224, 232, 29 L. Ed. 101.

Questions to a merchant appraiser as to whether he proceeded on the appraisal in accordance with the instructions of the secretary of the treasury in respect to the mode of procedure were too general. The witness should have been asked to give particulars of the method pursued, leaving it to the court and jury to make the comparison with the instructions which were in evidence. *Auffmordt v. Hedden*, 137 U. S. 310, 321, 34 L. Ed. 674. See the title **REVENUE LAWS**, vol. 10, p. 915.

88. Hypothetical questions.—*Forsyth v. Doolittle*, 120 U. S. 73, 78, 30 L. Ed. 586. See the title **EXPERT AND OPINION EVIDENCE**, vol. 6, p. 200.

89. Incumbent on parties to establish right to ask question.—*Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 10 L. Ed. 535. See the title **EVIDENCE**, vol. 5, pp. 1010, 1045.

d. *Questions Calling for Inferential Answers.*—Where the answer to a question would be purely an inference based upon facts previously proven, and an inference which is for the jury to draw from those facts, the question is properly excluded.⁹⁰

e. *Error.*—As to where improper questioning of witness does not injure complainant and is not ground for reversal, see the title *APPEAL AND ERROR*, vol. 2, p. 342. As to the right and also the duty of a trial court to correct an error arising from the erroneous admission of evidence when discovered, and that such correction removes the cause of reversal, where the error is not of such a serious nature as to have affected the minds of the jury, despite the correction by the court, see the title *APPEAL AND ERROR*, vol. 2, p. 343. As to rule that court will be presumed to have acted correctly in rejecting evidence, until the contrary is proven, see the title *EVIDENCE*, vol. 5, p. 1004.

4. *DISCRETION OF COURT*—a. *In General.*—The extent to which the examination of witnesses may be allowed, must, in a great degree, be left to the discretion of the court.⁹¹ Interrogatories calling for immaterial testimony may be excluded in the discretion of the court.⁹² If the question, however, is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it.⁹³

b. *Allowance of Leading Questions.*—The allowance of leading questions lies in the sound discretion of the trial court.⁹⁴ Their allowance is discretionary for the purpose of impeachment,⁹⁵ or where counsel is surprised by the statements of his witness.⁹⁶

90. *Purely inferential questions.*—Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 456, 40 L. Ed. 766.

91. *Discretion of court.*—Forsyth v. Doolittle, 120 U. S. 73, 78, 30 L. Ed. 586.

The mode of conducting trials, and the order of introducing evidence, and the time when it is to be introduced, are matters properly belonging very largely to the practice of the court where the matters of fact are tried by a jury. Wills v. Russell, 100 U. S. 621, 625, 25 L. Ed. 607; Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 459, 10 L. Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503. See the title *APPEAL AND ERROR*, vol. 1, p. 991.

Questions regarding the age, antecedents, business and experience of witnesses are largely within the discretion of the court which is not reviewable, unless it manifestly appears that such questions are put for an improper purpose, see the title APPEAL AND ERROR, vol. 1, p. 991.

Where a question is illegal only because it may elicit improper testimony, permitted by the court to be answered over objection, it is not error of which a revising court can take notice, if the witness knows nothing of the matter as to which he is interrogated, or his answer is favorable to the objecting party, see the title APPEAL AND ERROR, vol. 2, p. 342.

92. *Immaterial testimony.*—Storm v. United States, 94 U. S. 76, 85, 24 L. Ed. 42.

93. *Erroneous exclusion.*—Buckstaff v.

Russell, 151 U. S. 626, 637, 38 L. Ed. 292; Storm v. United States, 94 U. S. 76, 85, 24 L. Ed. 42.

Considerations determining error.—"Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded." Buckstaff v. Russell, 151 U. S. 626, 637, 38 L. Ed. 292.

94. *Leading questions discretionary.*—As to the allowance of a leading question being within the discretion of the court, that in order that the court of errors take notice of an exception to the conduct of the trial court, in permitting leading questions, such conduct must appear to be a plain case of the abuse of discretion, see the title *APPEAL AND ERROR*, vol. 1, p. 992.

95. *Leading questions for impeachment.*—It is within the discretion of the trial court to permit leading questions to be propounded for the purposes of impeachment. Union Pac. R. Co. v. O'Brien, 161 U. S. 451, 456, 40 L. Ed. 766.

96. *Counsel surprised by statements of witness.*—"It is settled that a trial court can, in its discretion, permit, upon direct examination, a leading question to be asked, when the counsel conducting the examination is surprised by the statements of the witness." Putnam v. United

5. **EXCLUDING WITNESSES FROM COURT ROOM.**—If a witness disobeys the court's order of withdrawal from the court room, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.⁹⁷

6. **EXCEPTIONS AND OBJECTIONS.**—**Necessity for Objections and Exceptions.**—As to the necessity for objections and exceptions to the admission or rejection of testimony, see the title **APPEAL AND ERROR**, vol. 2, p. 92, et seq. As to necessity of objections and exceptions to the mode of examination of witnesses, see the title **APPEAL AND ERROR**, vol. 2, p. 118.

Form and Sufficiency of Exceptions and Objections.—See the title **APPEAL AND ERROR**, vol. 2, p. 94, et seq. An objection to the examination of a witness should state specifically the ground of the objection, in order that the opposite party may have the opportunity of removing it, if possible.⁹⁸ Where a question is in itself unobjectionable, but the answer goes beyond what is called for, and is improper or incompetent testimony, an objection to the question will not extend to the answer. Special objection must be taken in such case to the answer.⁹⁹

Time to Take and Perfect Exceptions.—See the title **APPEAL AND ERROR**, vol. 2, p. 97.

Waiver of Exceptions and Objections.—See the title **APPEAL AND ERROR**, vol. 2, p. 119.

Contents of Bill of Exceptions.—As to scope and contents of bill of exceptions regarding examination and rejection of witnesses, and as to the necessity of their names, see the title **EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL**, vol. 6, p. 1.

B. Cross-Examination—1. **RIGHT OF CROSS-EXAMINATION**—a. *In General.*—The party against whom a witness is called has the right of cross-examination, within reasonable limits, which is a valuable one for many purposes,¹

States, 162 U. S. 687, 694, 40 L. Ed. 1118; *St. Clair v. United States*, 154 U. S. 134, 150, 38 L. Ed. 936.

97. **Disobedience of order of withdrawal.**—Holder v. United States, 150 U. S. 91, 92, 37 L. Ed. 1010.

Contempt.—As to the willful disobedience of an order by withdrawal, constituting a contempt on the part of the witness, see the title **CONTEMPT**, vol. 4, p. 536.

98. **Objection must be specific.**—Planing-Machine Co. v. Keith, 101 U. S. 479, 493, 25 L. Ed. 939.

99. **Objection to question does not extend to answer.**—If the answer of the witness goes beyond the question, it is to it that the objection of counsel should be directed, by a motion to exclude it as not responsive, or otherwise improper, or as incompetent testimony. Therefore, where a witness was asked whether he could form a judgment of the quantity of timber which had been on certain pine timber lands from the stumps that remained, and he stated in his answer what, in his judgment, the quantity was, special objection should have been made to the answer. *Gould v. Day*, 94 U. S. 405, 414, 24 L. Ed. 232.

1. **Right of cross-examination.**—Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, and as a means of ascertaining the order of the events as narrated by the witness in his examination in chief, and the time and place when and where they occurred, and the attending circumstances, and of testing the intelligence, memory, impartiality, truthfulness, and integrity of the witness; but a few questions, well directed to those several objects, are in general amply sufficient to effect all that can well be accomplished by the fullest enjoyment of that admitted right. *The Ottawa*, 3 Wall. 268, 271, 18 L. Ed. 165. See *Johnston v. Jones*, 1 Black 209, 226, 17 L. Ed. 117.

Depositions.—As to the right and opportunity of cross-examination being essential to the use of deposition against a party, and the inadmissibility of depositions used in a former suit in which one was neither party nor privy, see the title **DEPOSITIONS**, vol. 5, p. 331.

Cross-examination where defendant answers under oath.—As to right of plain-

but the benefit of the right may be secured without excessive questioning.²

b. *Examination of Adverse Parties.—In General.*—It is familiar law that where a witness discloses in his testimony that he is adverse in interest and feeling to the party calling him, the latter may change the character of his examination from a direct to a cross-examination, and the opposing party is always adverse in interest.³

Parties to Record.—In some states statutes provide that parties to the record in civil proceedings may be examined by the adverse party as under cross-examination, but this provision has no application to suits in equity in the federal courts.⁴

2. **LATITUDE OF CROSS-EXAMINATION**—a. *Discretion of Court.*—It lies in the discretion of the court to allow a reasonable license in cross-examination.⁵ The extent to which a cross-examination may be carried beyond what is necessary to exhibit the merits of the case, must be guided and limited by the discretion of the judge who presides at the trial.⁶

b. *Limitation to Direct Examination.*—**In General.**—While a witness may be cross-examined in regard to material matters brought out on his direct examination,⁷ the rule has been long settled, that the cross-examination must be

tiff to call and cross-examine defendant who answers under oath, as required by the bill, denying specifically the existence of any fraud, see the title EQUITY, vol. 5, p. 884.

Defendant in criminal trials.—As to the right of cross-examination of the defendant in a criminal case when he testifies in his own behalf, and as to the latitude of such examination, see the titles CONSTITUTIONAL LAW, vol. 4, p. 512; CRIMINAL LAW, vol. 5, p. 128. As to the right of the defendant in criminal cases in the federal courts, to a confrontation of witnesses, whom he may examine, see the title CONSTITUTIONAL LAW, vol. 4, p. 496.

Right of cross-examination of witnesses before a master or referee.—See the title REFERENCE, vol. 10, p. 611.

Right of cross-examination of witnesses before arbitrators.—See the title ARBITRATION AND AWARD, vol. 2, p. 477.

Right of cross-examination of witnesses in admiralty.—See the title ADMIRALTY, vol. 1, p. 175.

2. **Four or five hundred interrogatories to a single witness excessive.**—The Ottawa, 3 Wall. 268, 270, 18 L. Ed. 165.

3. **Witnesses adverse in interest.**—United States v. Budd, 144 U. S. 154, 165, 36 L. Ed. 384.

Defendant's answer under oath.—Where in a suit in equity by the government against two defendants to set aside a contract, they file written answers under oath denying the charges of fraud, if the government doubted their statements it could have called either one and cross-examined him to its satisfaction. Its failure to exercise such right cannot now be made a basis of impeaching their sworn statements. United States v. Budd, 144 U. S. 154, 165, 36 L. Ed. 384.

4. **Examination of adverse party in Pennsylvania.**—The statute of Pennsyl-

vania, providing a party to the record of any civil proceeding may be examined as under cross-examination, at the instance of the adverse party, and the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony, has no application to suits in equity in the courts of the United States. Dravo v. Fabel, 132 U. S. 487, 490, 33 L. Ed. 421.

5. **Discretion of court.**—Nailor v. Williams, 8 Wall. 107, 109, 19 L. Ed. 348.

6. **Extent of cross-examination.**—Johnston v. Jones, 1 Black 209, 17 L. Ed. 117; Klein v. Russell, 19 Wall. 433, 463, 22 L. Ed. 116.

This discretion is not subject to review in a court of error.—See the title APPEAL AND ERROR, vol. 1, p. 991.

7. **Material matters brought out by direct examination.**—The Ottawa, 3 Wall. 268, 270, 18 L. Ed. 165.

In an action for injuries due to the upsetting of a stage coach, the plaintiff testified that he was rightfully in the coach as a regular passenger under the usual conditions, that he was taken as a passenger by the driver, and that one of the defendants had said since the accident that he had ordered the driver to receive him without fare. It was proper, on cross-examination, to require him to state whether his fare was demanded of him by the regular agent of the company before the accident, and whether on his refusal to pay he was ordered to leave the coach and refused to do so. It was an examination in regard to the very thing about which he testified in chief. To permit a party to the suit to tell his own tale of a transaction like this, and to conceal what is important to the defendant in regard to the same occurrence and at the same time, would be gross perversion of justice, and would bring into discredit the policy of permitting parties to actions to testify in their own behalf. Gilmer v.

limited to the matters thus stated.⁸

Exceptions to Rule.—This rule, however, is subject to two necessary exceptions. The opposite party may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contra-

Higley, 110 U. S. 47, 50, 28 L. Ed. 62. See the title CARRIERS, vol. 3, p. 588.

Where in an action on an insurance policy one of the directors of the defendant company testified as to a conversation with the agent of the plaintiff, regarding the death of the deceased, it was not error to admit on cross-examination evidence that was a part of the same conversation and had a bearing upon the testimony given by the witness on his direct examination. *Home Benefit Ass'n v. Sargent*, 142 U. S. 691, 696, 35 L. Ed. 1160. See, generally, the title INSURANCE, vol. 7, p. 66.

Action on promissory note.—When one executed his note to a company and deposited with the president of the company certain stock as security, and in a suit by president as indorser, against the maker, the plaintiff is asked, on cross-examination, by the defendant, what was the value of the shares of stock, and whether it was good security for the note, the question was proper as showing the character of the stock, where the plaintiff had given, on his direct examination, evidence as to the transaction respecting the stock. *Lancaster v. Collins*, 115 U. S. 222, 226, 29 L. Ed. 373. See, generally, the title BILLS, NOTES AND CHECKS, vol. 3, p. 257.

In a prosecution for murder, when a physician for the defense was on the stand and had finished his direct examination, he was asked by the district attorney the following question: "You think from your experience with him, from your conversation with him, that he killed the man because he threatened his life; your idea is that he killed the man because he threatened his life?" which question was objected to, the objection overruled, and the witness permitted to answer. His answer was: "Well, in part; and because he thought his own life was in danger, and because he thought he had the right to destroy this menace to his own life." This was clearly within the proper limits of cross-examination, and the objection was properly overruled. *Davis v. United States*, 165 U. S. 373, 377, 41 L. Ed. 750. See, generally, the title HOMICIDE, vol. 6, p. 695.

Question to ascertain whether contract was in writing.—Where a witness testifies, in his direct examination, to a purchase made by him, it is competent, on cross-examination, to ask him whether his contract was in writing; and, if it was, to identify the paper. *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740.

Where a letter carrier was indicted for stealing a letter and its contents from

the mail and became a witness for himself, denying the charge, and intimating that someone had placed stolen money in his coat, it was admissible, upon cross-examination, for the purpose of showing the improbability of the explanation, to obtain from the witness all the circumstances which might throw light upon the subject, for that purpose he was asked if he had any enemies in the department, which was not error. *Scott v. United States*, 172 U. S. 343, 348, 43 L. Ed. 471.

Dying declarations.—As to where a witness testifying as to a dying declaration testifies that deceased stated he did not know who shot him, that he may be asked whether he did not say that the defendant did not shoot him, see the title DYING DECLARATIONS, vol. 5, p. 686.

8. Limitation to direct examination.—*Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535; *Johnston v. Jones*, 1 Black 209, 226, 17 L. Ed. 117; *Rea v. Missouri*, 17 Wall. 532, 542, 21 L. Ed. 707.

New matter first introduced on cross-examination.—Where a witness on his cross-examination stated he was worth a certain sum, part of which he had acquired by advances of money to a friend to buy up government vouchers on speculation upon shares, it was in the discretion of the court to refuse to compel him to tell the name of the friend. It was on a new matter first introduced on the cross-examination, and was in fact a cross-examination upon a cross-examination. If courts did not possess discretionary power to control such a course of examination, trials might be rendered interminable. *Rea v. Missouri*, 17 Wall. 532, 542, 21 L. Ed. 707.

Plaintiff refraining from introducing evidence as to alleged special damages in an injury case.—Where in an action against a railroad company to recover for personal injuries received while traveling as a passenger the plaintiff alleged by way of special damage that at the time he received the injury he was engaged in a certain business and that it yielded him a certain amount per month, but at the trial he refrained from going into evidence on the subject of the alleged special damage, there was no error in refusing to permit the defendant to cross-examine him in reference to the details of the business in which he was engaged prior to the occurrence of the accident. *Northern Pac. R. Co. v. Umlin*, 158 U. S. 271, 276, 39 L. Ed. 977. See, generally, the title CARRIERS, vol. 3, p. 556.

dictory statements.⁹

Examining Witness as His Own.—Subject to those exceptions, the general rule is that if the party wishes to examine the witness as to other matters, he must in general do so by making him his own witness and calling him as such in the subsequent progress of the cause.¹⁰

Cross-Examination of Parties.—A greater latitude is allowable in the cross-examination of a party who places himself on the stand, than in that of other witnesses.¹¹

c. *Error.*—The extent and manner of cross-examination is necessarily within the discretion of the trial court, and the exercise of that discretion is not reviewable.¹² The refusal to allow the introduction of evidence on cross-examination is not ground for reversal where no injury results,¹³ or the party is

9. **Exceptions to general rule.**—Authorities of the highest character show that the established rule of practice in the federal courts and in most other jurisdictions in this country is that a party has no right to cross-examine a witness, without leave of the court, as to any facts and circumstances not connected with matters stated in his direct examination, subject to two necessary exceptions. He may ask questions to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. *Wills v. Russell*, 100 U. S. 621, 625, 25 L. Ed. 607.

10. **Making witness his own.**—*Wills v. Russell*, 100 U. S. 621, 625, 25 L. Ed. 607; *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 459, 10 L. Ed. 535; *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503.

In an action of ejectment, the subscribing witness to a deed introduced was present in court during the trial, and was examined with reference to certain matters, but not touching the execution of the deed. The defendant thereupon claimed the right to cross-examine him with reference to such execution. Held, that the defendant must, for that purpose, call the witness, and could not properly make the inquiry upon the cross-examination. *Houghton v. Jones*, 1 Wall. 702, 706, 17 L. Ed. 503. See, generally, the title *EJECTMENT*, vol. 5, p. 695.

11. **Greater latitude where party places himself on stand.**—*Rea v. Missouri*, 17 Wall. 532, 21 L. Ed. 707.

Where in an action for wrongful attachment the evidence tended to show an intent on the debtor's part at the time of the suing out and levy of the attachment, to defraud his creditors by secreting his property by putting it into the shape of notes, and by fraudulently placing them beyond their reach, and it also appeared from the evidence in chief of the debtor, as a witness in his own behalf, that on the day of the levy of the attachment, or the next day, a certain amount owed to him was put in the shape of negotiable notes; the refusal of the court to allow him to be asked on cross-examination what he did with these

notes was error. Upon the issue involved, the defendants were entitled to a wide latitude in cross-examining the party charged with fraudulent conversion when testifying for himself. *Eames v. Kaiser*, 142 U. S. 488, 491, 35 L. Ed. 1090. See, generally, the titles *ATTACHMENT AND GARNISHMENT*, vol. 2, p. 660; *FRAUDULENT AND VOLUNTARY CONVEYANCES*, vol. 6, p. 472.

12. **Decision of court not reviewable.**—Since the extent and manner of cross-examination is necessarily within the discretion of the trial court, the exercise of that discretion is not reviewable, even though the examination extends to matters not connected with the examination in chief. See the title *APPEAL AND ERROR*, vol. 1, p. 991.

Examination as to matters not inquired into on direct examination.—Where it appears that no injury resulted to the complainant, a judgment will not be reversed merely because the court, at the trial, permitted a witness on his cross-examination to be interrogated as to matters pertinent to the issue, but about which he had not testified in chief. *Wills v. Russell*, 100 U. S. 621, 25 L. Ed. 607. See *Fourth Nat. Bank v. Albaugh*, 188 U. S. 734, 736, 47 L. Ed. 673. See, also, the title *APPEAL AND ERROR*, vol. 2, p. 342.

Cases not infrequently arise where the convenience of the witness or of the court or the party producing the witness will be promoted by a relaxation of the rule, limiting the cross-examination to the matters opened by the examination in chief to enable the witness to be discharged from further attendance; and if the court in such a case should refuse to enforce the rule, it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party. *Wills v. Russell*, 100 U. S. 621, 626, 25 L. Ed. 607.

13. **No injury resulting.**—A judgment will not be reversed because a witness, when testifying in his own behalf, was not permitted to answer certain questions on cross-examination, where no harm could have resulted from the ruling; as in a subsequent stage of the case,

given the opportunity of introducing it later.¹⁴

3. **CROSS-EXAMINATION AS TO LETTERS AND RECORDS.**—A witness may be questioned as to letters from copies,¹⁵ and he may also be cross-examined as to a prior suit without the production of its record.¹⁶

4. **CROSS-EXAMINATION TO TEST KNOWLEDGE AND ACCURACY OF WITNESS.**—The extent to which a cross-examination may be allowed to test the accuracy or credibility of a witness, is largely subject to the sound discretion of the trial court; especially where the question has no reference to any matter disclosed by the examination in chief.¹⁷

5. **CROSS-EXAMINATION TO TEST TRUTH OR CREDIBILITY OF WITNESS**—a. *In General.*—Courts usually allow questions to be put to a witness to affect his credibility; but it is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced, and of the nature of the testimony given by the witness in his examination in chief, it is fit and proper that questions of the kind should be overruled, and to what extent such a cross-examination shall be allowed.¹⁸

b. *Questions Tending to Degrade Witness.*—As to questions which tend to degrade but do not incriminate a witness, see the title **CONSTITUTIONAL LAW**, vol. 4, p. 513.

c. *Bias or Hostility.*—A witness may be cross-examined as to matters showing bias or hostility.¹⁹

when the questions were clearly proper, the witness testified fully as to all the matters originally inquired about, see the title **APPEAL AND ERROR**, vol. 2, p. 342.

14. **Opportunity to introduce evidence later.**—When the court rules correctly that certain matters are not proper subjects of cross-examination, and at the same time notifies the defendant that he can recall the witness and examine him fully in reference to those matters, and the defendant fails to recall the witness or introduce his testimony thereon, it is difficult to see any grounds of complaint. *Thiede v. Utah Territory*, 159 U. S. 510, 519, 40 L. Ed. 237.

15. **Objection that letter used on cross-examination was not best evidence.**—Where a witness was asked on cross-examination if the firm of which he was a member had not written a certain letter, the contents of which were stated to him from a copy, the overruling of his objection that the letter was the best evidence was not error. *Toplitz v. Hedden*, 146 U. S. 252, 255, 36 L. Ed. 961. See, generally, the title **BEST AND SECONDARY EVIDENCE**, vol. 3, p. 214.

16. It was not error to allow a witness to be cross-examined as to a claim made by him in a prior suit, and the overruling of his objection that the record was the best evidence was not error. If he wished to appeal to the prior record to refresh his recollection, he could have called for it and done so. *Toplitz v. Hedden*, 146 U. S. 252, 254, 36 L. Ed. 961.

17. **Cross-examination to test accuracy or credibility.**—*Blitz v. United States*, 153 U. S. 308, 312, 38 L. Ed. 725.

Discretion not reviewable.—The exercise of that discretion is not review-

able upon writ of error. See the title **APPEAL AND ERROR**, vol. 1, p. 991.

Cross-examination of the accused when he takes the stand in his own behalf.—See the title **CONSTITUTIONAL LAW**, vol. 4, p. 513.

18. **Cross-examination to test credibility.**—*Storm v. United States*, 94 U. S. 76, 85, 24 L. Ed. 42.

Discretion of court.—The extent to which cross-examination may be allowed to test the credibility of a witness—especially where the question has no reference to any matter disclosed by the examination in chief—is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable; certainly not where the question upon its face suggests nothing material to the inquiry where the defendant is guilty or not guilty of the specific offense charged in the indictment. *Blitz v. United States*, 153 U. S. 308, 312, 38 L. Ed. 725. See the title **APPEAL AND ERROR**, vol. 1, p. 991.

Cross-examination as to personal actions.—Where the president of a national bank was tried for misapplication of its funds and the cashier of the bank testified in behalf of the defendant, it is proper on cross-examination to ask why he resigned his position at a certain date which was subsequent to the alleged criminal acts but prior to the finding of the indictment. He had testified on defendant's behalf, and his personal actions were relevant on cross-examination as testing his testimony in chief. *Agnew v. United States*, 165 U. S. 36, 47, 41 L. Ed. 624. See, generally, the title **BANKS AND BANKING**, vol. 3, p. 1.

19. **Bias or hostility.**—A and B were jointly indicted for murder. On the

d. *Prior Inconsistent Statements*.—A witness may be cross-examined as to alleged contradictory statements to test his credibility; it is proper to show on cross-examination that he has made contradictory statements, oral or written, on the subject of the matter to which he testifies.²⁰

e. *Collateral and Irrelevant Matters*.—(1) *In General*.—Incidental and collateral matters may be drawn out on cross-examination to test the temper and credibility of a witness;²¹ but it is proper to exclude immaterial questions.²²

(2) *Conclusiveness of Answer*.—Where a party cross-examined a witness as

separate trial of A, B's wife testified that the deceased was killed by A and B. On cross-examination the witness was asked if she was not living with another party who was the only other witness in the case, and if they had not also agreed to live together if her husband was convicted and she herself got clear. She was also asked if the defendant was not drunk and what his conversation was when he awoke. Held, that all these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end. The two Indian witnesses (of whom the woman was one) did not agree in regard to the details of the alleged murder, and there is enough in the record to show that they were both of a low order of intelligence, and that they testified without any very solemn appreciation of their responsibilities as witnesses upon the trial of one individual for the murder of another. *Tla-Koo-Yel-Lee v. United States*, 167 U. S. 274, 277, 42 L. Ed. 166. See, generally, the title *HOMICIDE*, vol. 6, p. 695.

Statement of purpose of examination.

—The witnesses for the plaintiff was asked on cross-examination if he had not recently stated to different parties, in talking about the matter, that he wanted the plaintiffs to recover because he would then get his pay. Plaintiff's counsel objected to the question on the ground it did not specify time and place. Defendant's counsel replied that he did not propose to impeach the witness; whereupon the court sustained the objection. Held, there is no error in this. If the design was to impeach the witness in another mode, than by subsequent contradiction, as by showing interest or bias, supposing it to have been competent for such purpose, it was the duty of counsel to have accompanied his disclaimer with that qualification. He must be taken, without such explanation, to have waived the objection. *Oil Co. v. Van Etten*, 107 U. S. 325, 335, 27 L. Ed. 319.

20. Prior inconsistent statements.—

Toplitz v. Hedden, 146 U. S. 252, 254, 36 L. Ed. 961.

Cross-examination of statements in prior suit without production of record.—

It was proper to question a witness on cross-examination as to alleged contradictory statements made in a prior suit without production of the record. If he wish to appeal to the prior record to refresh his memory, he could call for it and do so. *Toplitz v. Hedden*, 146 U. S. 252, 254, 36 L. Ed. 961.

Where, in a suit for infringement of a patent, a witness called for the defendant to prove want of novelty stated that he had used a particular process, claimed by the defendant to be same as that patented, for twenty years and after issue of the patent, it was permissible for plaintiff to ask witness if he had not forbidden him to use it and if witness did not disclaim using the patented process and reply it was a way of his own. *Klein v. Russell*, 19 Wall. 433, 22 L. Ed. 116. See, generally, the title *PATENTS*, vol. 9, p. 136.

A written statement signed by a witness and admitted by him to have been so signed may be used in cross-examining him as to material points testified to by him. *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 519, 34 L. Ed. 747. See post, "Prior Contradictory Statements," V, A, 2.

21. Incidental and collateral issues.—

Where a witness in his cross-examination referred to a paper, it was not error to require him to state its contents; though no notice to produce it had been given, when it was an incidental and collateral matter drawn out to test the temper and credibility of the witness, and it in no wise affected the merits of the controversy between the parties. *Klein v. Russell*, 19 Wall. 433, 464, 22 L. Ed. 116.

22. Immaterial questions.—

Where the court permitted the defendants' counsel, for the purpose of showing bias and prejudice on the part of two witnesses, for the prosecution to ask them on cross-examination whether they had, at their own expense, employed another attorney to assist the district attorney in the prosecution of this case; and they frankly answered that they had, that fact having been thus proved and admitted, the further question to one of them, "How much do you pay him?" might properly be excluded by the presiding judge as

to collateral matters, matters not founded in the issue, he will be bound by the answer, and is not permitted to introduce evidence to contradict it.²³

6. CROSS-EXAMINATION AS TO COLLATERAL, INFERENTIAL AND IRRELEVANT MATTERS.—It is proper to exclude cross-examination as to collateral matters tending to confuse and mislead,²⁴ but incidental and collateral matters may be drawn out to test the temper and credibility of the witness.²⁵ It is also proper to exclude cross-examination as to matters that are clearly irrelevant,²⁶ or purely inferential.²⁷ Incompetent questions are not allowable on cross-examination in order to predicate upon them an impeachment or contradiction of the witness.²⁸

7. EXCEPTIONS AND OBJECTIONS.—Necessary for Objections and Exceptions.—See the titles *APPEAL AND ERROR*, vol. 2, p. 92; *EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL*, vol. 6, p. 15. A party cannot, by his omission to take an objection to the admission of improper evidence, brought out on a cross-examination, found a right to introduce testimony in chief, to rebut it or explain it.²⁹

immaterial. *United States v. Ball*, 163 U. S. 662, 673, 41 L. Ed. 300.

Question to a woman as to difficulties with husband.—The credibility of a witness cannot be impeached by asking her whether she has not had some difficulty with her husband. *Thiede v. Utah Territory*, 159 U. S. 510, 519, 40 L. Ed. 237.

23. Conclusiveness of answers.—*Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535.

A letter carrier was indicted for stealing a letter and its contents from the mail and became a witness for himself, denying the charge, and intimated that someone had placed stolen money in his coat, on cross-examination he stated that he had two enemies in the department, giving their names. It was held that the transaction might show by the two witnesses that they were not his enemies. The evidence objected to was not irrelevant, and the government was not bound by the answers of the defendant as to the two persons being his enemies. The evidence was not collateral to the main issue of guilt or innocence, nor was the subject first drawn out by the government. *Scott v. United States*, 172 U. S. 343, 348, 43 L. Ed. 471.

24. Collateral issues tending to confuse and mislead.—In an action against a railway company for the death of the deceased by derailment of a locomotive by reason of deposit in a railway cut and the witness was asked on cross-examination whether the cut was not constructed as cuts were ordinarily constructed on roads running through such places, the court did not err in its exclusion, because railway cuts are not made upon any recognized pattern and the testimony offered would have been no aid to the jury without further testimony showing that the surroundings of other cuts were substantially similar to those of the cut where the accident happened, which would have involved collateral issues tending to confuse and mislead. *Union*

Pac. R. Co. v. O'Brien, 161 U. S. 451, 456, 40 L. Ed. 766. See, generally, the titles *DEATH BY WRONGFUL ACT*, vol. 5, p. 200; *NEGLIGENCE*, vol. 8, p. 873.

25. Collateral and inferential matters to test credibility.—See ante, "Collateral and Irrelevant Matters," IV, B, 5, c.

26. Matters clearly irrelevant.—Where a party was prosecuted for voting more than once at an election, and the United States deputy marshal swore that he saw the defendant vote twice at a certain poll, it was held that a question on cross-examination why he did not arrest him when he saw that he had voted was clearly irrelevant and properly excluded. *Blitz v. United States*, 153 U. S. 308, 312, 38 L. Ed. 725. See the title *ELECTIONS*, vol. 5, p. 730.

Cross-examination to ascertain names of witnesses.—Questions propounded to a witness, on his cross-examination, merely to ascertain the names of the persons whom a party may desire to call as witnesses to disprove the case of the opposite party, may be excluded. *Storm v. United States*, 94 U. S. 76, 24 L. Ed. 42.

27. Matters purely an inference based on facts previously proved.—Where the answer to a question asked a witness on cross-examination would have been purely an inference based upon facts previously proven, and an inference which it was for the jury to draw from those facts, it was properly excluded. *Union Pac. R. Co. v. O'Brien*, 161 U. S. 451, 456, 40 L. Ed. 766.

28. Incompetent questions for impeachment.—*Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 521, 34 L. Ed. 747.

29. Philadelphia, etc., R. Co. v. Stimpson, 14 Pet. 448, 10 L. Ed. 535.

Testimony was not offered by a defendant, or stated by him as matter of defense, in the stage of the cause when it is usually introduced, according to the practice of the court; it was offered, after the defendant's counsel had stated, in open court, that they had closed their

Time to Take and Perfect Exceptions.—See the title *APPEAL AND ERROR*, vol. 2, p. 97.

Form and Sufficiency of Exceptions and Objections.—See the title *APPEAL AND ERROR*, vol. 2, p. 94.

Scope and Contents of Bill of Exceptions.—See the title *EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL*, vol. 6, p. 47.

C. Redirect Examination.—Where the re-examination of a witness is not directed to the ascertainment of what other statements had been made in a conversation upon the subject about which he had testified on his cross-examination, but to the drawing out of new matter, not connected with the subject to which the cross-examination related, it was clearly improper.³⁰

D. Rebuttal.—Evidence in denial of some affirmative case or fact which the defendant has attempted to prove may be brought out in rebuttal.³¹ The allowance of evidence in rebuttal lies in the sound discretion of the trial court.³² While the omission to challenge evidence as not properly in rebuttal may waive the mere order of proof, this does not render evidence admissible that is not legitimate rebutting testimony.³³

evidence, and after the plaintiff, in consequence of that declaration, had discharged his own witness; the circuit court refused to admit the testimony. Held, that this decision was proper. *Philadelphia, etc., R. Co. v. Stimpson*, 14 Pet. 448, 449, 10 L. Ed. 535.

30. Re-examination of witness.—*Bal-
lew v. United States*, 160 U. S. 187, 193,
40 L. Ed. 388.

31. Rebutting evidence defined.—*Car-
ver v. United States*, 160 U. S. 553, 555,
40 L. Ed. 532. See the titles *DYING
DECLARATIONS*, vol. 5, p. 687; *EVI-
DENCE*, vol. 5, p. 1010.

**Use in rebuttal of same illustrations
used by other party.**—In an action on a
life insurance policy the defendant sought
to show by a witness that the deceased
killed himself in a certain manner, but on
cross-examination it appeared his arm
was too short to reach the trigger. Sub-
sequently, the plaintiff introduced testi-
mony tending to show the length of the
arm of the deceased and the improb-
ability of his being able to reach the
trigger in the manner described by the
witness. The testimony was objected to
on the ground that the gun had not been
identified as the one which caused the
death. Held, that the defendant pre-
sented the gun for use and illustration
before the jury, and there was no ma-
terial error in permitting the plaintiff to
use the same gun for purposes of other
illustration, especially when she followed
that with testimony tending, although,
perhaps, only slightly, to identify it.
*Pythias Knights' Supreme Lodge v.
Beck*, 181 U. S. 49, 56, 45 L. Ed. 741.
See, generally, the title *INSURANCE*,
vol. 7, p. 66.

**Evidence in rebuttal as to effect of
light from flash of a revolver.**—In a
prosecution for murder, a witness for
the prosecution testified on cross-exami-
nation that although the night was dark,
he identified the defendant by the flash
of pistol shots. The government was

permitted to call and examine witnesses
in rebuttal with respect to the effect of
light from the flash of a revolver, and
whether such light would be sufficient to
enable a person firing the revolver to be
identified. The court held that had the
defense put in no evidence whatever upon
the subject, the question would have been
presented whether it was or was not a
matter of discretion for the court to ad-
mit this testimony in rebuttal; but in view
of the fact that the defense put in a cal-
endar apparently for the purpose of show-
ing the time that the moon rose that
night, as having some bearing upon this
question, there was no impropriety in
putting in this testimony. *Fitzpatrick v.
United States*, 178 U. S. 304, 316, 44 L.
Ed. 1078. See, generally, the title
HOMICIDE, vol. 6, p. 695.

32. Discretion of court.—"The govern-
ment called a witness in rebuttal, who
was examined as to the presence of the
defendant at a particular place, at a par-
ticular time, to rebut testimony which
had been offered by the defendant to
prove the alibi upon which he relied. This
testimony was objected to on the ground
that the proof was not proper rebuttal.
The court ruled that it was, and allowed
the witness to testify. It was obviously
rebuttal testimony; however, if it should
have been more properly introduced in
the opening, it was purely within the
sound judicial discretion of the trial
court to allow it, which discretion, in the
absence of gross abuse, is not reviewable
here." *Goldsby v. United States*, 160 U.
S. 70, 74, 40 L. Ed. 343.

**Testimony strictly competent only in
chief.**—As to right of a party to a ruling
of court as to testimony strictly compe-
tent only in chief, but its admission in
rebuttal discretionary with the court, see
the title *ORDER OF PROOF*, vol. 8,
p. 1006.

**33. Waiver of challenge of rebutting
evidence.**—While the omission to chal-
lenge evidence as not properly in re-

E. Surrebuttal.—Where plaintiff had closed his case in rebuttal, if the defendant had any right to introduce any testimony at all, such right was limited to the new matters brought out in the rebuttal.³⁴

F. Recall of Witness.—As to the refusal of the trial court to permit a witness who has been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination, not being a ground for error, because this is plainly a matter within the discretion of the trial court, see the title *APPEAL AND ERROR*, vol. 1, p. 992.

G. Refreshing Memory.—**In General.**—The memory of a witness may be refreshed by calling his attention to a proper writing or memorandum.³⁵

Persons by Whom Made.—The memorandum or writing must either have been made by the witness or under his direction, or he must be connected with

buttal may have waived the mere order of proof, this did not concede that the want of foundation for the introduction of evidence that the deceased said that a former statement made was true, could be excused for any reason. The contention made that foundation must be laid, covered sufficiently every suggestion that the evidence was admissible without it. As it was not legitimate rebutting testimony, it could not be admitted without the proper foundation although the order of proof was waived. *Carver v. United States*, 160 U. S. 553, 555, 40 L. Ed. 532. See the title *DYING DECLARATIONS*, vol. 5, p. 687.

34. Surrebuttal.—*Chateaugay, etc., Iron Co. v. Blake*, 144 U. S. 476, 485, 36 L. Ed. 510.

35. Refreshing memory.—*Putnam v. United States*, 162 U. S. 687, 40 L. Ed. 1118; *Vicksburg, etc., Railroad v. O'Brien*, 119 U. S. 99, 102, 30 L. Ed. 299.

"The rule is thus stated by Greenleaf (1 Greenl. Ev., § 436): 'Though a witness can testify only to such facts as are within his own knowledge and recollection, yet he is permitted to refresh and assist his memory, by the use of a written instrument, memorandum or entry in a book, and may be compelled to do so if the writing is presented in court. It does not seem to be necessary that the writing should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak to the facts from his own recollection. So, also, where the witness recollects that he saw the paper while the facts were fresh in his memory, and remembers that he then knew that the particulars therein mentioned were correctly stated. And it is not necessary that the writing thus used to refresh the memory should itself be admissible in evidence; for if inadmissible in itself as for want of a stamp, it may be still referred to by the witness.'" *Putnam v. United States*, 162 U. S. 687, 694, 40 L. Ed. 1118.

The right of counsel to refresh the memory of a witness in no way depends on the surprise that may have been created by the testimony of the witness,

which is one of the grounds for impeachment of one's own witness. The right to refresh the memory of a witness, by proper matter, exists independently of surprise. Where a legal instrument for refreshing the memory exists, it may be availed of by the witness himself or may be permitted to be referred to by the court without reference to the course of the examining counsel. *Putnam v. United States*, 162 U. S. 687, 697, 40 L. Ed. 1118. See post, "Impeachment of One's Own Witness," V, A, 4.

In a suit against a railroad company to recover for personal injuries received by an accident to a train, a written statement as to the nature and extent of the injuries, made by the plaintiff's physician while treating him for them, while inadmissible as affirmative evidence for the plaintiff, even though it was attached to a deposition of the physician, in which he swore that it was written by him and that it correctly stated the condition of his patient at the time referred to, it could have been used by the witness for the purpose of refreshing his recollection as to the facts therein stated. *Vicksburg, etc., Railroad v. O'Brien*, 119 U. S. 99, 102, 30 L. Ed. 299, distinguished in *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 520, 34 L. Ed. 747.

As to memoranda as evidence, see the title *DOCUMENTARY EVIDENCE*, vol. 5, p. 461.

Admissibility of memoranda for other purposes.—As to rulings by the supreme court that the general doctrine that memoranda made at the time the transaction in issue occurred are admissible for any other purpose than to refresh the memory of the witness, is not a rule to which the supreme court is committed, see the title *DOCUMENTARY EVIDENCE*, vol. 5, p. 461.

As to refreshing memory by notes taken at a former trial, as to evidence of a witness therein, since deceased, see the title *DEPOSITIONS*, vol. 5, p. 326.

Where "an unproved copy of an unproved account" was handed to a witness and read and used by him as a memorandum with which to refresh his recollection of the articles mentioned in an ac-

it in such a way as to make it competent for the purpose for which it is proposed to use it.³⁶

Contemporaneousness of Memoranda.—It is also well settled that the writings or memoranda are inadmissible to refresh the memory of a witness, unless reduced to writing at or shortly after the time of the transaction, and while it must have been fresh in his memory.³⁷

V. Impeachment and Corroboration.

A. Impeachment—1. **RIGHT TO IMPEACH.**—As to the right of the accused in the federal courts to a confrontation of witnesses, and his right to impeach

count, the court did not err in allowing this to be done, and permitting his testimony to go to the jury for what it was worth. *New York, etc., Co. v. Fraser*, 130 U. S. 611, 620, 32 L. Ed. 1031.

36. Persons by whom memorandum is made.—*Putnam v. United States*, 162 U. S. 687, 694, 40 L. Ed. 1118.

Testimony taken before grand jury.—Where the objection below did not address itself to the fact that the minutes of the testimony taken before the grand jury had not been properly authenticated or that they had not been reduced to writing in the presence of the witness or read over or examined by him at the time, the court assumed that in these particulars the use of the testimony taken before the grand jury to refresh memory was not objectionable. *Putnam v. United States*, 162 U. S. 687, 694, 40 L. Ed. 1118.

Entries made by witness or some one under his supervision.—In an action on a contract for the construction of a crushing plant, a party sent by the plaintiff to superintend the erection of the plant and to watch its workings when completed was allowed to testify as to the workings of such plant for a certain period from books in which the workings of the mill were recorded either by himself or the foreman of the defendant company. He was present at the mill most of the time during the day and had a general knowledge of the accuracy of these entries, so far as respects the work during that time. Held, that the testimony was competent for that purpose. *Chateaugay, etc., Iron Co. v. Blake*, 144 U. S. 476, 483, 36 L. Ed. 510.

37. Contemporaneousness of memoranda.—*Maxwell v. Wilkinson*, 113 U. S. 656, 658, 28 L. Ed. 1037; *Putnam v. United States*, 162 U. S. 687, 695, 706, 40 L. Ed. 1118, distinguishing *Hickory v. United States*, 151 U. S. 303, 38 L. Ed. 170.

"The memorandum must have been 'presently committed to writing,' Lord Holt in *Sandwell v. Sandwell*, Comb. 445; S. C. Holt, 295; 'while the occurrences mentioned in it were recent, and fresh in his recollection,' Lord Ellenborough in *Burrough v. Martin*, 2 Camp. 112; 'written contemporaneously with the transaction,' Chief Justice Tindal in *Steinkeller v. Newton*, 9 Car. & P. 313; or, 'contemporaneously or nearly so with the facts

deposed to,' Chief Justice Wilde (afterwards Lord Chancellor Truro) in *Whitfield v. Aland*, 2 Car. & K. 1015." *Maxwell v. Wilkinson*, 113 U. S. 656, 658, 28 L. Ed. 1037; *Putnam v. United States*, 162 U. S. 687, 695, 40 L. Ed. 1118.

Reason of rule.—"The very essence, however, of the right to thus refresh the memory of the witness is, that the matter used for that purpose be contemporaneous with the occurrences as to which the witness is called upon to testify. Indeed, the rule which allows a witness to refresh his memory by writings or memoranda is founded solely on the reason that the law presupposes that the matters, used for the purpose, were reduced to writing so shortly after the occurrence, when the facts were fresh in the mind of the witness, that he can with safety be allowed to recur to them in order to remove any weakening of memory on his part, which may have supervened from lapse of time." *Putnam v. United States*, 162 U. S. 687, 695, 40 L. Ed. 1118.

Memoranda made four months after conversation took place.—The testimony given before a grand jury, and reduced to writing, as to conversations that occurred more than four months before is not contemporaneous and will not support a reasonable probability that the memory of the witness, if impaired at the time of the trial, was not equally so when his testimony on the prior occasion was committed to writing. *Putnam v. United States*, 162 U. S. 687, 696, 40 L. Ed. 1118.

Memorandum made twenty months after transaction.—Where a memorandum in writing of a transaction is made twenty months after it took place and the person making the memorandum states that he does not recollect the transaction but that it took place, for he had so stated in the memorandum, as it was his habit never to sign a statement unless it was true, it is error to admit such memorandum in aid of his memory. *Maxwell v. Wilkinson*, 113 U. S. 656, 659, 28 L. Ed. 1037.

What is contemporaneous.—In appreciating what length of time after the occurrence may be considered as "contemporaneous," as "shortly after the time of the transaction," or "while fresh in his recollection," within the meaning of

their testimony, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 496. As to right to impeach the testimony of defendant in a criminal case when he takes the stand in own behalf, see the title *CONSTITUTIONAL LAW*, vol. 4, p. 512; *CRIMINAL LAW*, vol. 5, p. 128. As to contradiction of dying declarations, see the title *DYING DECLARATIONS*, vol. 5, p. 688.

2. **PRIOR CONTRADICTORY STATEMENTS**—a. *In General*.—The credibility of a witness may be impeached, after proper foundation is laid, by proof of prior inconsistent statements.³⁸ The courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him. They have even gone so far as to permit him to be recalled and cross-examined on that subject after he has left the stand.³⁹

b. *Laying the Foundation*.—**In General**.—The foundation must be first laid for impeaching a witness, by calling his attention to the time, place and circumstances of the contradictory statements, whether they were in writing or made orally.⁴⁰ This necessity of laying a foundation renders necessary the taking

the rule that memoranda are inadmissible to refresh the memory of a witness unless reduced to writing or shortly after the time of the transaction, and while it must have been fresh in his memory, the courts have differed somewhat, depending of course upon the facts of each particular case. See *Putnam v. United States*, 162 U. S. 687, 696, 40 L. Ed. 1118, where illustrations are given.

38. Inconsistent statements.—*Goldsby v. United States*, 160 U. S. 70, 74, 40 L. Ed. 343; *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 34 L. Ed. 747; *Hickory v. United States*, 151 U. S. 303, 309, 38 L. Ed. 170.

39. Liberality of court in allowing impeachment.—*Ayers v. Watson*, 132 U. S. 394, 404, 33 L. Ed. 378.

40. Necessity for foundation.—*Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 520, 34 L. Ed. 747; *Conrad v. Griffey*, 16 How. 38, 46, 14 L. Ed. 835; *Mattox v. United States*, 156 U. S. 237, 245, 39 L. Ed. 409; *The Charles Morgan*, 115 U. S. 69, 77, 29 L. Ed. 316.

The authorities, except in some of the New England States, are almost unanimous to the effect that such foundation must be laid for impeachment of witness. *Mattox v. United States*, 156 U. S. 237, 245, 39 L. Ed. 409; *Conrad v. Griffey*, 16 How. 38, 47, 14 L. Ed. 835.

Great particularity required in questioning.—The attention of the witness must be called to what may be brought forward for the purpose of impeaching or contradicting him, with great particularity as to time and place and circumstances so that he can deny it, or make any explanation, intended to reconcile what he formerly said with what he is now testifying. *Ayers v. Watson*, 132 U. S. 394, 404, 33 L. Ed. 378; *Conrad v. Griffey*, 16 How. 38, 46, 14 L. Ed. 835; *The Charles Morgan*, 115 U. S. 69, 77, 29 L. Ed. 316.

Questions to be asked on cross-examination.—"If a witness is to be impeached, in consequence of his having made, on some other occasion, different

statements, oral or written, from those which he makes on the witness stand, as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where, and the person to whom he made the varying statements. In no other way can a foundation be laid for putting in the impeaching testimony." *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 519, 34 L. Ed. 747.

A witness for the plaintiff was asked on cross-examination, if he had not recently stated to defendant parties, in talking about the matter, that he wanted the plaintiffs to recover because he would then get his pay. Plaintiffs' counsel objected to the question on the ground that he did not specify time and place. Defendant's counsel replied that he did not propose to impeach the witness. There was no error in sustaining the objection. If the object was to impeach the witness by subsequent contradiction, the question was clearly incompetent, as too indefinite. *Oil Co. v. Van Etten*, 107 U. S. 325, 335, 27 L. Ed. 319.

Circumstances same whether witness testifies orally or by deposition.—The circumstances under which the former statements of a witness can be introduced to contradict or impeach his testimony, are the same whether his testimony in the principal case is given orally in court before the jury or is taken by deposition afterwards read to them. *Ayers v. Watson*, 132 U. S. 394, 404, 33 L. Ed. 378.

Reason for rule.—This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enables him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony. *Conrad v. Griffey*, 16 How. 38, 46, 14 L. Ed. 835; *Mattox v. United States*, 156 U. S. 237, 245, 39 L. Ed. 409.

Letters written by a witness cannot be

out of a new deposition when a party wishes to avail himself of contradictory declarations made after a deposition is taken.⁴¹

Contradictory Statements in Writing.—Where the contradictory statement is in writing, its production for the purpose of laying the foundation for impeachment is necessary, except under special circumstances.⁴²

Presumptions as to Proper Foundation.—It will be presumed that proper foundation was laid where cross-examination shows that attention of the witness was called to prior statements in other depositions used in another trial and he was specifically examined as to same, and admitted that he testified therein.⁴³

Death Does Not Change Rule.—The requisite foundation is not dispensed

used for the purpose of impeaching him, where his attention has not been first called to them. *Gregory Consol. Min. Co. v. Starr*, 141 U. S. 222, 226, 35 L. Ed. 715; *Conrad v. Griffey*, 16 How. 38, 14 L. Ed. 835.

Declarations inadmissible as evidence of fraud but competent for impeachment.—Where certain declarations of a witness were inadmissible to show fraud and conspiracy in a sale, but it was urged they were competent for the purpose of contradicting him as a witness by showing that he had made statements out of court different from those made as a witness, a foundation should have been laid for the use of those declarations, and the court should have instructed the jury, that, in determining, between the parties to the record, the true character of the sale, the subsequent declarations were competent only as impeaching his credibility as a witness. *Winchester, etc., Mfg. Co. v. Creary*, 116 U. S. 161, 166, 29 L. Ed. 591.

41. Contradictory declarations made subsequent to taking of deposition.—The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions, is inadmissible, if objected to. The only way for the party to avail himself of such declarations is to sue out a second commission. Such evidence is always inadmissible until the witness, whose testimony is thus sought to be impeached has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation. *Conrad v. Griffey*, 16 How. 38, 46, 14 L. Ed. 835.

42. If the contradictory declaration is in writing, questions as to its contents, without the production of the instrument itself, are ordinarily inadmissible, and a cross-examination for the purpose of laying the foundation of its use as impeachment would not, except under special circumstances, be allowed until the paper was produced and shown to the witness

while under examination. Circumstances may arise, however, which will excuse its production. All the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so. Whether this has been done is for the court to determine before the impeaching evidence is admitted. *The Charles Morgan*, 115 U. S. 69, 77, 29 L. Ed. 316.

Rule in the Queen's Case.—"The rule of evidence invoked by the plaintiff, and laid down in *The Queen's Case*, 2 Brod. & Bing. 284, 288, is, that if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read as the evidence of the existence of the statements. This principle is not applicable to the present case, because the plaintiff did not take the objection that the whole statement was not, but should have been, read as evidence; and the court, with the assent of the plaintiff, excluded it from being read in evidence." *Chicago, etc., R. Co. v. Artery*, 137 U. S. 507, 520, 34 L. Ed. 747.

43. Presumption as to proper foundation.—For the purpose of impeaching and contradicting the depositions of certain witnesses in a collision case, their depositions in former suits growing out of the same collision were offered and admitted. The cross-examination, on which the right to use such depositions for impeachment depended, was not put into the record. The bill of exceptions showed, however, that in the cross-examination of the witnesses their attention was called to the evidence in the other cases; that they were specifically examined as to the correctness of said evidence, and admitted having testified therein; that no objection was made that the evidence offered was not evidence of said witnesses respectively, or that the same had been imperfectly taken or reported. Held, that it must be presumed that ample foundation was laid for the introduction of the evidence. *The Charles Morgan*, 115 U. S. 69, 78, 29 L. Ed. 316.

with by reason of the death of a person whose testimony is introduced in evidence.⁴⁴

Dying Declarations.—As to where requisite foundation is dispensed with in case of a dying declaration, see the title DYING DECLARATIONS, vol. 5, p. 688.

c. *Relevancy, Competency and Materiality of Evidence*—(1) *In General.*—A witness may be impeached by showing that on another occasion he made contradictory statements relating to a matter material and relevant to the case;⁴⁵ but such statements must be shown to have been made by him, not those of another person, not a witness in the case.⁴⁶

44. Death does not dispense with requisite foundation.—The requirement that before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself, as to whether he has ever made such statements, is not dispensed with by reason of the death of a person, whose testimony at a former trial is introduced in evidence and it is impossible to so question him. *Mattox v. United States*, 156 U. S. 237, 250, 39 L. Ed. 409.

Principle applicable to depositions or other statements.—"It is believed that in no case has any court deliberately held that after the witness's testimony has been taken, committed to writing and used in the court, and by his death he is placed beyond the reach of any power of explanation, then in another trial such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony." *Ayers v. Watson*, 132 U. S. 394, 404, 33 L. Ed. 378; *Mattox v. United States*, 156 U. S. 237, 247, 39 L. Ed. 409. See, generally, the title DEPOSITIONS, vol. 5, p. 320.

Applies both to criminal and civil cases.—The case of *Ayers v. Watson*, 132 U. S. 394, 404, 33 L. Ed. 378, differs principally from the case of *Mattox v. United States*, 156 U. S. 237, 247, 39 L. Ed. 409, in the fact that it was a civil instead of a criminal case. The former case was an action of ejectment, in which the defendant introduced the deposition of one Johnson, taken in 1878 or 1880—a surveyor who had made a survey of the land in question. His deposition had been twice taken and used upon former trials but prior to the last trial he had died. Plaintiff, in rebuttal, offered a deposition of the witness taken in 1860 in a suit between other parties, in which his testimony in regard to the matters to which he testified in the deposition offered by defendant varied materially from these latter depositions. The deposition was held to be inadmissible. Three trials had been had before a jury, in each of which the same testimony of the witness Johnson had been introduced and relied on, and in each of which he had been cross-examined, and no reference made to his former deposition nor any attempt to call his attention to it.

The cases in the state courts are by no means numerous, but these courts, so far as they have spoken upon the subject, are unanimous in holding that the fact that the attendance of the witness cannot be procured, or even that the witness himself is dead, does not dispense with the necessity of laying the proper foundation. *Mattox v. United States*, 156 U. S. 237, 248, 39 L. Ed. 409.

Reason for rule.—While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. The history of criminal trials leads one to believe that witnesses as to inconsistent statements would be forthcoming with painful frequency to make the desired proof. *Mattox v. United States*, 156 U. S. 237, 250, 39 L. Ed. 409.

45. Statements as to speed of train.—Where in an action for personal injuries a witness on his direct examination testified that a train was going ten miles an hour, and on cross-examination denied stating to another party that the train was going about fifteen miles an hour, this statement is competent evidence to impeach his credibility. *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469, 477, 35 L. Ed. 213.

Declarations inconsistent with a letter of a codefendant.—If one defendant produce in evidence a letter from his codefendant to the plaintiff, the latter may give in evidence the written declarations of that codefendant, to discredit the letter by showing that he had at another time, given a very different account of the same transaction. *Riggs v. Lindsay*, 7 Cranch 500, 504, 3 L. Ed. 419.

A paper in the handwriting of a deceased cosurety of the defendant was clearly inadmissible to show that the testimony of the other witnesses, was not consistent with the appraisalment which they had made, pursuant to the order of the court. *Very v. Watkins*, 23 How. 469, 473, 16 L. Ed. 522. See, generally, the title PRINCIPAL AND SURETY, vol. 9, p. 713.

46. Statements by a third person.—S., a witness in behalf of the government,

(2) *Evidence Introduced without Limitation.*—Where evidence in regard to which a witness has been cross-examined is offered without limitation, it may be considered not only as impeaching the credibility of the witness but as a piece of independent evidence in the cause.⁴⁷

3. CHARACTER OR REPUTATION OF WITNESS—*a. Examination of Witness—*

(1) *In General.*—Where the purpose of testimony is to impeach a witness for want of veracity, it is not improper to ask the person on the stand what is the general "reputation" for truth of the witness sought to be impeached. It is even more proper than to ask what is his general "character" for truth; though the question is sometimes asked in the latter form; the word "character" being then used as synonymous with "reputation."⁴⁸

(2) *Extent of Inquiry.*—The questions must call for the general reputation for truth or veracity of the witness sought to be impeached, or his general character; they cannot be extended to particular facts or transactions.⁴⁹

b. Evidence Admissible.—Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or upon warm admiration for constant truthfulness, or natural indignation at habitual falsehood; and whether his neighbors are virtuous or immoral in their own lives. Such considerations may affect the weight, but do not touch the

was asked on cross-examination, whether he had heard his father, in the presence of R., make a certain statement. He answered that he did not. On the opening of the defendant's case, S. was recalled for further cross-examination, and the question was again asked him, and he replied to the same effect. Thereupon the defense put R. upon the stand to testify as to the conversation had by him with the father of S. (in the presence of S.) the father not being a witness in the cause. The testimony was excluded on the ground that while it would be competent if the proper foundation had been laid to impeach the witness, by proving statements made by him, it was incompetent to affect his credibility by showing statements made by another person, not a witness in the case. *Goldsby v. United States*, 160 U. S. 70, 74, 40 L. Ed. 343.

47. *Effect of offering evidence for impeachment without limitation.*—Where a witness was cross-examined as to the contents of a prior affidavit, in order to impeach his credibility as a witness, and the plaintiff later offers the affidavit in evidence, general and without limitation as to its purpose, it became a piece of the plaintiff's evidence to be weighed and considered like any other testimony in the case, and the defendants were entitled to an instruction that it not only could be considered as impeaching the credibility of the witness but that it might be considered with the deposition of the witness in the cause as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition. Doubtless the utmost effect of the affidavit, had it been formally introduced on cross-examination, would be to destroy the testimony of the witness in the deposition. On the other

hand, as the affidavit was not put in upon the cross-examination of the witness, and the plaintiff read it as part of her case, it must necessarily be considered as a piece of independent evidence to be weighed in connection with the deposition, and the jury was necessarily left to consider which of the two, when taken in connection with the other testimony in the case, was to be considered as the more credible. *Connecticut, etc., Ins. Co. v. Hillmon*, 188 U. S. 208, 214, 47 L. Ed. 446.

48. *Proper questions to ask.*—*Knode v. Williamson*, 17 Wall. 586, 21 L. Ed. 670.

49. *Extent of inquiry.*—"Courts of justice differ very widely, whether the general reputation of the witness for truth and veracity is the true and sole criterion of his credit, or whether the inquiry may not properly be extended to his entire moral character and estimation in society. They also differ as to the right to inquire of the impeaching witness whether he would believe the other on his oath. All agree, however, that the first inquiry must be restricted either to the general reputation of the witness for truth and veracity, or to his general character; and that it cannot be extended to particular facts or transactions." See *Teese v. Huntingdon*, 23 How. 2, 11, 16 L. Ed. 479, where the cases are examined.

Must not call for own knowledge of particular acts or transactions.—The questions must not call for the witness' own knowledge of acts and transactions from which the reputation is derived. *Teese v. Huntingdon*, 23 How. 2, 13, 16 L. Ed. 479.

Reputation for moral character.—For the purpose of impeaching a witness, a question was asked of another witness,

competency, of the evidence offered to impeach or to support his testimony.⁵⁰ Testimony as to the admissions and conduct of a person cannot be impeached by his statements to a third party as to the character of the witness.⁵¹

c. *Knowledge Required of Impeaching Witness.*—"Whenever a witness is called to impeach the credit of another, he must know what is generally said of the witness whose credit is impeached by those among whom the last-named witness resides, in order that he may be able to answer the inquiry either as to his general character in the broader sense, or as to his general reputation for truth and veracity."⁵²

4. **IMPEACHMENT OF ONE'S OWN WITNESS.—In General.**—Proof of the contradictory statements of one's own witness, voluntarily called and not a party, inasmuch as it would not amount to substantive evidence and could have no effect but to impair the credit of the witness, was generally not admissible at common law.⁵³

"What is the reputation of the (first) witness for moral character?" This question was objected to, and properly not allowed to be put by the court below. *Teese v. Huntingdon*, 23 How. 2, 16 L. Ed. 479.

50. **Evidence admissible.**—*Brown v. United States*, 164 U. S. 221, 224, 41 L. Ed. 410. See the title EVIDENCE, vol. 5, p. 1053.

51. **Conversations of deceased party as to character of witness used for impeachment.**—The plaintiff's witness testified that the deceased had admitted to him his marriage with a certain party and stated his reasons for concealing his own name and taking hers; also, that the deceased had great confidence in him. One of the defendants called as a witness for the defense, was permitted, against the objection of plaintiff, to testify to conversations with deceased about the witness, and that deceased had expressed great distrust of him, calling him anything but an honest man and stating that he had been in the penitentiary, and that it had cost deceased \$500 to get him out. *Maryland v. Baldwin*, 112 U. S. 490, 494, 28 L. Ed. 822.

52. **Knowledge required of impeaching witnesses.**—*Teese v. Huntingdon*, 23 How. 2, 13, 16 L. Ed. 479.

"He is not required to speak from his own knowledge of the acts and transactions from which the character or reputation of the witness has been derived, nor indeed is he allowed to do so, but he must speak from his own knowledge of what is generally said of him by those among whom he resides, and with whom he is chiefly conversant." *Teese v. Huntingdon*, 23 How. 2, 13, 16 L. Ed. 479.

Where witness has no knowledge of general reputation.—Where a witness was examined for the purpose of impeaching a witness, and another witness was asked what was the reputation of the first-mentioned witness for truth and veracity, and he replied that he had no means of knowing, not having had any transac-

tions with him for five years, this question was excluded by the court, which must judge according to its discretion whether or not it applies to a time too remote. *Teese v. Huntingdon*, 23 How. 2, 16 L. Ed. 479.

A witness testified that he knew the one sought to be impeached, and had had business transactions with him during the years 1852-53 in the city where they resided. On being asked what was the reputation of the witness for truth and veracity, he replied that he had no means of knowing what it was, not having had any dealings with him since those transactions; thereupon counsel repeated the question, limiting it to that period. An objection to the question on the ground that the period named in the question was too remote, was sustained. Held, such testimony undoubtedly might properly be excluded by the court when it applies to a period of time so remote from the transaction involved in the controversy; as thereby to become entirely unsatisfactory and immaterial; and as the law could not fix that period of limitation, it must necessarily be left to the discretion of the court. *Teese v. Huntingdon*, 23 How. 2, 14, 16 L. Ed. 479.

53. **Impeachment of one's own witness.**—*Hickory v. United States*, 151 U. S. 303, 309, 38 L. Ed. 170. See *Bram v. United States*, 168 U. S. 532, 565, 42 L. Ed. 568.

Where one was also witness of adverse party.—In a proceeding upon a writ of right, the demandants were not at liberty to discredit their own witness who was also a witness of the adverse parties by showing his former declarations on the same subject; though they might show by other witnesses that he was mistaken as to the matters stated. *Ellicott v. Pearl*, 10 Pet. 412, 441, 9 L. Ed. 475.

Where witnesses of same party contradict each other.—Where on an information for goods seized as British goods, and imported into Pennsylvania, the informer called a witness, who was contradicted by another witness of his own,

Parties Taken by Surprise.—But when a party is taken by surprise by the evidence of his witness, the latter may be interrogated as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness.⁵⁴

Statutes Modifying Common Law.—It has been provided by statute in many jurisdictions that in case a witness proves adverse, inconsistent statements made at other times may be shown.⁵⁵

B. Corroboration.—As a general rule where the credibility of the witness has been attacked by showing prior inconsistent statements, the testimony cannot be corroborated by showing that he has made the same statement at other times. There are exceptions of a peculiar nature, as where the testimony is assailed as a fabrication of a recent date, or a complaint recently made.⁵⁶ It

he could not call his first witness to disprove what the second had said. *Rapp v. Le Blanc*, 1 Dall. 63, 1 L. Ed. 38. See, generally, the title INFORMERS, vol. 6, p. 1020.

In an action to secure the proceeds of certain property assigned, the plaintiff introduced a witness to prove the execution and delivery of the assignment; on cross-examination the witness stated by implication that the assignment created a trust in favor of a bank, of which one of the defendants was receiver; but he limited it to a certain amount. The court allowed other witnesses to state that such witness had at other times out of court stated that the assignment was made to secure the bank generally for the assignor's liability to it. It was held that the receiver on his cross-examination did not make the party testifying his own witness, and became bound by his statements as to the assignment, and be precluded from showing he had made contradictory statements. The evidence of the witness' declarations was put in not merely to contradict what he said on the stand, but as evidence largely relied on to prove the facts which he had stated. There is no doubt, of course, that the witness had a right to testify to what he was shown to have declared, however bad it might be for the plaintiff. Therefore the one question is whether his declaration was some evidence as against them of facts which certainly might have been established by his oath. *Fourth Nat. Bank v. Albano*, 188 U. S. 734, 736, 47 L. Ed. 673. See, generally, the title ASSIGNMENTS, vol. 2, p. 549.

54. Party taken by surprise.—*Hickory v. United States*, 151 U. S. 303, 309, 38 L. Ed. 170, distinguished in *Putnam v. United States*, 162 U. S. 687, 706, 40 L. Ed. 1118.

"Surprise on the part of the examiner of a witness by the latter's unexpected adverse testimony, on direct examination, was among the elements by which it was determined that the right existed to ask a witness as to contradictory statements

previously made by him, not for the purpose of refreshing his memory, but with the object of neutralizing or overthrowing his testimony, and this course was only allowed where the right to neutralize or impeach the testimony of one's own witness existed. Indeed, this doctrine of surprise was a part of the controversy as to whether one could be allowed to neutralize or contradict the testimony of his own witness under given conditions which was long agitated, and which culminated in some of the states of the Union and in England in statutory provision on the subject." *Putnam v. United States*, 162 U. S. 687, 697, 40 L. Ed. 1118.

Where a witness for the defendants was not hostile and his testimony was not in itself prejudicial, yet it did contradict one of the defendants, but the court allowed defendants' counsel to cross-examine the witness they chose, and to prove the fact to be otherwise than as stated by him, the supreme court said that it could not say that error was committed because the court in the exercise of its discretion, under the circumstances, declined to concede any further relaxation of the rule, and allow defendants to show previous declarations of witness. *Hickory v. United States*, 151 U. S. 303, 309, 38 L. Ed. 170.

55. "By statute in England and in many of the states, it has been provided that a party may, in case the witness shall in the opinion of the judge prove adverse, by leave of the judge, show that he has made at other times statements inconsistent with his present testimony, and this is allowed for the purpose of counteracting actually hostile testimony with which the party has been surprised." *Hickory v. United States*, 151 U. S. 303, 309, 38 L. Ed. 170.

56. Corroborative evidence.—"Where parol proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion, that, in

is an additional objection to the admission of the confirmatory evidence where it consists of declarations subsequent to the contradictory declarations given in evidence to impeach the verity of the witness.⁵⁷

VI. Credibility of Witnesses.⁵⁸

A. Contradictory Statements.—Where many witnesses are produced to the same facts, and they contradict one another in material circumstances, they prove themselves unworthy of credit.⁵⁹

B. Improbability of Statements.—The improbability of the statements of a witness goes to his credibility.⁶⁰

general, evidence is not admissible, in order to confirm his testimony, to prove that, at other times, he has given the same account as he has under oath; for it is but his mere declaration of the fact; and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations, not under oath; and the repetition of his assertion does not carry his credibility further, if so far, as his oath. We say, in general, because there are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case; as, where the testimony is assailed as a fabrication of a recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." *Ellicott v. Pearl*, 10 Pet. 412, 439, 9 L. Ed. 475. See *Conrad v. Griffey*, 11 How. 480, 491, 13 L. Ed. 779.

The modern rule in England that for the purpose of impugning testimony of a witness, the declarations at another time might be inquired into, but not for the purpose of confirming his evidence, was approved. *Ellicott v. Pearl*, 10 Pet. 412, 440, 9 L. Ed. 475.

57. Declarations subsequent to the contradictory declarations.—*Ellicott v. Pearl*, 10 Pet. 412, 440, 9 L. Ed. 475.

Where a witness was examined for the plaintiff, and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others, affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant. *Conrad v. Griffey*, 11 How. 480, 13 L. Ed. 779; *Conrad v. Griffey*, 16 How. 38, 14 L. Ed. 835.

Evidence to corroborate testimony of surveyor in writ of right proceedings.—The demandants examined a witness, by way of deposition, as to a certain survey, and the tenants to discredit the testimony of the witness introduced evidence as to certain statements made by a witness in regard to such survey. The demandants, to sustain the witness, offered witnesses to prove the statements and conversations of said witness at other times, corresponding with the statements

made in his deposition relative to the survey. The latter evidence was excluded. *Ellicott v. Pearl*, 10 Pet. 412, 438, 9 L. Ed. 475.

58. Credibility of witnesses.—See the titles EVIDENCE, vol. 5, p. 1052, et seq.; INSTRUCTIONS, vol. 7, p. 47.

Considerations determining weight to be given testimony of witnesses.—See the title EVIDENCE, vol. 5, p. 1048, et seq. As to considerations affecting the weight of the testimony of witnesses in insurance cases as to habits and conduct of the deceased, see the title INSURANCE, vol. 7, p. 164.

Expert and opinion evidence as to value.—As to weight and credibility of such testimony, see the title EVIDENCE, vol. 5, p. 1029, et seq.

Conclusiveness of positive, uncontradicted testimony and circumstances discrediting it.—See the title EVIDENCE, vol. 5, p. 1047.

Relative value of positive and negative evidence.—See the title EVIDENCE, vol. 5, p. 1047.

Proof of marriage.—As to where testimony was of such a character that a hundred such witnesses would not be sufficient to impeach the testimony of one witness swearing positively to a marriage, see the title MARRIAGE, vol. 8, p. 252.

Proof that a Chinaman is a merchant by testimony of two witnesses other than Chinese.—See the title CHINESE EXCLUSION ACTS, vol. 3, p. 773.

59. Witnesses contradicting each other.—*Luco v. United States*, 23 How. 515, 536, 16 L. Ed. 545.

A witness, who at different times gives different versions of the same transaction and whose testimony varies as his interest in the particular litigation may require, cannot complain if the court fails to give his testimony the weight to which it would be otherwise entitled. See the title EVIDENCE, vol. 5, p. 1049.

60. Preternatural recollection of dates.—See the title EVIDENCE, vol. 5, p. 1050.

Unusual powers of recollection.—See the title EVIDENCE, vol. 5, p. 1050.

Even in the absence of any direct conflicting testimony, there may be such an inherent improbability in the statement of a witness as to induce the court or

C. Manner of Testifying.—The conduct of a witness and his manner of testifying affects his credibility as a witness.⁶¹

D. Infamy.—See the title EVIDENCE, vol. 5, p. 1052.

E. Interest and Bias.—While interest is no longer a disqualification as a witness,⁶² interest and bias may be considered as affecting his credibility.⁶³

F. Intelligence and Experience of Witness.—As to erroneous estimates by inexperienced and not very intelligent men as to time and distance not being a good reason for discrediting their testimony, which in other respects is reliable, see the title EVIDENCE, vol. 5, p. 1050.

jury to disregard his evidence. See the title APPEAL AND ERROR, vol. 5, p. 1047.

61. Conduct and manner of testifying.—See the title EVIDENCE, vol. 5, pp. 1047, 1050.

62. Interest no longer a disqualification.—See ante, "Statutory Changes in Common-Law Rules," III.

63. Interest is now considered as affecting credibility, not as a barrier to the witness stand. *Reagan v. United States*, 157 U. S. 301, 306, 39 L. Ed. 709.

Witnesses interested in result of suit.—While the jury has no right to arbitrarily disregard the positive testimony of unimpeached and uncontradicted witnesses, the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. *Sonnenheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 408, 43 L. Ed. 492.

If a witness is liable to an influence, it taints his credibility. *Mifflin v. Bingham*, 1 Dall. 272, 275, 1 L. Ed. 133.

A man might lawfully transfer all his interest in property which is about to become the subject of suit, for the purpose of making himself a witness in such suit. And while his testimony is to be carefully, and, perhaps, suspiciously scrutinized, when contradicting the positive statements made by a defendant in equity responsively to the complainant's bill, such testimony is still to be judged of by the ordinary rules which govern in the law of evidence, and to be credited or discredited accordingly. *Tobey v. Leonards*, 2 Wall. 423, 17 L. Ed. 842.

Defendant a witness.—As to the rule that the fact a witness is the defendant does not condemn him as unworthy of belief, but at the same time creates an interest greater than any other witness and to that extent affects the question of credibility and is therefore a proper matter to be suggested by the court to the jury, see the title CRIMINAL LAW, vol. 5, p. 129, n. 64.

As to charge of the court as to the weight and credibility of evidence given by the accused, see the title CRIMINAL LAW, vol. 5, p. 129.

Patents.—As to bias or interest affecting the credibility of witnesses testifying

to a prior use of a device, see the title PATENTS, vol. 9, pp. 191, 192.

Interest of patentee in suit for infringement.—*Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 486, 35 L. Ed. 521.

Depositions of defendants taken under cross-examination.—Where the plaintiff used the depositions of defendants, taken "as under cross-examination" they made those parties their own witnesses, while the plaintiffs were not concluded by their evidence, and might show they were mistaken, it could not be properly contended by the plaintiffs that they were unworthy of credit. The evidence must be given such weight as under all the circumstances it is fairly entitled to receive. *Dravo v. Fabel*, 132 U. S. 487, 490, 33 L. Ed. 421.

Foreman of railroad employees.—In an action for injuries by a spike maul being thrown from a railroad track by a passing train, where the negligence of the foreman of the gang upon failing to discover the maul upon the track immediately prior to the passage of the train, under a Texas statute, was that of a vice principal and not a fellow servant, the material facts in the case were whether the foreman just prior to the coming of the train looked along the track and did not see any obstructions on it. He stated that he did not, but the court was of opinion that other facts proved in the case were of such a character as to make it proper to submit a question to the jury. The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness where his testimony relates to the question of the performance or nonperformance of a duty which he owed on account of the position which he occupied. It was, therefore, a question for the jury as to what measure of credence should be given to his testimony. Of course, the mere absence of evidence that the foreman did his duty would not be equivalent to evidence, direct or circumstantial, that

G. Falsus in Uno, Falsus in Omnibus.—Circumstances often render this doctrine applicable to the testimony of a witness.⁶⁴

H. Questions of Law and Fact.—The credibility of witnesses is a matter to be determined by the jury.⁶⁵

I. Witnesses Waiving Privilege.—Where an attorney refused to be employed in a transaction, and the right of privilege from examination is not claimed, it cannot affect his credibility that he is willing to expose fraud in the transaction under these circumstances.⁶⁶

J. Presumptions.—A witness unimpeached is to be presumed unimpeachable.⁶⁷

VII. Privilege of Refusing to Testify.

A. Discovery.⁶⁸—As to rule in equity never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property, see the title DISCOVERY, vol. 5, p. 354.

B. Testimony against Interest.—In a civil case one is not bound to testify against his interest.⁶⁹

C. Communications between Government Officers.—See the title PRIVILEGED COMMUNICATIONS, vol. 9, p. 748.

D. Self-Incrimination.—The provision that no one shall be compelled to give testimony which may expose him to prosecution for crime is treated elsewhere in this work.⁷⁰

he did not, and it rested with the plaintiff to show negligence of the foreman for which the defendant would be liable. *Texas, etc., v. R. Co. v. Carlin*, 189 U. S. 354, 361, 47 L. Ed. 849.

64. Falsus in uno, etc.—See the title EVIDENCE, vol. 5, p. 1052.

65. Credibility of witnesses.—See the titles CRIMINAL LAW, vol. 5, p. 118; EVIDENCE, vol. 5, p. 1059; INSTRUCTIONS, vol. 7, p. 47.

Whether certain letters alleged to be in the possession of the defendant were ever written, and what, if written, they contained, presented a question of fact depending on the credibility of the witness, and that question of fact was for the consideration of the jury, and not for the determination of the court. *Dunbar v. United States*, 156 U. S. 185, 196, 39 L. Ed. 390.

Instructions as to credibility of witnesses.—See the title INSTRUCTIONS, vol. 7, p. 47.

In an action by a widow for the death of her husband through the defendant's negligence, the suggestion that because the only witnesses of the accident, and whom the plaintiff was therefore compelled to call, were in the defendant's employ, and might be prejudiced in its favor, the question how far they were so biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof. *Bunt v. Sierra Butte Gold Min. Co.*, 138 U. S. 483, 34 L. Ed. 1031.

66. In a proceeding for confirmation of a land grant it appears that the counsel to whom claimants made application for services, on examination of the document presented to him as evidence of title, re-

fused to be so employed; because the deed produced was a palpable forgery, and the right of privilege from examination was neither claimed by the counsel nor by the claimant. Having answered without objection, it cannot affect his credibility that he was willing to expose a fraud under these circumstances. *Luco v. United States*, 23 How. 515, 540, 16 L. Ed. 545.

67. Presumptions.—*Baker v. Humphrey*, 101 U. S. 494, 498, 25 L. Ed. 1065.

68. Application for witnesses not a discovery of evidence.—An application for witnesses, or "affidavit" as it is called in § 878, Rev. Stat., by one accused of crime to secure attendance of witnesses, is not a "pleading" nor a "discovery of evidence obtained" from him within the meaning of the Revised Statutes, § 860, which provides that such "pleading" or "discovery of evidence obtained" shall not be used against the defendant in a criminal proceeding. The statements therein contained was competent evidence to contradict his testimony when he took the stand in his own behalf. *Tucker v. United States*, 151 U. S. 164, 169, 38 L. Ed. 112. See the title CRIMINAL LAW, vol. 5, p. 129.

69. Testimony against interest.—*United States v. Grundy*, 3 Cranch 337, 344, 2 L. Ed. 459.

70. Constitutional privilege against self-incrimination.—See the title CONSTITUTIONAL LAW, vol. 4, p. 504, for full treatment of the subject.

Importance of provision.—This privilege was recognized in one of our earliest cases. See *Marbury v. Madison*, 1 Cranch 137, 144, 2 L. Ed. 60.

Though a party against whom proceedings are pending denies the possession of

WOMEN.—As to women being citizens of the United States, see the title CITIZENSHIP, vol. 3, p. 798. As to admission to practice law, see the title ATTORNEY AND CLIENT, vol. 2, p. 706. As to right of suffrage, see the title ELECTIONS, vol. 5, p. 724.

WOOD.—See the title REVENUE LAWS, vol. 10, p. 887.

WOOL.—See the title REVENUE LAWS, vol. 10, p. 892. As to wool elastic webbing, see UNION ELASTIC WEBBING, ante, p. 746.

WOODS AND FORESTS.—See the title TREES AND TIMBER, ante, p. 748, and references given.

WOOLEN WASTE.—See the title REVENUE LAWS, vol. 10, pp. 875, 892.

WORDS.—Words are the common signs that mankind make use of to declare their intention to one another.¹

WORDS AND PHRASES.—These are treated, as they occur alphabetically, throughout the series.

WORK AND LABOR.—See the titles ASSUMPSIT, vol. 2, p. 636; IMPLIED CONTRACTS, vol. 6, p. 888. And see note 2.

a cash book, this does not bar his privilege of refusing to produce books of account. *Ballman v. Fagin*, 200 U. S. 186, 196, 50 L. Ed. 433.

No presumption against accused when he fails to testify.—See the title CRIMINAL LAW, vol. 5, p. 131.

As to right of accomplices to pardon where they relinquish their privilege of silence and testify for the prosecution, see the title ACCOMPLICES AND ACCESSORIES, vol. 1, p. 68.

1. Words.—*Lake County v. Rollins*, 130 U. S. 662, 671, 32 L. Ed. 1060. See the titles INTERPRETATION AND CONSTRUCTION, vol. 7, p. 261; STATUTES, ante, p. 62.

2. Work and labor.—Where the overseer and foreman of the body of miners

performed manual labor upon the mine, and planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture, it was "**work and labor**" within the meaning of an act giving a lien for "**work and labor.**" His duties were similar to those of the foreman of a gang of track hands upon a railroad, or of a force of mechanics engaged in building a house; and very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house; their performance may well be called work and labor. *Mining Co. v. Cullins*, 104 U. S. 176, 177, 26 L. Ed. 704. See the titles LIENS, vol. 7, p. 894; MECHANICS' LIENS, vol. 8, p. 331.

WORKING CONTRACTS.

BY A. P. WALKER.

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I. Formation.

A. In General.—A building agreement and the specifications annexed to it constitute the contract.¹

B. Mutual Assent.—The minds of the parties should meet as to the terms of a working contract.²

C. Writing.—Working contracts are not required to be in writing. Whether the contract is reduced to writing and signed by the parties is quite immaterial, so long as the terms were agreed upon and understood between them. When the contractor is directed to proceed with the work called for by the plans the contract is closed, and the preparation and signing of a formal writing only calls into existence additional evidence of the fact.³

D. Plans, Drawings and Specifications, and Bids.—A person advertising for bids for work in accordance with specifications should inform bidders of the condition of the work, so as to enable them to bid understandingly.⁴

Withdrawal of Bids.—See the title MUNICIPAL CORPORATIONS, vol. 8, p. 518.

E. Approval.—A working contract may require the approval of an architect or engineer as a condition essential to its legal consummation.⁵

II. Construction and Operation.

A. Construction Generally.—Working contracts are construed by the

1. **Formation.**—Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 33 L. Ed. 934. See, also, *Harvey v. United States*, 105 U. S. 671, 688, 26 L. Ed. 1206; *Garfield v. United States*, 93 U. S. 242, 23 L. Ed. 779; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398; *Girard Ins., etc., Co. v. Cooper*, 162 U. S. 529, 40 L. Ed. 1062.

The act of congress of 1886, 24 Stat. 12, c. 50, adopting the plans and drawings of an architect for the construction of a public building, did not constitute a contract between the architect and the United States but only declared the intention of congress. *Smithmeyer v. United States*, 147 U. S. 342, 358, 37 L. Ed. 196.

2. **Mutual assent.**—*Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337; *Moffett, etc., Co. v. Rochester*, 178 U. S. 373, 44 L. Ed. 1108. See the title CONTRACTS, vol. 4, p. 561.

A contractor made a formal proposition in writing to pave streets to the board of public works of a municipality, which was considered and agreed to by the head of the board. By the direction of the head of the board the secretary wrote a letter accepting the proposition which concluded, viz, "accepted by order of the board," and signed the same as secretary. The action of the secretary was made without official acceptance of the proposition by the board which consisted of several members, and without any authority from them to indorse the acceptance on it. It was held that this does not constitute a contract with the board of public works and is not "a contract in writing signed by the parties making the same." *Brown v. District of Columbia*, 127 U. S. 579, 32 L. Ed. 262.

Facts showing assent of engineer to change from plans and specifications. See *Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337.

Contract between city and unincorporated association for construction of street railway conditioned upon obtaining consent of city after incorporation. See the title STREET RAILWAYS, ante, p. 252.

3. **Writing.**—*Girard Ins., etc., Co. v. Cooper*, 162 U. S. 529, 543, 40 L. Ed. 1062. And see *Harvey v. United States*, 105 U. S. 671, 688, 26 L. Ed. 1206, citing *Garfield v. United States*, 93 U. S. 242, 23 L. Ed. 779; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398.

4. **Plans, drawings and specifications, and bids.**—*United States v. Gibbons*, 109 U. S. 200, 27 L. Ed. 906.

The specifications of a contract for replacing a government building provided that "the foundations and the brick walls now standing that were uninjured by the fire will remain and be carried up to the height designated in the plan by new work," it was the duty of the officer acting for the United States, the right performance of which the government assumed, to point out to the bidders the parts of the foundation and walls which were in fact so far uninjured as to enter into a new structure, and this was actually done by dismantling and stripping the burnt building so that upon inspection of what was left standing the proposing contractor would be able by measurement to ascertain precisely what new work he was to do and be paid for. *United States v. Gibbons*, 109 U. S. 200, 204, 27 L. Ed. 906.

5. A contract for the construction of a canal for the United States provided that it should be "subject to approval of the

same rules which are applicable to contracts in general.⁶

A building agreement and the specifications annexed to it must be construed together.⁷

B. Independent and Dependent Stipulations.—Mutual stipulations in working contracts are usually construed to be dependent;⁸ but if it appears that the parties so intended, the stipulations will be construed to be independent.⁹

C. Practical Construction by Parties.—A practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the builder seeks to obtain a deduction from the contract price.¹⁰

D. Warranty of Character of Site.—A contract to construct a dock for the United States, which "imposed upon the contractors the obligation to construct the dock according to the specifications within a designated time for an agreed price upon an 'available' site to be selected by the United States," does not contain any warranty, express or implied, in favor of the contractors, concerning the character of the underlying soil. The word "available" intrinsically has no such meaning.¹¹

E. Warranty against Imperfect or Improper Materials or Construction.—A warranty against defects arising from imperfect or improper materials or construction is not a warranty against effects of improper and rough usage, or inability to resist the usual disintegrating forces to which the structure, etc., is subjected.¹²

chief of engineers, United States army." It was held that the approval of the chief of engineers of the United States army is essential to the legal consummation of the contract. Such approval is a future or subsequent approval of the contract as written, and not of something precedent. Thus the engineer's direction of the acceptance of the contractor's bid and the furnishing of a blank for the contract does not amount to an approval. *Monroe v. United States*, 184 U. S. 524, 46 L. Ed. 670, citing *United States v. Speed*, 8 Wall. 77, 78, 19 L. Ed. 449.

6. Construction generally.—*Chicago, etc., R. Co. v. Hoyt*, 149 U. S. 1, 37 L. Ed. 625.

"Building."—A contract to furnish "all of the dimension stone that may be required in the construction" of a building does not include dimension stone used in "the approaches or steps leading up into the building." *United States v. Mueller*, 113 U. S. 153, 28 L. Ed. 946.

Contracts for construction of water-works.—See the titles *MUNICIPAL CORPORATIONS*, vol. 8, p. 595; *WATER COMPANIES AND WATERWORKS*, ante, p. 985.

7. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934.

8. Independent and dependent stipulations.—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157. See post, "Dependent and Independent Provisions," V, A.

9. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157; *Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, 151 U. S. 571, 33 L. Ed. 157.

10. Practical construction by parties.—*District of Columbia v. Gallaher*, 124 U. S. 505, 510, 31 L. Ed. 526, a case in which a sewer was by mutual consent made to vary from the plans set forth in a written contract. And see *Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337.

11. Warranty of character of site.—*Simpson v. United States*, 172 U. S. 372, 380, 43 L. Ed. 482. The builders knew that a test of the soil in the yard had been made, and drew the contract without any express stipulation that the ground selected should be of a defined character.

12. Warranty against imperfect or improper materials or construction.—*District of Columbia v. Clephane*, 110 U. S. 212, 28 L. Ed. 122, so held as to a covenant to repair a wood pavement if any part thereof shall become defective from imperfect or improper materials or construction within three years from the completion of the work, where the pavement may have become defective from improper and rough usage, from permitting water to stand on it and produce decay or from the inherent inability of wood pavement to resist the usual disintegrating forces to which all pavements are subjected. It will not be presumed because the work needed repair within three years that the material furnished by the contractor was originally imperfect or that the construction was not well done. In the absence of any evidence that the pavement became defective within three years from imperfect or improper material or construction used by the contractor there is no cause of action against him.

F. Work Included in Contract and Extra Work.—See post, "Extra Work," VII.

G. Ownership of Materials.—Under a contract for the construction of a ship for the United States, the vessel in all respects to be at the risk of the builder until upon its completion, the United States should accept it, upon final examination and certificate, as conforming in every particular with the requirements of the contract, and answering the description of the specification; the title to the vessel did not pass until such completion and acceptance by the United States and a resolution of congress giving all interest of the government to certain parties conveyed nothing. The fact that the contractor was paid in installments as the work progressed or that the secretary of the navy appointed a superintendent to see that it conformed in every respect to the requirements of the contract, does not cause title to pass from the contractor.¹³

H. Assignment.—See the titles *ASSIGNMENTS*, vol. 2, pp. 566, 581; *UNITED STATES*, ante, p. 747. A stipulation in a building contract between a state and the contractor which provides that the contractor shall not assign the contract in whole or in part without the written consent of the state authorities, is binding both upon the contractor and equally binding upon all who dealt with him or sought to acquire rights in it by assignment or transfer.¹⁴

III. Alteration, Modification and Rescission.

Authority to Make and Effect of Authorized Alterations.—Where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall, notwithstanding, be considered subsisting so far as it can be traced.¹⁵

IV. Termination or Forfeiture.

Stipulations authorizing the builder or employer in a working contract to declare a forfeiture and terminate the same are not favored by law.¹⁶

V. Performance or Breach.

A. Dependent and Independent Provisions.—The rule that where the agreements go to the whole of the consideration on both sides, the promises are dependent and one of them a condition precedent to the other, is applicable to building or working contracts. In such case performance of the work is a condition precedent to recovery of the money to be paid.¹⁷ But if the agreements go to a part only of the consideration on both sides, the promises are independent.¹⁸

B. Substantial Performance.—Unless the contractors have complied sub-

13. Ownership of materials.—Clarkson v. Stevens, 106 U. S. 505, 515, 27 L. Ed. 139. See the title *SALES*, vol. 10, p. 1042.

14. Burck v. Taylor, 152 U. S. 634, 38 L. Ed. 578.

15. Authority to make and effect of authorized alterations.—Bank v. Patterson, 7 Cranch 299, 303, 3 L. Ed. 351. See the titles *ASSUMPSIT*, vol. 2, pp. 639, 650; *MERGER*, vol. 8, p. 339.

Authority of assistant superintendent to vary contract to furnish rubble stone for government building.—See the title *UNITED STATES*, ante, p. 747.

Loss from unauthorized changes of specifications.—See post, "Loss or Damage from Unauthorized Change of Specifications." **As to extra work**, see post, "Changes and Alterations," VII, B. 4.

16. Termination and forfeiture.—Anvil fabrications," V, I, 2, b.

Min. Co. v. Humble, 153 U. S. 540, 547, 38 L. Ed. 814.

Mining contracts.—See the title *MINES AND MINERALS*, vol. 8, p. 403.

17. Dependent and independent provisions.—Dermott v. Jones, 23 How. 220, 16 L. Ed. 442. See ante, "Independent and Dependent Stipulations," II, B. See the titles *CONTRACTS*, vol. 4, pp. 580, 581; *COVENANTS*, vol. 5, pp. 10, 11.

So held as to a contract to build stores and warehouse by a certain day in which the words of the contract for payment are "in consideration of the covenants and their due performance." *Dermott v. Jones*, 23 How. 220, 16 L. Ed. 442.

18. Dermott v. Jones, 23 How. 220, 231, 16 L. Ed. 442; *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 337, 338, 14 L. Ed. 157.

Covenant to pay monthly.—See the title *COVENANTS*, vol. 5, p. 11.

stantially with the specifications of the contract, or a strict compliance therewith has been waived, they cannot recover for the price of materials and labor furnished in the construction of the building.¹⁹

C. Defective or Partial Performance—1. **IN GENERAL**.—When a contractor has been guilty of fraud or has wilfully abandoned the work or left it unfinished, he cannot recover in any form of action.²⁰

2. **SUPERINTENDENT HAVING KNOWLEDGE OF DEFECT**.—Where a pier of a bridge was built under the supervision of an agent of the contractors for the bridge, and in accordance with his directions, he is held to have knowledge of any defect in the pier, and his knowledge in this particular is the knowledge of the contractors. Under such circumstances, the contractors can no more justify their proceeding with the work without satisfying themselves of the fitness of the pier for the superstructure intended, than they could justify the erection of the bridge at some other point on the river.²¹

D. Time—1. **IN GENERAL**.—Where a working contract does not fix any time for the completion of the work, the law implies an undertaking to complete it within a reasonable time.²²

19. Substantial performance.—Woodruff v. Hough, 91 U. S. 596, 602, 23 L. Ed. 332.

Substantial performance is all that is required to satisfy a building agreement, and in the adjudication of controversy growing out of building contracts slight differences in the dimensions between the building constructed and the terms of the contract may, under many circumstances, be overcome by a reasonable application of that rule; but it has no application in cases where the differences are so great that the effect would be to make a new contract and substitute it in the place of the stipulation executed by the parties. This is true although it be shown that the building constructed cost more and was of greater value and better adapted to the purposes to be accomplished. *Swain v. Seamens*, 9 Wall. 254, 263, 19 L. Ed. 554.

A contract to build, on a lot sold upon mortgage, a mill fifty feet wide by one hundred and fifty feet long, is not, as a proposition of law, substantially complied with by building one that is seventy-eight feet wide by one hundred long, even though the purpose of the contract was to give the vendor security for the purchase money of the lot, and though the mill of the latter dimensions cost more and be better adapted to the purposes intended than such a one as was contracted for. *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554.

Where a building is completed by the contractor in the full belief induced by the conduct and declarations of the builder that it would be accepted as a compliance with the stipulations as to dimensions, and where taken as a whole, the proof is satisfactory that his conduct and declarations led the contractors to believe that he was content with the change made, and that he would readily

acquiesce in their doings when the building was completed, he cannot be heard to allege or prove the contrary to the prejudice of their rights. *Swain v. Seamens*, 9 Wall. 254, 274, 19 L. Ed. 554.

But if the vendor, having made an agreement that upon a mill of the former dimensions being built on the lot sold, he will accept policies of insurance on it for the amount of another mortgage collateral to one given on the property sold, and he does accept such policies, he cannot decline to enter satisfaction on such other mortgage because the mill was not of the dimensions contracted for. He waives by such acceptance of the policies all rights to object to the variation in the construction. *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554.

The builder's acquiescence in a change of the dimensions of a building may be shown by proof that he was present and made no objections to the change. *Swain v. Seamens*, 9 Wall. 254, 19 L. Ed. 554.

20. Defective or partial performance.—*Dermott v. Jones*, 23 How. 220, 16 L. Ed. 442.

Where a contractor engaged to build a house for a certain sum of money, and the owner of the house, when sued, offered to prove that there were various omissions in the work stipulated to be done, and portions of the work were done in a defective manner, not being as well done as contracted for, and filed a bill of particulars of these omissions and defects by way of set-off, this evidence was admissible. *Van Buren v. Digges*, 11 How. 461, 13 L. Ed. 771.

21. Superintendent having knowledge of defect.—*Railroad Co. v. Smith*, 21 Wall. 255, 263, 22 L. Ed. 513.

22. Time.—*Minneapolis Gas Light Co. v. Kerr Murray Mfg. Co.*, 122 U. S. 300, 30 L. Ed. 1190. A case of a verbal contract.

2. **TIME AS ESSENCE**—a. *In General*.—Time may be of the essence in a working contract.²³

Proof of Date of Execution of Contract.—Where work is to be completed at a stipulated time from the date of execution of the contract, the fact that the contract was executed and delivered subsequent to its date may be proved by parol evidence.²⁴

b. *Extension of Time*.—Where there is nothing in an extension of time to indicate that any particular time was in the minds of the parties as to when the work was to be completed, the law implies that the work shall not be unnecessarily prolonged but shall be completed within a reasonable time.²⁵

c. *Waiver of Nonperformance*.—A builder is liable on his covenant for the contract price of a piece of work when completed, where absolute performance at the stipulated time was waived by him; and a claim by him of fines and penalties for delay or failure cannot be sustained.²⁶ Where a party, who, by contract, has

23. Time as essence.—*Dermott v. Jones*, 23 How. 220, 16 L. Ed. 442; *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 38 L. Ed. 167. See the title **CONTRACTS**, vol. 4, p. 584.

A contract required the contractors to have the machinery therein described built and set up on board a boat, within sixty days from a certain date. The promisor failed to furnish such boat until after the said sixty days had elapsed. It was held that the work must be completed within sixty days from the date on which the boat was furnished, the parties on both sides having proceeded without objection. *McGowan v. American, etc., Bark Co.*, 121 U. S. 575, 30 L. Ed. 1027.

Contract to erect building.—See the title **CONTRACTS**, vol. 4, p. 584, note 27.

Contract to build a bridge—Time not of essence.—See *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 38 L. Ed. 167. See the title **CONTRACTS**, vol. 4, p. 584, note 27.

24. Proof of date of execution of contract.—*District of Columbia v. Camden Iron Works*, 181 U. S. 453, 461, 45 L. Ed. 948.

25. Extension of time.—*Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 138, 35 L. Ed. 961.

A contract was entered into by which a contractor agreed to construct a mill for S. The mill was to be completed by August 1, 1885, and it was agreed that it must be approved by a certain referee before it was accepted. The corn rolls in the mill did not work satisfactorily and S. wrote to the contractor on August 6, 1885, stating that the mill was satisfactory and was thereby accepted. He also stated that the corn rolls did not work satisfactorily but that whenever such rolls were put in or should do satisfactory work he would be ready to pay for the entire work. On October 16, the corn rolls having been put in, the mill was accepted as satisfactory by the referee. It was held that the letter was a waiver of the time in which the mill

was to be constructed and that S. thereby agreed to pay for the whole work if it was completed in a reasonable time and that whether the time from August 6 to September 16 was unreasonable or not was a question for the jury to determine. *Van Stone v. Stillwell, etc., Mfg. Co.*, 142 U. S. 128, 137, 35 L. Ed. 961.

26. Waiver of nonperformance.—*District of Columbia v. Camden Iron Works*, 181 U. S. 453, 462, 45 L. Ed. 948; *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *McGowan v. American, etc., Bark Co.*, 121 U. S. 575, 601, 30 L. Ed. 1027.

Requesting a contractor to go on and complete the work, and part payment after his failure to do so within the stipulated time is a waiver of strict performance as to time; and the contractor may recover the value of the work actually done. *Philadelphia, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by the covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, etc., need not be considered; but if the other party says to him, "I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed. For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to per-

a right to have and takes security to have work finished by a certain day—no penalty nor any right to terminate the contract for noncompletion being reserved—permits the other side, after breach, to go on in an effort to complete the contract, he has no right to compel him to complete it in a manner which necessarily involves him in loss.²⁷

E. Quality of Work—1. **IN GENERAL**.—A contract to build a structure for a particular use implies that the structure when complete shall be serviceable for that purpose and capable of being used with like facility as similar structures.²⁸ Where a subcontractor completed a work partly constructed by the contractor, the law implies a warranty that the work sold or transferred to the subcontractor, was reasonably suitable for the purposes for which the contractor knew it was designed. This is the rule although the contractor made no statement or representation as to the quality of the work he had done, where the defect was not apparent upon inspection and could not have been discovered by the subcontractor until actually tested during the erection of the structure.²⁹

2. **ARCHITECT'S OR ENGINEER'S CERTIFICATE OF PERFORMANCE**—a. *In General*.—A working contract may require an architect's or engineer's certificate of performance as a condition precedent to payment.³⁰ To make such a certificate conclusive requires plain language in the contract.³¹ Where such certificate is

form within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work. *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 651, 23 L. Ed. 341.

A contractor is not required after the builder has defaulted on a payment due to proceed with the work at the hazard of further loss; but he is entitled to recover the contract price of the work done, together with a per cent on the estimates, and a liquidated sum both of which had been retained by the builder as a security for the contractor's performance of the contract. *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

The acceptance of the buildings by the builder as they had been constructed by the contractor is not a release of the contractor from his undertaking to finish them in the time specified in the contract. *Dermott v. Jones*, 23 How. 220, 233, 16 L. Ed. 442.

Where there was a special contract to build a house by a certain day, which was not fulfilled, owing to various circumstances, and the contractor brought a suit setting forth the special contract and averring performance, it was erroneous in the court to instruct the jury to find for the plaintiff, as the work was not finished by the appointed day, though it was completed after the time with the knowledge and approbation of the defendant. By the terms of the contract, the performance of the work was a condition precedent to the payment of the money sued for. *Dermott v. Jones*, 23 How. 220, 16 L. Ed. 442.

27. *Clark v. United States*, 6 Wall. 543, 18 L. Ed. 916.

If the United States government permitted a contractor to go on in the effort

to complete his contract after the time when it should have been completed, it has not thereby acquired a right to compel him to do it in a manner which necessarily involved him in great loss. *Clark v. United States*, 6 Wall. 543, 546, 18 L. Ed. 916.

28. **Quality of work**.—*Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513.

Where a contract calls for the construction of a drawbridge upon which the cars of a railroad company can cross, it implies that the bridge shall be serviceable for that purpose and capable of being used with like facility as similar bridges properly constructed. If a defect in the condition of a pier upon which the bridge is to rest will prevent this result from being attained, it is the duty of the contractors to insist upon an alteration of the pier, or to make it themselves, before proceeding with the construction of the bridge. *Railroad Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513.

29. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. Ed. 86. See the title **WARRANTY**, ante, p. 974.

30. **Architect's or engineer's certificate of performance**.—*Martinsburg, etc., R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255; *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. Ed. 811.

31. *Mercantile Trust Co. v. Hensey*, 205 U. S. 298, 51 L. Ed. 811, in which it is said: "The cases of *Sweeney v. United States*, 109 U. S. 618, 27 L. Ed. 1053; *Chicago, etc., R. Co. v. Price*, 138 U. S. 185, 34 L. Ed. 917; *Sheffield, etc., R. Co. v. Gordon*, 151 U. S. 285, 38 L. Ed. 164, were all cases in which the contract itself provided that the certificate should be final and conclusive between the parties."

The contract provided in regard to payments as the work progressed, that a

required a suit cannot be maintained on the contract without it, and, in the absence of fraud or such mistake on the part of the architect or engineer as necessarily implies bad faith or a failure to exercise an honest judgment, the certificate is conclusive upon the parties and neither can go behind it.³² But either party may attack the estimates and classifications and certificate of the engineer for fraud.³³

certificate was to be obtained from and signed by the architect in charge, before the contractor was entitled to payment. It also provided that the certificate should "in no way lessen the total and final responsibility of the contractor; neither shall it exempt the contractor from liability to replace work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications either in execution or materials." There was a further positive agreement of the contractor to execute and complete all the work as set forth in the specifications in the best and most workmanlike manner, and also that final payment was to be made only when the houses are completed in accordance with the agreement and the plans and specifications prepared therefor. It was held that the whole contract shows that the certificate that the houses had been completed according to the contract and its plans and specifications was not to be conclusive of the question, and the plaintiff was not thereby precluded from showing that in fact the contractor had not complied with his contract, and the plaintiff had thereby sustained damage. *Mercantile Trust Co. v. Hensley*, 205 U. S. 298, 308, 51 L. Ed. 811.

32. *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255; *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. Ed. 1053, affirmed and applied.

Under a contract containing a stipulation that the company's "superintendent shall pass upon the work every two weeks, and if he is satisfied, it shall be final acceptance by" the company "so far as done;" the acceptance of the work by the superintendent forecloses the parties from thereafter claiming that the contract had not been performed according to its terms. The contractors did not guarantee that the work or plant as a whole should be adequate in design, strength, and capacity, and workmanship for the purposes intended and specified; and, as an acceptance of the work bi-weekly as it progressed was shown and a further acceptance of the whole on completion of the contract was made by the superintendent in compliance with the terms of the contract, such acceptance in the absence of fraud or mistake on the part of the superintendent is conclusive upon the company. *Sheffield, etc., R. Co. v. Gordon*, 151 U. S. 285, 292, 38 L. Ed. 164.

It has been so held as to contracts for construction of railroads.—See *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255; *Chicago, etc., R. Co. v. Price*, 138 U. S. 185, 199, 34 L. Ed. 917.

Under a contract for the construction of a railroad, providing that the work should be executed under the direction and supervision of the chief engineer of the railroad company and his assistants, etc.; the mere incompetency or mere negligence of the division of chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith. *Chicago, etc., R. Co. v. Price*, 138 U. S. 185, 194, 195, 34 L. Ed. 917.

Under a contract for constructing a railroad, the work was under the immediate supervision of the division engineer who made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division according to quantities and classifications. Under such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the company. Subsequently a subordinate engineer of the railroad company, who had not supervised the work of the contractors, re-estimated and reclassified it, and upon such re-estimate and reclassification, which were approved by the chief engineer, the company claimed that the monthly estimates upon which the contractors had been paid from time to time were too large. It was held that the railroad company was not authorized to go behind the estimates from time to time by its division engineer which were approved and certified by the assistant chief engineer and chief engineer; and that the re-measurements and reclassifications made by the subordinate engineer, without the knowledge or co-operation of the contractors, are not binding upon them. *Chicago, etc., R. Co. v. Price*, 138 U. S. 185, 194, 195, 34 L. Ed. 917.

Transportation contract with the United States.—See the title UNITED STATES, ante, p. 747.

Municipal contract for public works.—See the title MUNICIPAL CORPORATIONS, vol. 8, p. 596.

33. *Martinsburg, etc., R. Co. v. March*,

b. *Where United States Builder.*—The rules above set forth respecting the conclusiveness of an architect's or engineer's certificate of performance, etc., are applicable to government contracts.³⁴

c. *Subcontractors.*—**Subcontractors**, who accept the specifications for the work which were in the contractor's contract, are not bound by the acts of third persons, to whose decision the work was submitted, in accepting or rejecting the work as coming up to the specifications, unless they expressly agreed to be so bound.³⁵

F. Superintendence and Control.—See ante, "Architect's or Engineer's Certificate of Performance," V, E, 2.

Authority of Superintendent to Make Incidental Contracts.—Authority "to superintend the building of a house," or the performance of a construction contract, includes the power to make necessary incidental contracts.³⁶

114 U. S. 549, 29 L. Ed. 255; Louisville, etc., R. Co. v. Meyer, 30 L. Ed. 689; Sheffield, etc., R. Co. v. Gordon, 151 U. S. 285, 38 L. Ed. 164.

34. United States builder.—Sweeney v. United States, 109 U. S. 618, 620, 27 L. Ed. 1053, following Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106.

In Sweeney v. United States, 109 U. S. 618, 27 L. Ed. 1053, a contractor sought to recover from the United States the price of a wall built by him around the national cemetery. The contract provided that the wall should be received and become the property of the United States, after an officer or civil engineer, to be designated by the government to inspect the work, should certify that it was in all respects such as the contractor agreed to construct. The officer designated for that purpose refused to so certify, on the ground that neither the material nor the workmanship was such as the contract required. As the officer exercised an honest judgment in making his inspection, and as there was, on his part, neither fraud, nor such gross mistake as implied bad faith, it was adjudged that the contractor had no cause for action, on the contract, against the United States. Martinsburg, etc., R. Co. v. March, 114 U. S. 549, 551, 29 L. Ed. 255; Sweeney's Case, supra, applied and followed; Kihlberg v. United States, 97 U. S. 398, 24 L. Ed. 1106. See to the same effect Chicago, etc., R. Co. v. Price, 138 U. S. 185, 193, 34 L. Ed. 917; United States v. Gleason, 175 U. S. 588, 605, 44 L. Ed. 200.

The engineer in charge of the construction of a dock for the United States approved of the quarry from which the sandstone for its construction was to be taken. The contract provided that such stones were to be "hard, clean and free from seams and imperfections and of good bed and build," and must be "of quality approved by the engineer." It was held that such approval is not final under the contract so as to forestall the engineer's judgment of stone furnished or

about to be used, or the judgment of any "other competent officer, person or persons" who might be designated by the navy department to inspect or reject the work and material. The engineer was given power to judge not of a type of stone, but particular stones, and his decision is only final as to stones actually cut and delivered. United States v. Barlow, 184 U. S. 123, 133, 46 L. Ed. 463.

In United States v. Gleason, 175 U. S. 588, 44 L. Ed. 285, the court construed a contract between the United States and a firm of contractors, under which the engineer was to decide whether the failure to complete the work was due to the force of the elements or to fault of the contractors.

35. Subcontractors.—Woodruff v. Hough, 91 U. S. 596, 23 L. Ed. 332.

A., who had covenanted with the supervisors of a county to construct a jail subject to the approval of the superintendent, who was authorized to stop the work if it and the materials furnished did not conform to certain plans and specifications, entered into a contract with B. to manufacture and erect in its proper position all the wrought-iron work for the jail, according to such plans and specifications. Held, that B. was entitled to recover on his contract the value of the work done and materials furnished by him, if he substantially complied with the plans and specifications, or a strict compliance therewith had been waived by A., although the supervisors, in the exercise of the power reserved in their contract with A., condemned B.'s work, and required A. to replace a portion of it. Woodruff v. Hough, 91 U. S. 596, 23 L. Ed. 332.

36. Authority of superintendent to make incidental contracts.—So held as to the authority of an engineer to agree with the contractors that they should be paid for construction of a ditch outside the regular contract, as excavations from the surface down. Henderson Bridge Co. v. McGrath, 134 U. S. 260, 274, 33 L. Ed. 934.

Control by County Court of Kentucky of County Construction Contract.—See the title *COUNTIES*, vol. 4, p. 856.

G. Reference of Matters of Dispute to Architect or Engineer.—It is competent for parties to a working contract to make it a term of the contract that the decision of an architect or engineer, or other person, of all or specified matters of dispute that may arise during the execution of the work, shall be final and conclusive; and, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.³⁷

H. Excuses for Nonperformance—1. **DIFFICULTY OF PERFORMANCE.**—Unforeseen difficulty, however great, of performing a building contract, will not excuse a breach by the contractor.³⁸

2. **DEFAULT OF BUILDER.**—In a contract to make and complete a structure, with agreements for monthly payments, a failure to make a payment at the time specified is a breach which justifies the abandonment of the work, and entitles the contractor to recover a reasonable compensation for the work actually performed. And this, notwithstanding a clause in the contract providing for the rate of interest which the deferred payment shall bear in case of failure.³⁹

3. **OBSTRUCTION OR PREVENTION OF PERFORMANCE BY BUILDER.**—Acts of the builder, which delay the contractor in the completion of a building contract requiring the work to be completed by a specified day, excuses nonperformance by the contractor.⁴⁰

37. Reference of matters of dispute to architect or engineer.—*United States v. Gleason*, 175 U. S. 588, 602, 44 L. Ed. 284, citing *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 255; *Chicago, etc., R. Co. v. Price*, 138 U. S. 185, 34 L. Ed. 917; *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106.

It is not necessary for the engineer, in passing on the application for an extension of time because of interruption occasioned by force of elements and not by any fault of the plaintiff, in order to give efficacy to his decision, to declare in terms that it was based on a finding of fault on the part of the contractor; and the conclusion of the engineer amounts to a decision or judgment within the meaning of the contract, although the court reached a different conclusion. *United States v. Gleason*, 175 U. S. 588, 608, 44 L. Ed. 284.

The engineer in charge, when applied to for a further extension of time, may take in view previous delinquencies and the futility of the extensions therefore granted. An indefinite succession of extensions is not within the contemplation of the contract. *United States v. Gleason*, 175 U. S. 588, 606, 44 L. Ed. 284.

It is not competent to go back of the judgment of the engineer to whom the contract refers questions of performance and extension of time for carrying on the work, and to revise his action by the views of the court. This can only be done upon allegations and proof of bad faith, or of mistake or negligence so great, so gross, as to justify an inference of bad faith. *United States v. Gleason*, 175 U. S. 588, 607, 44 L. Ed. 284.

38. Difficulty of performance.—*Dermott v. Jones*, 2 Wall. 1, 7, 17 L. Ed. 762; *Simpson v. United States*, 172 U. S. 372, 43 L. Ed. 482.

Performance of a contract to build a house for another on the soil of such person, and that the work shall be executed, finished, and ready for use and occupation, and be delivered over so finished and ready for the owner of the soil, at a day named, is not excused by the fact that there was a latent defect in the soil, in consequence of which the walls sank and cracked, and the house, having become uninhabitable and dangerous, had to be practically taken down and rebuilt on artificial foundations. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762; *Railroad Co. v. Smith*, 21 Wall. 255, 263, 22 L. Ed. 513.

39. Default of builder.—*Canal Co. v. Gordon*, 6 Wall. 561, 18 L. Ed. 894.

40. Obstruction or prevention of performance by builder.—*Van Buren v. Digges*, 11 How. 461, 478, 13 L. Ed. 771. See the title *CONTRACTS*, vol. 4, p. 587.

Mere acquiescence by a contractor, engaged to build a house, in the defendant's causing certain work to be done by a third person, thereby obstructing a fulfillment of the contract, will not exclude the contractor from the benefit of having further time allowed to finish the house. It was not necessary for him to make a special agreement that further time should be allowed, in consequence of the delay caused by the extra work. It is difficult to conceive, upon what ground the defendant could be permitted to interpose an obstruction to the fulfill-

4. **WAIVER OF FULL PERFORMANCE.**—See ante, "Substantial Performance," V, B; "Waiver of Full Performance," V, H, 4. A promisor is liable on his covenant for the contract price of a piece of work, where he waives strict performance by the contractor.⁴¹

I. Liability for Breach—1. **LIABILITY OF CONTRACTOR.**—See post, "Security for Completion, Penalties and Forfeitures;" VIII. "Set-Off and Recoupment," IX, D. And see the title **DAMAGES**, vol. 5, p. 157.

2. **LIABILITY OF PROMISOR**—a. *Negligence, Default or Improper Interference*—(1) *In General.*—A contractor is entitled to recover any damages he may have sustained by the delay of his work or the increase of his expenses in performing it occasioned by the negligence, acts, or defaults of the promisor.⁴² Where, in the progress of the work, the contractor was stopped by an injunction issued by a chancery court, he was not entitled to recover damages for the delay occasioned by it, unless the jury should find that the promisor did not use reasonable diligence to obtain a dissolution of the injunction.⁴³

(2) *Obstruction or Prevention of Performance.*—A promisor is liable on his covenant for the contract price of a piece of work, where strict performance was prevented by him.⁴⁴

(3) *Liability of United States.*—Like an individual, the United States must answer for damages resulting from an improper interference of its officers with the work of a contractor,⁴⁵ or default in the performance of its undertak-

ment of the contract, and then to convert that very obstruction into a merit on his own part, or into the foundation of a claim against the party whom he had already subjected to the inevitable consequences of the obstruction interposed; and inability to comply with his engagement, and a postponement of the fruits of a compliance therewith, if that had been permitted. Mere acquiescence in this irregularity by the plaintiff should not subject him to farther mischief. Van Buren v. Digges, 11 How. 461, 479, 13 L. Ed. 771.

41. *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. Ed. 948.

42. **Negligence, default or improper interference.**—*United States v. Mueller*, 113 U. S. 153, 28 L. Ed. 946; *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

Where the contract was to place the waste earth where ordered by the engineer, it was the duty of the engineer to provide a convenient place; and if he failed to do so the contractor was entitled to recover the damages sustained from the failure to provide such place. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

43. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

44. **Obstruction of prevention of performance.**—*District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. Ed. 948.

If the promisor annulled a working contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he is entitled to recover dam-

ages for any loss of profit he might have sustained; and of the reasons which influenced the promisor, the jury are the judges. *Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157. See, also, *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341. And see the title **DAMAGES**, vol. 5, p. 181.

45. **Liability of United States.**—*United States v. Smith*, 94 U. S. 214, 218, 24 L. Ed. 115; *United States v. Barlow*, 184 U. S. 123, 137, 46 L. Ed. 463; *Clark v. United States*, 6 Wall. 543, 546, 18 L. Ed. 916; *Smoot's Case*, 15 Wall. 36, 47, 21 L. Ed. 107; *Manufacturing Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715; *United States v. Mueller*, 113 U. S. 153, 28 L. Ed. 946.

The United States government is liable for loss to which a contractor was subjected by the improper interference of its officers in the execution of his contract, although the injuries were inflicted after the day at which its contract should have been completed. *Clark v. United States*, 6 Wall. 543, 546, 18 L. Ed. 916; *United States v. Smith*, 94 U. S. 214, 217, 24 L. Ed. 115. See, also, *Manufacturing Co. v. United States*, 17 Wall. 592, 21 L. Ed. 715; *Smoot's Case*, 15 Wall. 36, 47, 21 L. Ed. 107.

Under contracts to furnish stone to the United States for a building, and to saw it, and cut and dress it, all as "required," the contractor may recover damages for enforced suspensions of, and delays in, the work, by the United States, arising from doubts as to the desirability of completing the building in stone, and on the site, which involved the examination of the foundation and the stones by several commissions. *United States v. Mueller*, 113 U. S. 153, 28 L. Ed. 946.

ing to him.⁴⁶ But the United States is not liable for any expense he incurred by reason of being compelled to abide by the prohibitions expressed in his contract.⁴⁷

b. *Loss or Damage from Unauthorized Change of Specifications.*—A contractor who contracts with the United States to do the mason work on the piers and abutments of a bridge is entitled to recover for loss and damage caused by a reduction of the dimensions of the piers and abutments, made subsequently to the making of the contract.⁴⁸

3. MEASURE OF DAMAGES.—The usual rules of law respecting the measure of damages for breach of a contract apply to a breach of a working contract.⁴⁹

VI. Compensation.

A. Persons Liable.—In the absence of an express contract the person for whom the work is done is not liable to pay the persons employed by the contractor in the execution of his contract or those who furnish him material. There is no privity between the builder and the laborers or materialmen.⁵⁰

B. Persons Entitled to Compensation—1. WHERE CONTRACTORS PARTNERS.—See the title PARTNERSHIP, vol. 9, p. 88, note 41.

2. CONTRACTOR WHOSE CONTRACT TERMINATED.—A government contractor, who has failed to do his work within the stipulated time and whose contract is terminated by the officer in charge, and relet, cannot recover from the government the profits that he would have made had he performed the contract, nor the difference between the contract price and that at which the work was completed by the parties to whom it was relet.⁵¹

3. SUBCONTRACTOR.—See ante, "Subcontractors," V, E, 2, c. See the title INDEPENDENT CONTRACTORS, vol. 6, p. 904.

C. Ascertainment of Amount—1. MODE FIXED BY CONTRACT OF PARTIES.—Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount

46. *United States v. Smith*, 94 U. S. 214, 218, 24 L. Ed. 115.

The United States can be required to make compensation to a contractor for damages which he has actually sustained by their default in the performance of their undertakings to him. *United States v. Smith*, 94 U. S. 214, 218, 24 L. Ed. 115.

By reason of its improper suspension of the work of a contractor who had agreed to supply the skilled labor and the materials necessary for the erection of certain buildings for its use, the United States is liable in the court of claims for such damages as he has actually sustained. *United States v. Smith*, 94 U. S. 214, 24 L. Ed. 115.

47. *Cutting wood.*—A contract entered into between A and the quartermaster's department of the army, for the delivery of a number of cords of wood at a post on a military reservation, stipulated that no traders, sutlers, contractors, civilians, or others should be allowed to cut timber about said post, until all required by the United States for certain purposes was secured. The contractor cut a part of the wood on the reservation, when he was directed by the post commander

to cut outside of the reservation, which he did. Having performed his contract, he was paid in full for all the wood delivered thereunder. Held, that the contract prohibited him from cutting wood within the reservation, and that he cannot recover damages for any expense he incurred by reason of being compelled to cut and haul, from a point outside the reservation, the wood necessary to complete his contract. *Francis v. United States*, 96 U. S. 354, 24 L. Ed. 663.

48. *Loss or damage from unauthorized change of specification.*—*Harvey v. United States*, 113 U. S. 243, 28 L. Ed. 987.

49. *Measure of damages.*—*Quinn v. United States*, 99 U. S. 30, 25 L. Ed. 269.

50. *Persons liable.*—*United States v. Driscoll*, 96 U. S. 421, 24 L. Ed. 847; *Baltze v. Raleigh, etc., R. Co.*, 115 U. S. 634, 29 L. Ed. 505. See, also, the title UNITED STATES, ante, p. 747.

Right of laborers working for government contractors to recover from government for working over eight hours.—See the title LABOR, vol. 7, p. 787.

51. *Contractor whose contract terminated.*—*Quinn v. United States*, 99 U. S. 30, 25 L. Ed. 269. So held as to a contract to remove rock from a harbor en-

claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.⁵²

2. **INCREASED COST OF LABOR AND MATERIALS.**—Where no provision for any increase in the cost of labor and material is made, a contractor, who agrees to do a specified work at a fixed price, must be held to have taken the risk of the prices of the labor and materials which he was bound to furnish. It is one of the elements which he takes into account when he makes his bargain and he cannot expect the other party to guarantee him against unfavorable changes in those prices.⁵³

3. **EXTRA WORK.**—See post, "Right to Compensation," VII, B.

D. Lien of Contractor.—See the titles *MECHANICS' LIENS*, vol. 8, p. 328; *RAILROADS*, vol. 10, pp. 484, 485, 486. See, also, the title *LIENS*, vol. 7, p. 892.

E. Proof of Payment.—In an action to recover the amount alleged to be due under a contract for labor performed and materials furnished, orders and due bills drawn by a subcontractor on the defendant are not admissible as proof of payments to the plaintiff, where there was no power vested in the subcontractor to bind the plaintiff, and the orders and due bills purported to have been paid more than two years posterior to the date of a letter delivered by the plaintiff to the defendant's agent forbidding any payment to be made to the subcontractor or to his order, and nearly one month after the institution of the suit.⁵⁴

VII. Extra Work.

A. What Constitutes.—What constitutes extra work depends upon the construction of the contract.⁵⁵ A written bid of a contractor in connection with the advertisement, and the acceptance of that bid by the builder, constitutes the contract between the parties, so far as the question whether the contract price embraces a particular piece of work is concerned. A written contract in pursuance of the same is intended to be merely a reduction to form of the statements as to work and prices contained in the bid and specifications.⁵⁶

trance, which was terminated and relet for failure to complete at the specific time chiefly in consequence of the failure of a third party to deliver to the contractor the necessary explosives.

52. Mode fixed by contract of parties.—*United States v. Robeson*, 9 Pet. 319, 327, 9 L. Ed. 142; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 255, 34 L. Ed. 419. See, also, *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549, 29 L. Ed. 253.

53. Increased cost of labor and materials.—*Chouteau v. United States*, 95 U. S. 61, 24 L. Ed. 371.

The United States is not liable for the increased cost of labor and materials during delay in the construction of a steam battery, caused by alterations to the plans and specifications made by the government, although the contract provided that extra expenses caused by such changes are to be paid for. *Chouteau v. United States*, 95 U. S. 61, 24 L. Ed. 371.

An act of congress allowing a contractor compensation for additional cost necessarily incurred by reason of changes and alterations required by the government and delays in the prosecution of the work, contained the following clause: "But no allowance for an advance in the price of labor or material shall be considered un-

less such advance occurred during the prolonged term of the completing the work rendered necessary by delay resulting from the action of the government aforesaid." It was held that the contractor is not entitled to an allowance for any advance in the price of labor and material during the contract term. *United States v. Bliss*, 172 U. S. 321, 43 L. Ed. 463.

54. Proof of payments.—*Fresh v. Gilson*, 16 Pet. 327, 329, 10 L. Ed. 982.

55. What constitutes.—*Harvey v. United States*, 105 U. S. 671, 26 L. Ed. 1206; *United State v. Gibbons*, 109 U. S. 200, 29 L. Ed. 906.

56. Harvey v. United States, 105 U. S. 671, 688, 26 L. Ed. 1206, citing *Garfield v. United States*, 93 U. S. 242, 23 L. Ed. 779; *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398. See, also, *Harvey v. United States*, 113 U. S. 243, 28 L. Ed. 987.

In *Harvey v. United States*, 105 U. S. 671, 689, 26 L. Ed. 1206, it was held that the work of making and putting in the coffer dams before the laying of the masonry could be commenced was not within a bid to lay the masonry.

A contractor who enters into an agreement to do certain work on a street at fixed prices for grading, and

Work Done According to Direction of Engineer.—A covenant to do work according to a certain schedule, which schedule stated that it was done according to the directions of the engineer, bound the promisor to pay for the work which was executed according to such directions, although a profile was departed from which was made out before the contract was entered into.⁵⁷

Evidence.—Where the promisor offered to prove that certain work which he, the promisor, had caused to be done by a third person, was usual and proper, and necessary to the completion of the house, this evidence was properly rejected. He should have proved that it came within the contract. So, also, evidence was inadmissible that the defendant, in presence of the contractor, insisted upon its being within the contract; for this would have been making the promisor the judge in his own case.⁵⁸

B. Right to Compensation—1. IN GENERAL.—The right of the contractor to recover for extra work may be governed by stipulations in his contract.⁵⁹ Where there is no agreement to pay for extra work at a fixed price, the law implies an agreement to pay what it is reasonably worth.⁶⁰

2. PRELIMINARY WORK TO THAT REFERRED TO IN CONTRACT.—A contractor is entitled to reasonable compensation for labor done and materials furnished in constructing and performing the work necessarily connected therewith, and

for excavation and refilling, cannot recover an extra charge for rock excavations, upon the theory that it was outside the contract. The price was evidently fixed upon the supposed average character of the excavations. *Barnard v. District of Columbia*, 127 U. S. 409, 32 L. Ed. 207.

Work done by agent—Right of agent to recover for extra work.—A contractor, who had agreed with the district of Columbia to put down a water main, notified the superintendent in charge of the construction on the part of the district that he authorized an agent to perform the work and authorized the money for the same to be paid to said agent. The arrangement was accepted by the superintendent, and the agent performed the work and receipted from time to time for payments on the contract. The contract provided that no claims for extra work shall be made unless the same shall be in pursuance of a written order from the engineers. Subsequently the agent brought a suit in his own name for extra work. It was held that he was bound by the terms of the contract and his receipts given in accordance therewith. *Campbell v. District of Columbia*, 117 U. S. 615, 29 L. Ed. 1007.

In *Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337, the measurements showed an apparent variation from the contract rates: "An allowance of \$6.50 for masonry, and an allowance for haul." This allowance was made by the engineer after a controversy as to the contract rates arose. The court said: "There may have been good reason for allowing the haul, and the masonry may have been of a different quality from the rubble cement for which the contract fixes the price of \$5.00. We

are not disposed to assume the responsibility of changing these items."

57. Work done according to direction of engineer.—*Philadelphia, etc., R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157.

58. Evidence.—*Van Buren v. Digges*, 11 How. 461, 13 L. Ed. 771.

59. Right to compensation.—*Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. Ed. 416. See *Shipman v. District of Columbia*, 119 U. S. 148, 30 L. Ed. 337.

Under municipal contracts for construction of waterworks.—See the titles MUNICIPAL CORPORATIONS, vol. 8, p. 595; WATER COMPANIES AND WATERWORKS, ante, p. 985.

60. Henderson Bridge Co. v. McGrath, 134 U. S. 260, 33 L. Ed. 934.

Where there is an agreement to pay for extra work, not a fixed price, but what it was reasonably worth, which the law would have implied, it is immaterial whether the agent of the principal had or had not authority to make it. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934.

A contractor can recover the reasonable worth of extra work occasioned by the material modification of the specifications. *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934.

In *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 33 L. Ed. 934, it was held that the construction of the ditch in question was not covered by the original contract; and that fact was not affected by its passing through the borrowing pits. It is right to leave it to the jury to determine whether an agreement for extra work was made between the contractors and the engineer acting for the principal; and it is also properly left to the jury to decide whether the principal agreed to pay for such work what it was reasonably worth.

preliminary to, the work referred to in the contract.⁶¹

3. **EXPENDITURE IN EXPERIMENTS.**—The United States is liable for expenditures in experiments required by its officers and not provided for in the contract.⁶²

4. **CHANGES AND ALTERATIONS.**—**Changes Required by Government.**—Additional compensation may be allowed a contractor for increased cost caused by unauthorized changes and alterations required by the government.⁶³

5. **SETTLING, WASTE AND SHRINKAGE.**—Where one party agrees to build an embankment for a certain sum per cubic yards, at such places as he shall be directed by another, and the place selected is such that there is a natural settling of the batture or foundation while the embankment is building, and a consequent waste and shrinkage of the embankment, any system of measurement which does not allow for the embankment which supplies the place of the settling is not a correct one. The waste and shrinkage is the loss of the principal and the contractor is entitled to be paid for the number of yards actually built.⁶⁴

6. **REPLACING DEFECTIVE WORK.**—A claim for extra work for replacing defective work as required by the engineer or inspector in charge must be disallowed.⁶⁵

7. **GOVERNMENT CONTRACTS.**—The right to compensation for extra work in

61. Preliminary work to that referred to in contract.—*Harvey v. United States*, 113 U. S. 243, 28 L. Ed. 987.

Nor can such contractor be deprived of such compensation because he did not produce evidence of the accounts of its costs and expenses in the bill, but relied on the testimony of experts, when it did not appear that such evidence existed, if the evidence produced was the best evidence available to him and enabled the court to arrive at a correct conclusion. *Harvey v. United States*, 113 U. S. 243, 28 L. Ed. 987.

A court of claims in a suit against the United States by a contractor for the reasonable worth of labor done and material furnished in constructing coffer dams preliminary to the doing of the mason work for the piers and abutments of a bridge to which the contract referred, rejected the testimony of experts introduced by the contractors as to the value of the work, but allowed him the benefit of such testimony introduced by the United States, and allowed the contractor \$16,250.95 for their work. The supreme court on the evidence thus rejected by the court of claims awarded the contractors for such work the sum of \$40,093.77. *Harvey v. United States*, 113 U. S. 243, 28 L. Ed. 987.

Interest cannot be allowed such contractor.—Under § 1091 of the Revised Statutes, and the rule in *Tillson v. United States*, 100 U. S. 43, 25 L. Ed. 543, interest cannot be included in the recovery, nor did the special act of August 14, 1876, ch. 279, 19 Stat. 490, authorize the allowance of interest. *Harvey v. United States*, 113 U. S. 243, 28 L. Ed. 987.

62. Expenditure in experiment.—*United States v. Barlow*, 184 U. S. 123, 127, 136, 46 L. Ed. 463.

So held where the secretary of the navy required contractors who were constructing a dock for the United States, to sink the piles by the "water jet system, there being nothing in the contract to require the contractors to experiment with that system." The direction of the secretary was held not to be a "change or modification" within a clause providing for "change or modification" when agreed to in writing by the parties. *United States v. Barlow*, 184 U. S. 123, 136, 46 L. Ed. 463.

63. Changes required by government.—*United States v. Bliss*, 172 U. S. 321, 43 L. Ed. 463.

Contractors engaged in constructing a dry dock for the United States made a mistake in construction which they were required to correct; they were also required by the navy department to make other additions which had no relation to the error in the original construction but which would have been required irrespective of any such error. It was held that the cost of such additions is properly allowed as for extra work. *United States v. Barlow*, 184 U. S. 123, 131, 137, 46 L. Ed. 463.

64. Settling waste and shrinkage.—*Clark v. United States*, 6 Wall. 543, 18 L. Ed. 916.

The United States has been held liable to a contractor in such case. *Clark v. United States*, 6 Wall. 543, 18 L. Ed. 916.

65. United States v. Barbor, 184 U. S. 123, 139, 46 L. Ed. 463.

So held under a contract for the construction of a dock for the United States, which provided that all labor and materials "shall be of the best kind and quality adopted for the work," and subject not only to the approval of the engineer at a particular time, but also to the approval

government contracts is treated in the five preceding subdivisions of this section, see *supra*.

8. **WHEN RIGHT ACCRUES.**—Under a contract contemplating extra work, where payments are to be made in installments and balance upon completion of the work, the cause of action for such extra work as may have been done accrues upon the completion of the entire work.⁶⁶

VIII. Security for Completion, Penalties and Forfeitures.

See the titles **DAMAGES**, vol. 5, p. 177; **PENALTIES AND FORFEITURES**, vol. 9, p. 365. Where the contract provided that, if the house were not finished by a certain day, a deduction of ten per cent from the price should be made, and the defendant offered evidence to prove that this forfeiture was intended by the parties as liquidated damages, the evidence was properly rejected. It would have been irregular in the court to go out of the terms of the contract. Unless the forfeiture had been expressly adopted by the parties as the measure of injury or compensation, it would have been irregular to receive the evidence where the inquiry was into the essential justice and fairness of the acts of the parties.⁶⁷

Where strict performance of a contract for a piece of work is prevented or waived by the promisor, a claim by him of fines and penalties for delay or failure cannot be sustained.⁶⁸

Remission of Penalties for Delay in Performance.—An agreement between a contractor, who is subject to penalties and forfeitures to the government for delays in the performance of his contract, and the accounting officers, to remit the penalties upon condition that the amount thereof should go in part to the payment of the men who had furnished labor and material for the construction of the work, is valid.⁶⁹

Reserve Fund Retained to Secure Completion of Work.—Where a percentage of the contract price was retained for the purpose of securing the completion of the work, it must be paid over to the contractor on the completion of the work, which was relet at a lower price; unless the government has sustained some loss, some pecuniary or legal damage by his failure, the money which he has fairly earned should be paid to him when the work which he agreed to do has been completed though by others.⁷⁰

IX. Actions.

A. Assumpsit.—See the title **ASSUMPSIT**, vol. 2, p. 651, n. 78. Where a contractor has in good faith fulfilled, but not in the manner or within the time prescribed by, the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by fault of the defendant, the cost of the work or material has been increased, in so far the jury will be warranted in departing from the contract prices. In such case the defendant is entitled to recoup for the dam-

of an engineer subsequently appointed with full power to reject any material or work in whole or in part which he may deem unsuitable for the purpose intended, and to cause inferior or unsafe work to be taken down by and at the expense of the contractors and replaced by materials satisfactory to such engineer, by and at the expense of the contractor. In this case the work required to be taken down and replaced had been approved and accepted by the engineer's predecessor. *United States v. Barlow*, 184 U. S. 123, 139, 46 L. Ed. 463.

66. What right accrued.—*United States*

v. Gibbons, 109 U. S. 200, 27 L. Ed. 906.

67. *Van Buren v. Digges*, 11 How. 461, 13 L. Ed. 771.

68. *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. Ed. 948.

69. Remission of penalties for delay in performance.—*Redfield v. Windom*, 137 U. S. 636, 646, 34 L. Ed. 811.

70. Reserve fund retained to secure completion of work.—*Quinn v. United States*, 99 U. S. 30, 25 L. Ed. 269.

Release upon payment of reserve fund.—See the title **RELEASE**, vol. 10, p. 635, note 6.

ages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance.⁷¹

B. Jurisdiction of Court of Claims.—Where an alleged contract with the board of public works of the District of Columbia, which was never ratified by the board, was never ratified by congress, and a portion of the contractor's claim for work performed was rejected by the board of audit, the court of claims is without jurisdiction to entertain it.⁷²

C. Declarations.—In a declaration on a working contract an allegation that the work was prosecuted until the promisor made default in payment, is sufficient without offering to perform fully, but where the contractor has done nothing he must offer to perform or show readiness to put the promisor in default.⁷³

D. Set-Off and Recoupment.—The right of the promisor to set up any damages sustained by way of recoupment, exists in all cases where an action is brought upon a building contract, which imposes mutual duties and obligations, and there has been a breach of its terms, either in the manner or time of execution, on the part of the contractors for which a cross action might be maintained by the promisor.⁷⁴

E. Evidence.—Where the United States brings an action against the sureties on a contractor's bond to recover damages suffered from the failure or refusal of the contractor to perform his contract, the burden of proof is upon the United States to show a demand upon the contractor for the performance of his contracts and to show his failure and refusal to so perform them. Letters written by an officer of the government in the line of his official duty in reporting to his superior officer asserting that such demand had been made and followed by failure and refusal to perform, is not legal evidence of a demand upon the contractor or any such default on his part, as to give a cause of action against him and his sureties.⁷⁵

Operation of Release.—See the title RELEASE, vol. 10, p. 635.

F. Subrogation of Surety in Building Contract.—See the title SUBROGATION, ante, p. 276.

WORK OF NECESSITY.—See the title SUNDAYS AND HOLIDAYS, ante, p. 330.

WORKS OF ART.—See note 1.

71. *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762.

72. *Jurisdiction of court of claims.*—*Brown v. District of Columbia*, 127 U. S. 579, 32 L. Ed. 262.

73. *Declarations.*—*Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

A declaration of a contractor who had undertaken to build a railroad is sufficient on demurrer, which averred, in substance that from the time he entered upon the performance of the contract in July, 1872, until the fifteenth day of December of that year, when the possessor wholly failed to make the stipulated payment for the work then actually done, he, with a large force and with suitable equipments along the whole line of the road, had prosecuted the work with all the energy and skill that he possessed, and that the possessor had expressed satisfaction at the manner in which the work was done. *Phillips, etc., Const. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341.

74. *Set-off and recoupment.*—*Railroad Co. v. Smith*, 21 Wall. 255, 262, 22 L. Ed. 513.

75. *Evidence.*—*United States v. Corwin*, 129 U. S. 381, 32 L. Ed. 710.

1. *Works of art.*—In *United States v. Perry*, 146 U. S. 71, 74, 36 L. Ed. 890, a case involving the construction of a revenue act, the court said: "For most practical purposes works of art may be divided into four classes: 1. The fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone or bronze. These are subject to a duty of 15 per cent. 2. Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of a bric-a-brac, and are susceptible of an indefinite reproduction from the original. 3. Objects of art, which serve

WORSTED.—See the title *REVENUE LAWS*, vol. 10, pp. 881, 892.

WRAPPERS.—As to cigar wrappers, see the title *REVENUE LAWS*, vol. 10, p. 888.

WRECKS.—See the titles *CARRIERS*, vol. 3, p. 556; *COLLISION*, vol. 3, p. 870; *GENERAL AVERAGE*, vol. 6, p. 549; *MARINE INSURANCE*, vol. 8, p. 149; *SALVAGE*, vol. 10, p. 1062; *SHIPS AND SHIPPING*, vol. 10, p. 1148. As to injuries to ships caused by obstructions to navigation, see the title *ADMIRALTY*, vol. 1, p. 144. As to effect of loss or destruction of ship securing loan, see the title *BOTTOMRY AND RESPONDENTIA*, vol. 3, p. 457. As to power of master to sell ship and cargo in case of wreck, see the title *MASTERS OF VESSELS*, vol. 8, p. 306. As to liability of master of vessel for negligence causing wreck, see the title *MASTERS OF VESSELS*, vol. 8, p. 311. As to duty of master to take care of cargo when vessel is stranded, see the title *MASTERS OF VESSELS*, vol. 8, p. 309. As to right of insured to abandon vessel in case of wreck, see the title *MARINE INSURANCE*, vol. 8, p. 196. As to § 2928 of the Revised Statutes relating to goods taken from a wreck, see the title *REVENUE LAWS*, vol. 10, p. 912. As to forfeiture of goods saved from wreck, see the title *REVENUE LAWS*, vol. 10, p. 959. As to tugs liability for wreck of tow where tug is negligent, see the title *TOWAGE, TUGS, AND TOWS*, ante, p. 610.

WRITING.—See *LETTER*, vol. 7, p. 853; *PUBLICATION*, vol. 9, p. 817. See, also, note 1.

primarily an ornamental, and incidentally a useful, purpose, such as painted or stained glass windows, tapestry, paper hangings, etc. 4. Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas fixtures, and household and table furniture. See the title *REVENUE LAWS*, vol. 10, p. 885.

1. **Letter and writing not equivalent.**—The word *writing* when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and *writing* equivalent expressions. When in ordinary intercourse men speak of mailing a "letter" or receiving by mail a "letter," they do not say mail a *writing* or receive by mail a *writing*. In law the term *writing* is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. And in the many discussions to which this statute has given rise, these instruments are referred to as "the *writing*" or "some *writing*." But in its most frequent and most familiar sense the term *writing* is applied to books, pamphlets and the literary and scientific productions of authors. As for instance, in that clause in the United States constitution which provides that congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right

to their respective *writings* and discoveries." In the act of July 12, 1876, forbidding the mailing of any obscene writing, the term *writing*, as used in this statute, was not comprehensive enough to include the term "letter;" a published *writing* was contemplated by the statutes, and not a private letter, on the outside of which there was nothing but the name and address of the person to whom it was written. *United States v. Chase*, 135 U. S. 255, 258, 34 L. Ed. 117. See *PUBLICATION*, vol. 9, p. 817. See, also, the title *POSTAL LAWS*, vol. 9, p. 583.

Letter or initial upon newspaper wrapper not a writing.—As to a single letter or initial upon the wrapper of a newspaper not being a memorandum or *writing* within the meaning of a postal law, *MEMORANDUM*, vol. 8, p. 337. See, also, the title *POSTAL LAWS*, vol. 9, p. 566.

Copyright law.—As to *writings* as used in the constitution, authorizing congress to secure to authors for limited time, the exclusive right to their *writings*, see the title *COPYRIGHT*, vol. 4, p. 605.

As to labels not being embraced within the term *writing* used in the provision, see the title *COPYRIGHT*, vol. 4, p. 605.

Forgery and counterfeiting.—As to *writing* of which forgery may be committed, see the title *FORGERY AND COUNTERFEITING*, vol. 6, p. 381.

Postal laws.—As to the inhibition against mailing obscene *writings*, see the title *POSTAL LAWS*, vol. 9, p. 582.

Trademarks.—As to the word *writing* in the constitutional provision securing for a limited time to authors and inventors the exclusive right to their *writings* not embracing trademarks, see the title *TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION*, ante, p. 617.

WRIT OF RIGHT.

CROSS REFERENCES.

As to when the writ of right will lie at common law, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 31. As to misjoinder of parties, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, pp. 31, 32. As to writ of certiorari not being a writ of right, see the title **CERTIORARI**, vol. 3, p. 662. As to joint judgment in writ of right against tenants for costs, see the title **COSTS**, vol. 4, p. 813. As to converting ejectment into writ of right, see the title **EJECTMENT**, vol. 5, p. 698. As to period of limitation on writ of right, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**, vol. 7, p. 927.

What Necessary to Support Writ.—In order to support a writ of right, it is not necessary to prove an actual entry under title, nor actual taking of esples,¹ but seisin in deed, either by possession of the land, and preception of profits,² or by construction of law,³ is indispensable to enable the demandant to maintain his suit.

Persons Entitled to Maintain Writ.—When property has become vested in fee simple in two children, after the death of their father, then one of these children has a right to bring a real action by a writ of right for his undivided moiety of the property.⁴

What Brought into Controversy.—See footnote.⁵

Jurisdiction.—See footnote.⁶

Defenses.—A better subsisting adverse title in a third person is no defense in a writ of right.⁷

Parties.—See footnote.⁸

Pleading.—Under the act of Virginia, of 1786, the tenant may, at his elec-

1. **What necessary to support writ.**—*Green v. Liter*, 8 Cranch 229, 3 L. Ed. 545.

2. *Green v. Watkins*, 7 Wheat. 27, 5 L. Ed. 388.

Plaintiff must recover on the strength of his own title. *Marsh v. Brooks*, 8 How. 223, 233, 12 L. Ed. 1056.

3. *Green v. Watkins*, 7 Wheat. 27, 28, 5 L. Ed. 388; *Green v. Liter*, 8 Cranch 229, 3 L. Ed. 545.

4. **Persons entitled to maintain writ.**—*Homer v. Brown*, 16 How. 354, 14 L. Ed. 970.

5. **What brought into controversy.**—In *Green v. Watkins*, 7 Wheat. 27, 31, 5 L. Ed. 388, it is laid down that a writ of right does bring into controversy the mere right of the parties to the suit, and if so it, by consequence, authorizes either party to establish by evidence, that the other has no right whatever in the demanded premises; or that his mere right is inferior to that set up against him. *Ingilis v. Sailor's Snug Harbour*, 3 Pet. 99, 100, 7 L. Ed. 617.

Title brought into controversy.—A writ of right brings into controversy only the titles of the parties to the suit, and is a comparison of those titles, and either party may, therefore, prove any fact which defeats the titles of the other, or shows it never had a legal existence or has been parted with. *Green v. Watkins*, 7 Wheat. 27, 5 L. Ed. 388.

In **Kentucky**, a patent is the completion of the legal title; and it is the legal title only that can come in controversy in a writ of right. *Green v. Liter*, 8 Cranch 229, 3 L. Ed. 545.

6. The remedy by a writ of right for the recovery of corporeal hereditaments in fee simple may still be resorted to in the circuit court of the United States for the district of Massachusetts, though the same has been abolished in the courts of that state. Such a remedy existed in the courts of Massachusetts until the year 1840, and it became, by the judiciary acts of 1789 and 1792, a remedy in the circuit court for that district; any subsequent legislation of the state abolishing it in its courts does not extend to the courts of the United States, because it is a matter of process which is exclusively regulated by the acts of congress. *Homer v. Brown*, 16 How. 354, 364, 14 L. Ed. 970; *Wavman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253.

7. **Defenses.**—*Green v. Liter*, 8 Cranch 229, 3 L. Ed. 545.

8. **Parties.**—Under the act of Kentucky, to amend process in chancery and common law, the party may recover, although he prove only part of his claim in his declaration; but it does not enable him to join parties in a writ of right who could not be joined at common law. *Green v. Liter*, 8 Cranch 229, 3 L. Ed. 545.

tion, plead any special matter in bar, in a writ of right, or give it in evidence on the mise joined. The act is not compulsive, but cumulative.⁹

Evidence.—The demandant has a right to place before the assize all the evidence which she thinks might tend to establish her right of property, which has been ruled to be competent evidence in another suit; and against the competency of which, nothing is objected in this suit; and the assize have a right to have such evidence before them, that they may apply to it the instructions of the court, as the law of the case, without which they cannot do it.¹⁰ In a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disposing the demandant seisin.¹¹

Recovery.—In a writ of right, on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety, and upon this point there can be no well-founded distinction between an action of ejectment and a writ of right.¹²

WRITS.—See, generally, the title SUMMONS AND PROCESS, ante, p. 299. See, also, the titles ASSISTANCE, WRIT OF, vol. 2, p. 632; POSSESSION, WRIT OF, vol. 9, p. 549; REPLEVIN, vol. 10, p. 717; SCIRE FACIAS, vol. 10, p. 1076; VARIANCE, ante, p. 860; VENDITION EXPONAS, ante, p. 863; WRIT OF RIGHT, ante, p. 1140. As to writ of prohibition, see the titles PROHIBITION, vol. 9, p. 798 and references given; SUMMONS AND PROCESS, ante, p. 299. As to writ of error, see the title APPEAL AND ERROR, vol. 1, p. 382; vol. 2, p. 140. As to writ de ventro inspiciendo, see the title INSPECTION AND PHYSICAL EXAMINATION, vol. 7, p. 15. As to writ of inquiry, see the title INQUESTS AND INQUIRIES, vol. 6, p. 1070. As to writ of attachment, see the title ATTACHMENT AND GARNISHMENT, vol. 2, p. 679. As to writ of certiorari, see the title CERTIORARI, vol. 3, p. 651. As to writ of habeas corpus, see the title HABEAS CORPUS, vol. 6, p. 610. As to writ of audita querela, see the title AUDITA QUERELA, vol. 2, p. 749. As to writ of error coram nobis and coram vobis, see the title JUDGMENTS AND DECREES, vol. 7, p. 591. As to writ of mandamus, see the title MANDAMUS, vol. 8, p. 1. As to writ of ne exeat, see the title NE EXEAT, vol. 8, p. 871. As to writ of quo warranto, see the title QUO WARRANTO, vol. 10, p. 453. As to writ of sequestration, see the title SEQUESTRATION, vol. 10, p. 1112. As to subpcena for witnesses, see the title WITNESSES, ante, p. 1077. As to execution being a writ, see the title EXECUTIONS, vol. 6, p. 87. As to mandamus being a prerogative writ, see the title MANDAMUS, vol. 8, p. 10. As to writ of restitution, see the title APPEAL AND ERROR, vol.

9. Plea in bar.—*Green v. Lister*, 8 Cranch 229, 3 L. Ed. 545.

10. *Bradstreet v. Thomas*, 12 Pet. 174, 9 L. Ed. 1044.

It is error, on a trial of a writ of right, before the grand assize, to prevent the introduction of written evidence; because, in a trial between the demandant, offering the testimony, and a defendant, claiming in opposition to the demandant under the same title with that of the defendant, before the grand assize, the court had frequently examined the title set up by the written evidence offered, and had become fully cognizant of it; and had, in that trial at the suit of the demandant, in which it had been produced, decided that it in nowise tended to establish a legal title to the land in controversy in the demandant. *Bradstreet v. Thomas*, 12 Pet. 174, 9 L. Ed. 1044.

11. Evidence.—*Green v. Watkins*, 7 Wheat. 27, 5 L. Ed. 388, cited in *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 100, 7 L. Ed. 617.

Therefore, where the demandant proves an actual seisin, by pedis possessio, the tenant cannot be permitted to prove a superior outstanding title, since it does not disprove the demandant's seisin. But where the demandant relies for proof of seisin, solely upon a constructive actual seisin in virtue of a patent from the state, of vacant lands, the tenant may show that the land had been previously granted by the state, for that divests the title of the state, and disproves the demandant's constructive seisin. *Green v. Watkins*, 7 Wheat. 27, 5 L. Ed. 388.

12. *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, 100, 7 L. Ed. 617.

2, p. 388. As to writ of supersedeas, see the title **SUPERSEDEAS AND STAY OF PROCEEDINGS**, ante, p. 333. As to writ of elegit, see the title **JUDGMENTS AND DECREES**, vol. 7, p. 639.

WRITTEN CONTRACTS.—See the title **FRAUDS, STATUTE OF**, vol. 6, p. 451.

WRONGFUL ACT.—See the title **DEATH BY WRONGFUL ACT**, vol. 5, p. 201.

WRONGFUL ATTACHMENT.—See the title **ATTACHMENT AND GARNISHMENT**, vol. 2, p. 689.

WRONGFUL DETENTION.—As to liability of revenue officers for, see the title **REVENUE LAWS**, vol. 10, p. 1001.

WRONGFUL INJUNCTION.—See the title **INJUNCTIONS**, vol. 6, p. 1066.

WRONGFUL SEIZURE.—As to liability of revenue officers for, see the title **REVENUE LAWS**, vol. 10, p. 1002.

WROUGHT-IRON TUBES.—See the title **REVENUE LAWS**, vol. 10, p. 875.

YEAR.—The word “year” when used in a statute, is generally construed to mean calendar year.¹

YEARLY.—As to calculation of yearly commissions of receivers of public moneys for public lands, see the title **PUBLIC LANDS**, vol. 10, p. 233.

YOSEMITE VALLEY.—See the title **PUBLIC LANDS**, vol. 10, p. 230.

ZINC.—See **OXIDE OF ZINC**, vol. 8, p. 1018. See, also, the title **REVENUE LAWS**, vol. 10, pp. 886, 887.

1. **Year means calendar year**.—United States v. Dickson, 15 Pet. 141, 10 L. Ed. 689 (held not to mean fiscal year), dis-

tinguished in Hoyt v. United States, 10 How. 109, 143, 13 L. Ed. 348, 363



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